Incentive Compensation and Cross-Selling Under Fire:
Strategies for Compliance and Risk Management in Sales Practices

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Program Chair

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DEPARTMENT OF THE TREASURY
Office of the Comptroller of the Currency

FEDERAL RESERVE SYSTEM
[Docket No. OP-1374]

FEDERAL DEPOSIT INSURANCE CORPORATION

DEPARTMENT OF THE TREASURY
Office of Thrift Supervision
[Docket ID OTS-2010-0020]

Guidance on Sound Incentive Compensation Policies

AGENCIES: Office of the Comptroller of the Currency, Treasury (OCC); Board of Governors of the Federal Reserve System, (Board or Federal Reserve); Federal Deposit Insurance Corporation (FDIC); Office of Thrift Supervision, Treasury (OTS)**.**

ACTION: Final guidance.

SUMMARY: The OCC, Board , FDIC and OTS (collectively, the Agencies) are adopting final guidance designed to help ensure that incentive compensation policies at banking organizations do not encourage imprudent risk-taking and are consistent with the safety and soundness of the organization.

EFFECTIVE DATE: The guidance is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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SUPPLEMENTARY INFORMATION:

I. Background

Compensation arrangements are critical tools in the successful management of financial institutions. These arrangements serve several important and worthy objectives, including attracting skilled staff, promoting better organization-wide and employee performance, promoting employee retention, providing retirement security to employees, and allowing an organization's personnel costs to vary along with revenues.

It is clear, however, that compensation arrangements can provide executives and employees with incentives to take imprudent risks that are not consistent with the long-term health of the organization. For example, offering large payments to managers or employees to produce sizable increases in short-term revenue or profit--without regard for the potentially substantial short or long-term risks associated with that revenue or profit--can encourage managers or employees to take risks that are beyond the capability of the financial institution to manage and control.

Flawed incentive compensation practices in the financial industry were one of many factors contributing to the financial crisis that began in 2007. Banking organizations too often rewarded employees for increasing the organization's revenue or short-term profit without adequate recognition of the risks the employees' activities posed to the organization.

Having witnessed the damaging consequences that can result from misaligned incentives, many financial institutions are now re-examining their compensation structures with the goal of better aligning the interests of managers and other employees with the long-term health of the institution. Aligning the interests of shareholders and employees, however, is not always sufficient to protect the safety and soundness of a banking organization. Because banking organizations benefit directly or indirectly from the protections offered by the federal safety net (including the ability of insured depository institutions to raise insured deposits and access the Federal Reserve's discount window and payment services), shareholders of a banking organization in some cases may be willing to tolerate a degree of risk that is inconsistent with the organization's safety and soundness. Thus, a review of incentive compensation arrangements and related corporate governance practices to ensure that they are effective from the standpoint of shareholders is not sufficient to ensure they adequately protect the safety and soundness of the organization.

A. Proposed Guidance

In October 2009, the Federal Reserve issued and requested comment on Proposed Guidance on Sound Incentive Compensation Policies ("proposed guidance") to help protect the safety and soundness of banking organizations supervised by the Federal Reserve and to promote the prompt improvement of incentive compensation practices throughout the banking industry.[1] The proposed guidance was based on three key principles. These principles provided that incentive compensation arrangements at a banking organization should—

- Provide employees incentives that appropriately balance risk and reward;
- Be compatible with effective controls and risk-management; and
- Be supported by strong corporate governance, including active and effective oversight by the organization's board of directors.

Because incentive compensation arrangements for executive and non-executive employees may pose safety and soundness risks if not properly structured, the proposed guidance applied to senior executives as well as other employees who, either individually or as part of a group, have the ability to expose the relevant banking organization to material amounts of risk.

With respect to the first principle, the proposed guidance, among other things, provided that a banking organization should ensure that its incentive compensation arrangements do not encourage short-term profits at the expense of short- and longer-term risks to the organization. Rather, the proposed guidance indicated that banking organizations should adjust the incentive compensation provided so that employees bear some of the risk associated with their activities. To be fully effective, these adjustments should take account of the full range of risks that the employees' activities may pose for the organization. The proposed guidance highlighted several methods that banking organizations could use to adjust incentive compensation awards or payments to take account of risk.

With respect to the second principle, the proposed guidance provided that banking organizations should integrate their approaches to incentive compensation arrangements with their risk-management and internal control frameworks to better monitor and control the risks these arrangements may create for the organization. Accordingly, the proposed guidance provided that banking organizations should ensure that risk-management personnel have an appropriate role in designing incentive compensation arrangements and assessing whether the arrangements may encourage imprudent risk-taking. In addition, the proposed guidance provided that banking organizations should track incentive compensation awards and payments, risks taken, and actual risk outcomes to determine whether incentive compensation payments to employees are reduced or adjusted to reflect adverse risk outcomes.

With respect to the third principle, the proposed guidance provided that a banking organization's board of directors should play an informed and active role in ensuring that the organization's compensation arrangements strike the proper balance between risk and

[1] 74 FR 55227 (October 27, 2009).

profit not only at the initiation of a compensation program, but on an ongoing basis. Thus, the proposed guidance provided that boards of directors should review and approve key elements of their organizations' incentive compensation systems across the organization, receive and review periodic evaluations of whether their organizations' compensation systems for all major segments of the organization are achieving their risk-mitigation objectives, and directly approve the incentive compensation arrangements for senior executives.

The Board's proposed guidance applied to all banking organizations supervised by the Federal Reserve. However, the proposed guidance also included provisions intended to reflect the diversity among banking organizations, both with respect to the scope and complexity of their activities, as well as the prevalence and scope of incentive compensation arrangements. Thus, for example, the proposed guidance provided that the reviews, policies, procedures, and systems implemented by a smaller banking organization that uses incentive compensation arrangements on a limited basis would be substantially less extensive, formalized, and detailed than those at a large, complex banking organization (LCBO)[2] that uses incentive compensation arrangements extensively. In addition, because sound incentive compensation practices are important to protect the safety and soundness of all banking organizations, the Federal Reserve announced that it would work with the other Federal banking agencies to promote application of the guidance to all banking organizations.

The Board invited comment on all aspects of the proposed guidance. The Board also specifically requested comments on a number of issues, including whether:

- the three core principles are appropriate and sufficient to help ensure that incentive compensation arrangements do not threaten the safety and soundness of banking organizations;
- there are any material legal, regulatory, or other impediments to the prompt implementation of incentive compensation arrangements and related processes that would be consistent with those principles;
- formulaic limits on incentive compensation would likely promote the safety and soundness of banking organizations, whether applied generally or to specific types of employees or banking organizations;
- market forces or practices in the broader financial services industry, such as the use of "golden parachute" or "golden handshake" arrangements to retain or attract employees, present challenges for banking organizations in developing and maintaining balanced incentive compensation arrangements;
- the proposed guidance would impose undue burdens on, or have unintended consequences for, banking organizations, particularly smaller, less complex organizations, and whether there are ways such potential

[2] In the proposed guidance (issued by the Federal Reserve), the term LCBO was used as this is the term utilized by the Federal Reserve in describing such organizations. The final guidance uses the term Large Banking Organization (LBO), which encompasses terminology utilized by the OCC, FDIC and OTS.

burdens or consequences could be addressed in a manner consistent with safety and soundness; and

- there are types of incentive compensation plans, such as organization-wide profit sharing plans that provide for distributions in a manner that is not materially linked to the performance of specific employees or groups of employees, that could and should be exempted from, or treated differently under, the guidance because they are unlikely to affect the risk-taking incentives of all, or a significant number of employees.

B. Supervisory Initiatives

In connection with the issuance of the proposed guidance, the Federal Reserve announced two supervisory initiatives:

- A special horizontal review of incentive compensation practices at LCBO's ; and
- A review of incentive compensation practices at other banking organizations as part of the regular, risk-focused examination process for these organizations.

The horizontal review was designed to assess: the potential for these arrangements or practices to encourage imprudent risk-taking; the actions an organization has taken or proposes to take to correct deficiencies in its incentive compensation practices; and the adequacy of the organization's compensation-related risk-management, control, and corporate governance processes.

II. Overview of Comments

The Board received 34 written comments on the proposed guidance, which were shared and reviewed by all of the Agencies. Commenters included banking organizations, financial services trade associations, service providers to financial organizations, representatives of institutional shareholders, labor organizations, and individuals. Most commenters supported the goal of the proposed guidance--to ensure that incentive compensation arrangements do not encourage imprudent or undue risk-taking at banking organizations. Commenters also generally supported the principles-based approach of the proposed guidance. For example, many commenters specifically supported the avoidance of formulaic or one-size-fits-all approaches to incentive compensation in the proposed guidance. These commenters noted financial organizations are very diverse and should be permitted to adopt incentive compensation measures that fit their needs, while also being consistent with safe and sound operations. Several commenters also asserted that a formulaic approach would inevitably lead to exaggerated risk-taking incentives in some situations while discouraging employees from taking reasonable and appropriate risks in others. One commenter also argued that unintended consequences would be more likely to result from a "rigid rulemaking" than from a flexible, principles-based approach.

Many commenters requested that the Board revise or clarify the proposed guidance in one or more respects. For example, several commenters asserted that the

guidance should impose specific restrictions on incentive compensation at banking organizations or mandate certain corporate governance or risk-management practices. One commenter recommended a requirement that most compensation for senior executives be provided in the form of variable, performance-vested equity awards that are deferred for at least five years, and that stock option compensation be prohibited. Another commenter advocated a ban on "golden parachute" payments and on bonuses based on metrics related to one year or less of performance. Other commenters suggested that the guidance should require banking organizations to have an independent chairman of the board of directors, require annual majority voting for all directors, or provide for shareholders to have a vote (so called "say-on-pay" voting provisions) on the incentive compensation arrangements for certain employees of banking organizations. Other commenters requested that certain types of compensation plans, such as organization-wide profit sharing plans or 401(k) plans or plans covered by the Employee Retirement Income Security Act (29 U.S.C. 1400 et seq.), be exempted from the scope of the guidance because they were unlikely to provide employees incentives to expose their banking organization to undue risk.

Several commenters, however, did not support the proposed guidance. Some of these commenters felt that the proposed guidance was unnecessary and that the principles used in the proposed guidance were not needed. These commenters argued that the existing system of financial regulation and enforcement is sufficient to address the concerns raised in the proposed guidance. Several commenters also thought that the proposed guidance was too vague to be helpful, and that the ambiguity of the proposed guidance would make compliance more difficult, leading to increased costs and regulatory uncertainty. Some commenters also argued that the guidance was not warranted because there is insufficient evidence that incentive compensation practices contributed to safety and soundness or financial stability problems, or questioned the authority of the Federal Reserve or the other Federal banking agencies to act in this area.

In addition, a number of commenters expressed concern that the proposed guidance would impose undue burden on banking organizations, particularly smaller, less complex organizations. These commenters believed that incentive compensation practices at smaller banking organizations were generally not problematic from a safety and soundness perspective.[3] A number of commenters suggested that all or most smaller banking organizations should be exempt from the guidance. A number of commenters expressed concerns that the proposed guidance would impose unreasonable demands on the boards of directors of banking organizations and especially smaller organizations.

Several commenters also expressed concern that the proposed guidance, if implemented, could impede the ability of banking organizations to attract or retain qualified staff and compete with other financial services providers. In light of these concerns, some commenters suggested that the guidance expressly allow banking organizations to enter into such compensation arrangements as they deem necessary for recruitment or retention purposes. A number of commenters also encouraged the Federal Reserve to work with other domestic and foreign supervisors and authorities to promote

[3] On the other hand, one commenter requested that the proposed guidance not be enforced differently at larger institutions solely because of their size.

consistent standards for incentive compensation practices at financial institutions and a level competitive playing field for financial service providers.

The comments received on the proposed guidance are further discussed below.

III. Final Guidance

After carefully reviewing the comments on the proposed guidance, the Agencies have adopted final guidance that retains the same key principles embodied in the proposed guidance, with a number of adjustments and clarifications that address matters raised by the commenters. These principles are: (1) incentive compensation arrangements at a banking organization should provide employees incentives that appropriately balance risk and financial results in a manner that does not encourage employees to expose their organizations to imprudent risk; (2) these arrangements should be compatible with effective controls and risk-management; and (3) these arrangements should be supported by strong corporate governance, including active and effective oversight by the organization's board of directors. The Agencies believe that it is important that incentive compensation arrangements at banking organizations do not provide incentives for employees to take risks that could jeopardize the safety and soundness of the organization. The final guidance seeks to address the safety and soundness risks of incentive compensation practices by focusing on the basic problem they can pose from a risk-management perspective, that is, incentive compensation arrangements – if improperly structured – can give employees incentives to take imprudent risks.

The Agencies believe the principles of the final guidance should help protect the safety and soundness of banking organizations and the stability of the financial system, and that adoption of the guidance is fully consistent with the Agencies' statutory mandate to protect the safety and soundness of banking organizations.[4]

The final guidance applies to all the banking organizations supervised by the Agencies, including national banks, state member banks, state nonmember banks, savings associations, U.S. bank holding companies, savings and loan holding companies, the U.S. operations of foreign banks with a branch, agency or commercial lending company in the United States, and Edge and agreement corporations (collectively, "banking organizations").

A number of changes have been made to the proposed guidance in response to comments. For example, the final guidance includes several provisions designed to reduce burden on smaller banking organizations and other banking organizations that are

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[4] *See*, e.g. 12 U.S.C. 1818(b). The Agencies regularly issue supervisory guidance based on the authority in section 8 of the Federal Deposit Insurance (FDI) Act. Guidance is used to identify practices that the Agencies believe would constitute an unsafe or unsound practice and/or identify risk-management systems, controls, or other practices that the Agencies believe would assist banking organizations in ensuring that they operate in a safe and sound manner. Savings associations should also refer to OTS's rule on employment contracts 12 CFR 563.39.

not significant users of incentive compensation. The Agencies also have made a number of changes to clarify the scope, intent, and terminology of the final guidance.

A. Scope of Guidance

Compensation practices were not the sole cause of the financial crisis, but they certainly were a contributing cause--a fact recognized by 98 percent of the respondents to a survey of banking organizations engaged in wholesale banking activities conducted in 2009 by the Institute of International Finance and publicly by a number of individual financial institutions.[5] Moreover, the problems caused by improper compensation practices were not limited to U.S. financial institutions, but were evident at major financial institutions worldwide, a fact recognized by international bodies such as the Financial Stability Board (FSB) and the Senior Supervisors Group.[6]

Because compensation arrangements for executive and non-executive employees alike may pose safety and soundness risks if not properly structured, these principles and the final guidance apply to senior executives as well as other employees who, either individually or as part of a group, have the ability to expose the banking organization to material amounts of risk.[7] These employees are referred to as "covered employees" in the final guidance. In response to comments, the final guidance clarifies that an employee or group of employees has the ability to expose a banking organization to material amounts of risk if the employees' activities are material to the organization or are material to a business line or operating unit that is itself material to the organization.

Some commenters suggested that certain categories of employees, such as tellers, bookkeepers, administrative assistants, or employees who process but do not originate transactions, do not expose banking organizations to significant levels of risk and therefore should be exempted from coverage under the final guidance. The final guidance, like the proposed guidance, indicates that the facts and circumstances will determine which jobs or categories of employees have the ability to expose the

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[5] *See*, Institute of International Finance, Inc. (2009), *Compensation in Financial Services: Industry Progress and the Agenda for Change* (Washington: IIF, March) available at http://www.oliverwyman.com/ow/pdf_files/OW_En_FS_Publ_2009_CompensationInFS.pdf. See also UBS, Shareholder Report on UBS's Write-Downs, April 18, 2008, pp. 41-42 (identifies incentive effects of UBS compensation practices as contributing factors in losses suffered by UBS due to exposure to the subprime mortgage market) available at http://www.ubs.com/1/ShowMedia/investors/agm?contentId=140333&name=080418ShareholderReport.pdf.

[6] *See*, Financial Stability Forum (2009), *FSF Principles for Sound Compensation Practices (87 KB PDF)* (Basel, Switzerland: FSF, April), available at http://www.financialstabilityboard.org/publications/r_0904b.pdf; and Senior Supervisors Group (2009), *Risk-management Lessons from the Global Banking Crisis of 2008* (Basel, Switzerland: SSG, October), available at http://www.newyorkfed.org/newsevents/news/banking/2009/ma091021.html. The Financial Stability Forum was renamed the Financial Stability Board in April 2009.

[7] In response to a number of comments requesting clarification regarding the scope of the term "senior executives" as used in the guidance, the final guidance states that "senior executive" includes, at a minimum, "executive officers" within the meaning of the Board's Regulation O (12 CFR 215.2(e)(1)) and, for publicly traded companies, "named officers" within the meaning of the Securities and Exchange Commission's rules on disclosure of executive compensation (17 CFR 229.402(a)(3)). Savings associations should also refer to OTS's rule on loans by savings associations to their executive officers, directors, and principal shareholders. 12 CFR 563.43

organization to material risks and which jobs or categories of employees may be outside the scope of the guidance. The final guidance recognizes, for example, that tellers, bookkeepers, couriers, and data processing personnel would likely not expose organizations to significant risks of the types meant to be addressed by the guidance. On the other hand, employees or groups of employees who do not originate business or approve transactions could still expose a banking organization to material risk in some circumstances. Therefore, the Agencies do not believe it would be appropriate to provide a blanket exemption from the final guidance for any category of covered employees that would apply to all banking organizations.

After reviewing the comments, the Agencies have retained the principles-based framework of the proposed guidance. The Agencies believe this approach is the most effective way to address incentive compensation practices, given the differences in the size and complexity of banking organizations covered by the guidance and the complexity, diversity, and range of use of incentive compensation arrangements by those organizations. For example, activities and risks may vary significantly across banking organizations and across employees within a particular banking organization. For this reason, the methods used to achieve appropriately risk-sensitive compensation arrangements likely will differ across and within organizations, and use of a single, formulaic approach likely will provide at least some employees with incentives to take imprudent risks.

The Agencies, however, have not modified the guidance, as some commenters requested, to provide that a banking organization may enter into incentive compensation arrangements that are inconsistent with the principles of safety and soundness whenever the organization believes that such action is needed to retain or attract employees. The Agencies recognize that while incentive compensation serves a number of important goals for banking organizations, including attracting and retaining skilled staff, these goals do not override the requirement for banking organizations to have incentive compensation systems that are consistent with safe and sound operations and that do not encourage imprudent risk-taking. The final guidance provides banking organizations with considerable flexibility in structuring their incentive compensation arrangements in ways that both promote safety and soundness and that help achieve the arrangements' other objectives.

The Agencies are mindful, however, that banking organizations operate in both domestic and international competitive environments that include financial services providers that are not subject to prudential oversight by the Agencies and, thus, not subject to the final guidance. The Agencies also recognize that international coordination in this area is important both to promote competitive balance and to ensure that internationally active banking organizations are subject to consistent requirements. For this reason, the Agencies will continue to work with their domestic and international counterparts to foster sound compensation practices across the financial services industry. Importantly, the final guidance is consistent with both the Principles for Sound Compensation Practices and the related Implementation Standards adopted by the FSB in

2009.[8] A number of commenters expressed concern about the levels of compensation paid to some employees of banking organizations. As noted above, several commenters requested that the Board eliminate or limit certain types of incentive compensation for employees of banking organizations. Other commenters advocated that certain forms of compensation be required. For example, some commenters urged a ban on incentive compensation payments made in stock options, while others supported their mandatory use. Comments also were received with regard to the use of other types of stock-based compensation, such as restricted stock and stock appreciation rights. Consistent with its principles-based approach, the final guidance does not mandate or prohibit the use of any specific forms of payment for incentive compensation or establish mandatory compensation levels or caps. Rather, the forms and levels of incentive compensation payments at banking organizations are expected to reflect the principles of the final guidance in a manner tailored to the business, risk profile, and other attributes of the banking organization. Incentive compensation structures that offer employees rewards for increasing short-term profit or revenue, without taking into account risk, may encourage imprudent risk-taking even if they meet formulaic levels or include or exclude certain forms of compensation. On the other hand, incentive compensation arrangements of various forms and levels may be properly structured so as not to encourage imprudent risk-taking.

In response to comments, the final guidance clarifies in a number of respects the expectation of the Agencies that the impact of the final guidance on banking organizations will vary depending on the size and complexity of the organization and its level of usage of incentive compensation arrangements. It is expected that the guidance will generally have less impact on smaller banking organizations, which typically are less complex and make less use of incentive compensation arrangements than larger banking organizations. Because of the size and complexity of their operations, large banking organizations (LBOs)[9] should have and adhere to systematic and formalized policies, procedures and processes. These are considered important in ensuring that incentive compensation arrangements for all covered employees are identified and reviewed by appropriate levels of management (including the board of directors where appropriate and control units), and that they appropriately balance risks and rewards . The final guidance highlights the types of policies, procedures, and systems that LBOs should have and maintain, but that are not expected of other banking organizations. It is expected that, particularly in the case of LBO's, adoption of this principles-based approach will require an iterative supervisory process to ensure that the embedded flexibility that allows for

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[8] *See*, Financial Stability Forum, FSF Principles for Sound Compensation Practices, in note 6; and Financial Stability Board (2009), FSB Principles for Sound Compensation Practices: Implementation Standards (35 KB PDF) (Basel, Switzerland: FSB, September), available at http://www.financialstabilityboard.org/publications/r_090925c.pdf.

[9] For purposes of the final guidance, LBOs include, in the case of banking organizations supervised by (i) the Federal Reserve, large, complex banking organizations as identified by the Federal Reserve for supervisory purposes; (ii) the OCC, the largest and most complex national banks as defined in the Large Bank Supervision booklet of the Comptroller's Handbook; (iii) the FDIC, large complex insured depository institutions (IDIs); and (iv) the OTS, the largest and most complex savings associations and savings and loan holding companies. The term "smaller banking organizations' is used to refer to banking organizations that are not LBOs under the relevant agency's standard.

customized arrangements for each banking organization does not undermine effective implementation of the guidance.

With respect to U.S. operations of foreign banks, incentive compensation policies, including management, review, and approval requirements for a foreign bank's U.S. operations should be coordinated with the foreign banking organization's group-wide policies developed in accordance with the rules of the foreign banking organization's home country supervisor. These policies and practices should be consistent with the foreign bank's overall corporate and management structure and its framework for risk-management and internal controls, as well as with the final guidance.

B. Balanced Incentive Compensation Arrangements

The first principle of the final guidance is that incentive compensation arrangements should provide employees incentives that appropriately balance risks and rewards in a manner that does not encourage imprudent risk-taking. The amounts of incentive pay flowing to covered employees should take account of and adjust for the risks and losses--as well as gains--associated with employees' activities, so that employees do not have incentives to take imprudent risk. The formulation of this principle is slightly different from that used in the proposed guidance, which stated that organizations should provide employees incentives that do not encourage imprudent risk-taking beyond the organization's ability to effectively identify and manage risk. This change was made to clarify that risk-management procedures and control functions that ordinarily limit risk-taking do not obviate the need to identify covered employees and to develop incentive compensation arrangements that properly balance risk-taking incentives. To be fully effective, balancing adjustments to incentive compensation arrangements should take account of the full range of risks that employees' activities may pose for the organization, including credit, market, liquidity, operational, legal, compliance, and reputational risks.

A number of commenters expressed the view that increased controls could mitigate a lack of balance in incentive compensation arrangements. Under this view, unbalanced incentive compensation arrangements could be addressed either through the modification of the incentive compensation arrangements or through the application of additional or more effective risk controls to the business. The final guidance recognizes that strong and effective risk-management and internal control functions are critical to the safety and soundness of banking organizations. However, the Agencies believe that poorly designed or managed incentive compensation arrangements can themselves be a source of risk to banking organizations and undermine the controls in place. Unbalanced incentive compensation arrangements can place substantial strain on the risk-management and internal control functions of even well-managed organizations. Furthermore, poorly balanced incentive compensation arrangements can encourage employees to take affirmative actions to weaken the organization's risk-management or internal control functions.

The final guidance, like the proposed guidance, outlines four methods that are currently in use to make compensation more sensitive to risk. These are risk adjustment of awards; deferral of payment; longer performance periods; and reduced sensitivity to short-term performance. Each method has advantages and disadvantages. For example,

incentive compensation arrangements for senior executives at LBOs are likely to be better balanced if they involve deferral of a substantial portion of the executives' incentive compensation over a multi-year period, with payment made in the form of stock or other equity-based instruments and with the number of instruments ultimately received dependent on the performance of the organization (or, ideally, the performance of the executive) during the deferral period. Deferral, however, may not be effective in constraining the incentives of employees who may have the ability to expose the organization to long-term risks, as these risks may not be realized during a reasonable deferral period. For this reason, the final guidance recognizes that in some cases, two or more methods may be needed in combination (e.g., risk adjustment of awards and deferral of payment) to achieve an incentive compensation arrangement that properly balances risk and reward.

Furthermore, the few methods noted in the final guidance are not exclusive, and other effective methods or variations may exist or be developed. Methods for achieving balanced compensation arrangements at one organization may not be effective at another organization. Each organization is responsible for ensuring that its incentive compensation arrangements are consistent with the safety and soundness of the organization. The guidance clarifies that LBOs should actively monitor industry, academic, and regulatory developments in incentive compensation practices and theory and be prepared to incorporate into their incentive compensation systems new or emerging methods that are likely to improve the organization's long-term financial well-being and safety and soundness.

In response to a question asked in the proposed guidance, several commenters requested that certain types of compensation plans be treated as beyond the scope of the final guidance because commenters believed these plans do not threaten the safety and soundness of banking organizations. These included organization-wide profit sharing plans, 401(k) plans, defined benefit plans, and ERISA plans.

The final guidance does not exempt any broad categories of compensation plans based on their tax structure, corporate form, or status as a retirement or other employee benefit plans, because any type of incentive compensation plan may be implemented in a way that increases risk inappropriately. In response to these comments, however, the final guidance recognizes that the term "incentive compensation" does not include arrangements that are based solely on the employees' level of compensation and that do not vary based on one or more performance metrics (e.g., a 401(k) plan under which the organization contributes a set percentage of an employee's salary). In addition, the final guidance notes that incentive compensation plans that provide for awards based solely on overall organization-wide performance are unlikely to provide employees, other than senior executives and individuals who have the ability to materially affect the organization's overall performance, with unbalanced risk-taking incentives.

In many cases, there were comments on both sides of an issue, with some wanting less or no guidance and others wanting tough, or very specific prohibitions. For example, a number of commenters argued that the use of "golden parachutes" and similar retention and recruitment provisions to retain employees should be prohibited because such

provisions have been abused in the past.[10] A larger number of commenters, however, argued against a per se ban on such arrangements, stating that these provisions were in some cases essential elements of effective recruiting and retention packages and are not necessarily a threat to safety and soundness. One commenter stated that golden parachute payments triggered by changes in control of a banking organization are too speculative to encourage imprudent risk-taking by employees.

The final guidance, like the proposed guidance, provides that banking organizations should carefully consider the potential for golden parachutes and similar arrangements to affect the risk-taking behavior of employees. The final guidance adds language noting that arrangements that provide an employee with a guaranteed payout upon departure from an organization regardless of performance may neutralize the effect of any balancing features included in the arrangement to help prevent imprudent risk-taking. Organizations should consider including balancing features -- such as risk adjustments or deferral requirements -- in golden parachutes and similar arrangements to mitigate the potential for the arrangements to encourage imprudent risk-taking.

Provisions that require a departing employee to forfeit deferred incentive compensation payments may also weaken the effectiveness of a deferral arrangement if the departing employee is able to negotiate a "golden handshake" arrangement with the employee's new organization[11]. Golden handshake provisions present special issues for banking organizations and supervisors, some of which are discussed in the final guidance, because it is the action of the employee's new employer – which may not be a regulated institution – that can affect the current employer's ability to properly align the employee's interest with the organization's long-term health. The final guidance states that LBOs should monitor whether golden handshake arrangements are materially weakening the organization's efforts to constrain the risk-taking incentives of employees. The Agencies will continue to work with banking organizations and others to develop appropriate methods for addressing any effect that such arrangements may have on the safety and soundness of banking organizations.

C. Compatibility with Effective Controls and Risk-management

The second principle of the final guidance states that a banking organization's risk-management processes and internal controls should reinforce and support the development and maintenance of balanced incentive compensation arrangements. Banking organizations should integrate incentive compensation arrangements into their risk-management and internal control frameworks to ensure that balance is achieved. In particular, banking organizations should have appropriate controls to ensure that processes for achieving balance are followed. Appropriate personnel, including risk-management personnel, should have input in the design and assessment of incentive compensation arrangements. Compensation for risk-management and control personnel

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[10] Arrangements that provide for an employee (typically a senior executive), upon departure from an organization or a change in control of the organization, to receive large additional payments or the accelerated payment of deferred amounts without regard to risk or risk outcomes are sometimes called "golden parachutes."

[11] Golden handshakes are arrangements that compensate an employee for some or all of the estimated, non-adjusted value of deferred incentive compensation that would have been forfeited upon departure from the employee's previous employment.

should be sufficient to attract and retain appropriately qualified personnel and such compensation should not be based substantially on the financial performance of the business unit that they review. Rather, their performance should be based primarily on the achievement of the objectives of their functions (e.g., adherence to internal controls).

Banking organizations should monitor incentive compensation awards, risks taken and actual risk outcomes to determine whether incentive compensation payments to employees are reduced to reflect adverse risk outcomes. Incentive compensation arrangements that are found not to appropriately reflect risk should be modified as necessary. Organizations should not only provide rewards when performance standards are met or exceeded, they should also reduce compensation when standards are not met. If senior executives or other employees are paid substantially all of their potential incentive compensation when risk outcomes are materially worse than expected, employees may be encouraged to take large risks in the hope of substantially increasing their personal compensation, knowing that their downside risks are limited. Simply put, incentive compensation arrangements should not create a "heads I win, tails the firm loses" expectation.

A significant number of comments expressed concerns about the scope of the applicability of the proposed guidance to smaller banking organizations as well as the burden the proposed guidance would impose on these organizations. In response to these comments, the final guidance has made more explicit the Agencies' view that the monitoring methods and processes used by a banking organization should be commensurate with the size and complexity of the organization, as well as its use of incentive compensation. Thus, for example, a smaller organization that uses incentive compensation only to a limited extent may find that it can appropriately monitor its arrangements through normal management processes. The final guidance also discusses specific aspects of policies and procedures related to controls and risk-management that are applicable to LBOs and are not expected of other banking organizations.

D. Strong Corporate Governance

The third principle of the final guidance is that incentive compensation programs at banking organizations should be supported by strong corporate governance, including active and effective oversight by the organization's board of directors.[12] The board of directors of an organization is ultimately responsible for ensuring that the organization's incentive compensation arrangements for all covered employees -- not solely senior executives -- are appropriately balanced and do not jeopardize the safety and soundness of the organization. Boards of directors should receive data and analysis from management or other sources that are sufficient to allow the board to assess whether the overall design and performance of the organization's incentive compensation arrangements are consistent with the organization's safety and soundness. These reviews and reports should be appropriately scoped to reflect the size and complexity of the banking organization's activities and the prevalence and scope of its incentive compensation arrangements. The structure, composition, and resources of the board of

[12] In the case of foreign banking organizations (FBOs), the term "board of directors" refers to the relevant oversight body for the firm's U.S. operations, consistent with the FBO's overall corporate and management structure.

directors should be constructed to permit effective oversight of incentive compensation. The board of directors should, for example, have, or have access to, a level of expertise and experience in risk-management and compensation practices in the financial services sector that is appropriate for the nature, scope, and complexity of the organization's activities.[13]

Given the key role of senior executives in managing the overall risk-taking activities of an organization, the board of directors should directly approve compensation arrangements involving senior executives and closely monitor such payments and their sensitivity to risk outcomes. If the compensation arrangements for a senior executive include a deferral of payment or "clawback" provision, then the review should include sufficient information to determine if the provision has been triggered and executed as planned. The board also should approve and document any material exceptions or adjustments to the incentive compensation arrangements established for senior executives and should carefully consider and monitor the effects of any approved exceptions or adjustments to the arrangements.

In response to comments expressing concern about the impact of the proposed guidance on smaller banking organizations, the final guidance identifies specific aspects of the corporate governance provisions of the final guidance that are applicable to LBOs or other organizations that use incentive compensation to a significant degree, and are not expected of other banking organizations. In particular, boards of directors of LBOs and other organizations that use incentive compensation to a significant degree should actively oversee the development and operation of the organization's incentive compensation policies, systems and related control processes. If such an organization does not already have a compensation committee, reporting to the full board, with primary responsibility for incentive compensation arrangements, the board should consider establishing one. LBOs, in particular, should follow a systematic approach, outlined in the final guidance, in developing compensation systems that have balanced incentive compensation arrangements.

Several commenters expressed concern that the proposed guidance appeared to create a new substantive qualification for boards of directors that requires the boards of all banking organizations to have members with expertise in compensation and risk-management issues. A group of commenters noted that such a requirement could limit an already small pool of people suitable to serve on boards of directors of banking organizations and that smaller organizations may not have access to, or the resources to compensate, directors meeting these additional requirements. Some commenters also stated that terms such as "closely monitor" and "actively oversee" could be read to impose a higher standard on directors for their oversight of incentive compensation issues. On the other hand, one commenter noted that current law requires financial expertise on the boards of directors and audit committees of public companies and recommended that specialized risk-management competencies be required on the boards of all banking organizations.

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[13] Savings associations should also refer to OTS's rule on directors, officers, and employees. 12 CFR 563.33

To address concerns raised by these commenters, the final guidance clarifies that risk-management and compensation expertise and experience at the board level may be present collectively among the members of the board, and may come from formal training or from experience in addressing risk-management and compensation issues, including as a director, or may be obtained from advice received from outside counsel, consultants, or other experts with expertise in incentive compensation and risk-management. Furthermore, the final guidance recognizes that smaller organizations with less complex and extensive incentive compensation arrangements may not find it necessary or appropriate to require specially tailored board expertise or to retain and use outside experts in this area.

A banking organization's disclosure practices should support safe and sound incentive compensation arrangements. Specifically, a banking organization should supply an appropriate amount of information concerning its incentive compensation arrangements and related risk-management, control, and governance processes to shareholders to allow them to monitor and, where appropriate, take actions to restrain the potential for such arrangements to encourage employees to take imprudent risks.

While some commenters supported increased public disclosure of the incentive compensation practices of banking organizations, a greater number expressed concerns that any required disclosures of incentive compensation information by banking organizations be tailored to protect the privacy of employees and take account of the impact of such disclosures on the ability of organizations to attract and retain talent. Several commenters supported an alignment of required disclosures with existing requirements for public companies, arguing that additional requirements would add to the regulatory burden on banking organizations.

The proposed guidance did not impose specific disclosure requirements on banking organizations. The final guidance makes no significant changes from the proposed guidance with regard to disclosures, and states that the scope and level of information disclosed by a banking organization should be tailored to the nature and complexity of the organization and its incentive compensation arrangements. The final guidance notes that banking organizations should comply with the incentive compensation disclosure requirements of the federal securities law and other laws, as applicable.

A number of commenters supported additional governance requirements for banking organizations, such as "say on pay" provisions requiring shareholder approval of compensation plans, separation of the board chair and chief executive officer positions, majority voting for directors, annual elections for all directors, and improvements to the audit function. Some of these comments seek changes in federal laws beyond the jurisdiction of the Agencies; others address issues – such as "say on pay" requirements – that are currently under consideration by the Congress. The final guidance does not preempt or preclude these proposals, and indicates that the Agencies expect organizations to comply with all applicable statutory disclosure, voting and other requirements.

E. Continuing Supervisory Initiatives

The horizontal review of incentive compensation practices at LBOs is well underway. While this initiative is being led by the Federal Reserve, the other federal

banking agencies are participating in the work. Supervisory teams have collected substantial information from LBOs concerning existing incentive compensation practices and related risk-management and corporate governance processes. In addition, LBOs have submitted analyses of shortcomings or "gaps" in existing practices relative to the principles contained in the proposed guidance, as well as plans for addressing identified weaknesses. Some organizations already have implemented changes to make their incentive compensation arrangements more risk sensitive. Indeed, many organizations are recognizing that strong risk-management and control systems are not sufficient to protect the organization from undue risks, including risks arising from unbalanced incentive compensation arrangements. Other organizations have considerably more work to do, such as developing processes that can effectively compare incentive compensation payments to risks and risk outcomes. The Agencies intend to continue to regularly review incentive compensation arrangements and related risk-management, control, and corporate governance practices of LBOs and to work with these organizations through the supervisory process to promptly correct any deficiencies that may be inconsistent with safety and soundness.[14]

The Agencies intend to actively monitor the actions being taken by banking organizations with respect to incentive compensation arrangements and will review and update this guidance as appropriate to incorporate best practices that emerge. In addition, in order to monitor and encourage improvements, Federal Reserve staff will prepare a report, in consultation with the other Federal banking agencies, after the conclusion of 2010 on trends and developments in compensation practices at banking organizations.

IV. Other Matters

In accordance with the Paperwork Reduction Act (PRA) of 1995 (44 U.S.C. 3506; 5 CFR Part 1320 Appendix A.1), the Agencies have determined that certain aspects of the final guidance constitute a collection of information. The Board made this determination under the authority delegated to the Board by the Office of Management and Budget (OMB).

An agency may not conduct or sponsor, and an organization is not required to respond to, an information collection unless the information collection displays a currently valid OMB control number. Any changes to the Agencies' regulatory reporting forms that may be made in the future to collect information related to incentive compensation arrangements would be addressed in a separate Federal Register notice.

The final guidance includes provisions that state large banking organizations (LBOs) should (i) have policies and procedures that identify and describe the role(s) of

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[14] For smaller banking organizations, the Federal Reserve is gathering consistent information through regularly scheduled examinations and the normal supervisory process. The focus of the data gathering is to identify the types of incentive plans in place, the job types covered and the characteristics, prevalence and level of documentation available for those incentive compensation plans. After comparing and analyzing the information collected, supervisory efforts and expectations will be scaled appropriately to the size and complexity of the organization and its incentive compensation arrangements. For these smaller banking organizations, the expectation is that there will be very limited, if any, targeted examination work or supervisory follow-up. To the extent that any of these organizations has incentive compensation arrangements, the policies and systems necessary to monitor these arrangements are expected to be substantially less extensive, formalized and detailed than those of larger, more complex organizations.

the personnel and units authorized to be involved in incentive compensation arrangements, identify the source of significant risk-related inputs, establish appropriate controls governing these inputs to help ensure their integrity, and identify the individual(s) and unit(s) whose approval is necessary for the establishment or modification of incentive compensation arrangements; (ii) create and maintain sufficient documentation to permit an audit of the organization's processes for incentive compensation arrangements; (iii) have any material exceptions or adjustments to the incentive compensation arrangements established for senior executives approved and documented by its board of directors; and (iv) have its board of directors receive and review, on an annual or more frequent basis, an assessment by management of the effectiveness of the design and operation of the organization's incentive compensation system in providing risk-taking incentives that are consistent with the organization's safety and soundness.

The OCCand OTS have obtained, and the FDIC is seeking, emergency approval under 5 CFR 1320.13 for issuance of the guidance and will issue a Federal Register notice shortly for 60 days of comment as part of the regular PRA clearance process. During the regular PRA clearance process the estimated average response time may be re-evaluated.

The Board has approved the collection of information under its delegated authority. As discussed earlier in this notice, on October 27, 2009, the Board published in the Federal Register a notice requesting comment on the proposed Guidance on Sound Incentive Compensation Policies (74 FR 55227). The comment period for this notice expired November 27, 2009. The Board received three comments that specifically addressed paperwork burden. The commenters asserted that the hourly estimate of the cost of compliance should be considerably higher than the Board projected.

The final guidance clarifies in a number of respects the expectation that the effect of the final guidance on banking organizations will vary depending on the size and complexity of the organization and its level of use of incentive compensation arrangements. For example, the final guidance makes more explicit the view that the monitoring methods and processes used by a banking organization should be commensurate with the size and complexity of the organization, as well as its use of incentive compensation. In addition, the final guidance highlights the types of policies, procedures, systems, and specific aspects of corporate governance that LBOs should have and maintain, but that are not expected of other banking organizations.

In response to comments and taking into account the considerations discussed above, the Board is increasing the burden estimate for implementing or modifying policies and procedures to monitor incentive compensation. For this purpose, consideration of burden is limited to items in the final guidance constituting an information collection within the meaning of the PRA. The Board estimates that 1,502 large respondents would take, on average, 480 hours (two months) to modify policies and procedures to monitor incentive compensation. The Board estimates that 5,058 small respondents would take, on average, 80 hours (two business weeks) to establish or modify policies and procedures to monitor incentive compensation. The total one-time burden is estimated to be 1,125,600 hours. In addition, the Board estimates that, on a continuing basis, respondents would take, on average, 40 hours (one business week) each

year to maintain policies and procedures to monitor incentive compensation arrangements and estimates the annual on-going burden to be 262,400 hours. The total annual PRA burden for this information collection is estimated to be 1,388,000 hours.

General description of report:

This information collection is authorized pursuant to:

Board - Sections 11(a), 11(i), 25, and 25A of the Federal Reserve Act (12 U.S.C. 248(a), 248(i), 602, and 611,), section 5 of the Bank Holding Company Act (12 U.S.C. 1844), and section 7(c) of the International Banking Act (12 U.S.C. 3105(c)).

OCC - 12 U.S.C. 161, and Section 39 of the Federal Deposit Insurance Act (12 U.S.C. 1831p-1).

FDIC - Section 39 of the Federal Deposit Insurance Act (12 U.S.C. 1831p-1)

OTS - Section 39 of the Federal Deposit Insurance Act (12 U.S.C. 1831p-1) and Sections 4, 5, and 10 of the Home Owners' Loan Act (12 U.S.C. 1463, 1464, and 1467a).

The Agencies expect to review the policies and procedures for incentive compensation arrangements as part of their supervisory processes. To the extent the Agencies collect information during an examination of a banking organization, confidential treatment may be afforded to the records under exemption 8 of the Freedom of Information Act (FOIA), 5 U.S.C. 552(b)(8).

Board:

Title of Information Collection: Recordkeeping Provisions Associated with the Guidance on Sound Incentive Compensation Policies.

Agency form number: FR 4027.

OMB control number: 7100 – to be assigned.

Frequency: Annually.

Affected Public: Businesses or other for-profit.

Respondents: U.S. bank holding companies, state member banks, Edge and agreement corporations, and the U.S. operations of foreign banks with a branch, agency, or commercial lending company subsidiary in the United States.

Estimated average hours per response: Implementing or modifying policies and procedures: large respondents 480 hours; small respondents 80 hours. Maintenance of policies and procedures: 40 hours.

Estimated number of respondents: Large respondents, 1,502; Small respondents, 5,058

Estimated total annual burden: 1,388,000 hours.

As mentioned above, the OCC and OTS have obtained emergency approval under 5 CFR 1320.13. Their approval was obtained prior to the Board revising its burden estimates based on the comments received. For this reason, the OCC and OTS are publishing in this notice the original burden estimates. They will issue a Federal Register notice shortly for 60 days of comment as part of the regular PRA clearance process. During the regular PRA clearance process the estimated average response time may be

re-evaluated based on comments received. The FDIC is seeking emergency approval under 5 CFR 1320.13 and is publishing in this notice the revised burden estimates developed by the Board based on the comments received. The FDIC will issue a Federal Register notice shortly for 60 days of comment as part of the regular PRA clearance process and, during the regular PRA clearance process, the estimated average response time may be re-evaluated based on comments received.

OCC:

Title of Information Collection: Guidance on Sound Incentive Compensation Policies.

Agency form number: N/A.

OMB control number: 1557-0245.

Frequency: Annually.

Affected Public: Businesses or other for-profit.

Respondents: National banks.

Estimated average hours per response: 40 hours.

Estimated number of respondents: 1,650.

Estimated total annual burden: 66,000 hours.

FDIC:

Title of Information Collection: Guidance on Sound Incentive Compensation Policies.

Agency form number: N/A.

OMB control number: 3064-NEW.

Frequency: Annually.

Affected Public: Businesses or other for-profit.

Respondents: Insured state nonmember banks.

Estimated average hours per response: Implementing or modifying policies and procedures: large respondents 480 hours; small respondents 80 hours. Maintenance of policies and procedures: 40 hours.

Estimated number of respondents: Implementing or modifying policies and procedures: large respondents – 20; small respondents – 4,870; Maintenance of policies and procedures: 4,890.

Estimated total annual burden: 594,800 hours.

OTS:

Title of Information Collection: Sound Incentive Compensation Guidance.

Agency form number: N/A.

OMB control number: 1550-0129

Frequency: Annually.

Affected Public: Businesses or other for-profit.

Respondents: Savings associations.

Estimated average hours per response: 40 hours.

Estimated number of respondents: 765

Estimated total annual burden: 30,600 hours

The Agencies have a continuing interest in the public's opinions of our collections of information. At any time, comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing the burden, may be sent to:

Board:

Secretary, Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551.

OCC:

Communications Division, Office of the Comptroller of the Currency, Mailstop 2-3, Attention: 1557-0245, 250 E Street, SW., Washington, DC 20219. In addition, comments may be sent by fax to (202) 874-5274 or by electronic mail to regs.comments@occ.treas.gov. You may personally inspect and photocopy comments at the OCC, 250 E Street, SW., Washington, DC 20219. For security reasons, the OCC requires that visitors make an appointment to inspect comments. You may do so by calling (202) 874-4700. Upon arrival, visitors will be required to present valid government-issued photo identification and to submit to security screening in order to inspect and photocopy comments.

FDIC:

All comments should refer to the name of the collection, ''Guidance on Sound Incentive Compensation Policies.'' Comments may be submitted by any of the following methods:

• http://www.FDIC.gov/regulations/laws/federal/propose.html.

• E-mail: comments@fdic.gov.

• Mail: Gary Kuiper (202.898.3877), Counsel, Federal Deposit Insurance Corporation, F-1072, 550 17th Street, NW, Washington, DC 20429.

• Hand Delivery: Comments may be hand-delivered to the guard station at the rear of the 550 17th Street Building (located on F Street), on business days between 7 a.m. and 5 p.m.

OTS:

Information Collection Comments, Chief Counsel's Office, Office of Thrift Supervision, 1700 G Street, NW, Washington, DC 20552; send a facsimile transmission to (202) 906–6518; or send an e-mail to infocollection.comments@ots.treas.gov. OTS will post

comments and the related index on the OTS Internet Site at http://www.ots.treas.gov. In addition, interested persons may inspect comments at the Public Reading Room, 1700 G Street, NW, Washington DC 20552 by appointment. To make an appointment, call (202) 906–5922, send an e-mail to public.info@ots.treas.gov, or send a facsimile transmission to (202) 906–7755.

OMB:

Additionally, please send a copy of your comments by mail to: Office of Management and Budget, 725 17th Street, NW, #10235, Paperwork Reduction Project (insert Agency OMB control number), Washington, DC 20503. Comments can also be sent by fax to (202) 395-6974.

While the Regulatory Flexibility Act (5 U.S.C. 603(b)) does not apply to this guidance, because it is not being adopted as a rule, the Agencies have considered the potential impact of the proposed guidance on small banking organizations. For the reasons discussed in the "Supplementary Information" above, the Agencies believe that issuance of the proposed guidance is needed to help ensure that incentive compensation arrangements do not pose a threat to the safety and soundness of banking organizations, including small banking organizations. The Board in the proposed guidance sought comment on whether the guidance would impose undue burdens on, or have unintended consequences for, small organizations and whether there were ways such potential burdens or consequences could be addressed in a manner consistent with safety and soundness.

It is estimated that the guidance will apply to 8,763 small banking organizations. See 13 CFR 121.201. As noted in the "Supplementary Information" above, a number of commenters expressed concern that the proposed guidance would impose undue burden on smaller organizations. The Agencies have carefully considered the comments received on this issue. In response to these comments, the final guidance includes several provisions designed to reduce burden on smaller banking organizations. For example, the final guidance has made more explicit the Agencies' view that the monitoring methods and processes used by a banking organization should be commensurate with the size and complexity of the organization, as well as its use of incentive compensation. The final guidance also highlights the types of policies, procedures, and systems that LBOs should have and maintain, but that are not expected of other banking organizations. Like the proposed guidance, the final guidance focuses on those employees who have the ability, either individually or as part of a group, to expose a banking organization to material amounts of risk and is tailored to account for the differences between large and small banking organizations.

V. Final Guidance

The text of the final guidance is as follows:

GUIDANCE ON SOUND INCENTIVE COMPENSATION POLICIES

I. Introduction

Incentive compensation practices in the financial industry were one of many factors contributing to the financial crisis that began in mid-2007. Banking organizations too often rewarded employees for increasing the organization's revenue or short-term profit without adequate recognition of the risks the employees' activities posed to the organization[1]. These practices exacerbated the risks and losses at a number of banking organizations and resulted in the misalignment of the interests of employees with the long-term well-being and safety and soundness of their organizations. This document provides guidance on sound incentive compensation practices to banking organizations supervised by the Federal Reserve, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision (collectively, the "Agencies").[2] This guidance is intended to assist banking organizations in designing and implementing incentive compensation arrangements and related policies and procedures that effectively consider potential risks and risk outcomes.[3]

Alignment of incentives provided to employees with the interests of shareholders of the organization often also benefits safety and soundness. However, aligning employee incentives with the interests of shareholders is not always sufficient to address safety-and-soundness concerns. Because of the presence of the federal safety net, (including the ability of insured depository institutions to raise insured deposits and access the Federal Reserve's discount window and payment services), shareholders of a banking organization in some cases may be willing to tolerate a degree of risk that is inconsistent with the organization's safety and soundness. Accordingly, the Agencies expect banking organizations to maintain incentive compensation practices that are consistent with safety and soundness, even when these practices go beyond those needed to align shareholder and employee interests.

To be consistent with safety and soundness, incentive compensation arrangements[4] at a banking organization should:

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[1] Examples of risks that may present a threat to the organization's safety and soundness include credit, market, liquidity, operational, legal, compliance, and reputational risks.

[2] As used in this guidance, the term "banking organization" includes national banks, state member banks, state nonmember banks, savings associations, U.S. bank holding companies, savings and loan holding companies, Edge and agreement corporations, and the U.S. operations of foreign banking organizations (FBOs) with a branch, agency, or commercial lending company in the United States.

[3] This guidance and the principles reflected herein are consistent with the *Principles for Sound Compensation Practices* issued by the Financial Stability Board (FSB) in April 2009, and with the FSB's *Implementation Standards* for those principles, issued in September 2009.

[4] In this guidance, the term "incentive compensation" refers to that portion of an employee's current or potential compensation that is tied to achievement of one or more specific metrics (e.g., a level of sales, revenue, or income). Incentive compensation does not include compensation that is awarded solely for, and the payment of which is solely tied to, continued employment (e.g., salary). In addition, the term does not include compensation arrangements that are determined based solely on the employee's level of

- Provide employees incentives that appropriately balance risk and reward;
- Be compatible with effective controls and risk-management; and
- Be supported by strong corporate governance, including active and effective oversight by the organization's board of directors.

These principles, and the types of policies, procedures, and systems that banking organizations should have to help ensure compliance with them, are discussed later in this guidance.

The Agencies expect banking organizations to regularly review their incentive compensation arrangements for all executive and non-executive employees who, either individually or as part of a group, have the ability to expose the organization to material amounts of risk, as well as to regularly review the risk-management, control, and corporate governance processes related to these arrangements. Banking organizations should immediately address any identified deficiencies in these arrangements or processes that are inconsistent with safety and soundness. Banking organizations are responsible for ensuring that their incentive compensation arrangements are consistent with the principles described in this guidance and that they do not encourage employees to expose the organization to imprudent risks that may pose a threat to the safety and soundness of the organization.

The Agencies recognize that incentive compensation arrangements often seek to serve several important and worthy objectives. For example, incentive compensation arrangements may be used to help attract skilled staff, induce better organization-wide and employee performance, promote employee retention, provide retirement security to employees, or allow compensation expenses to vary with revenue on an organization-wide basis. Moreover, the analysis and methods for ensuring that incentive compensation arrangements take appropriate account of risk should be tailored to the size, complexity, business strategy, and risk tolerance of each organization. The resources required will depend upon the complexity of the firm and its use of incentive compensation arrangements. For some, the task of designing and implementing compensation arrangements that properly offer incentives for executive and non-executive employees to pursue the organization's long-term well-being and that do not encourage imprudent risk-taking is a complex task that will require the commitment of adequate resources.

While issues related to designing and implementing incentive compensation arrangements are complex, the Agencies are committed to ensuring that banking organizations move forward in incorporating the principles described in this guidance into their incentive compensation practices.[5]

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compensation and does not vary based on one or more performance metrics (e.g., a 401(k) plan under which the organization contributes a set percentage of an employee's salary).

[5] In December 2009 the Federal Reserve, working with the other Agencies , initiated a special horizontal review of incentive compensation arrangements and related risk-management, control, and corporate governance practices of large banking organizations (LBOs). This initiative was designed to spur and monitor the industry's progress towards the implementation of safe and sound incentive compensation arrangements, identify emerging best practices, and advance the state of practice more generally in the industry.

As discussed further below, because of the size and complexity of their operations, LBOs [6] should have and adhere to systematic and formalized policies, procedures, and processes. These are considered important in ensuring that incentive compensation arrangements for all covered employees are identified and reviewed by appropriate levels of management (including the board of directors where appropriate and control units), and that they appropriately balance risks and rewards. In several places, this guidance specifically highlights the types of policies, procedures, and systems that LBOs should have and maintain, but that generally are not expected of smaller, less complex organizations. LBOs warrant the most intensive supervisory attention because they are significant users of incentive compensation arrangements and because flawed approaches at these organizations are more likely to have adverse effects on the broader financial system. The Agencies will work with LBOs as necessary through the supervisory process to ensure that they promptly correct any deficiencies that may be inconsistent with the safety and soundness of the organization.

The policies, procedures, and systems of smaller banking organizations that use incentive compensation arrangements[7] are expected to be less extensive, formalized, and detailed than those of LBOs. Supervisory reviews of incentive compensation arrangements at smaller, less-complex banking organizations will be conducted by the Agencies as part of the evaluation of those organizations' risk-management, internal controls, and corporate governance during the regular, risk-focused examination process. These reviews will be tailored to reflect the scope and complexity of an organization's activities, as well as the prevalence and scope of its incentive compensation arrangements. Little, if any, additional examination work is expected for smaller banking organizations that do not use, to a significant extent, incentive compensation arrangements.[8]

For all banking organizations, supervisory findings related to incentive compensation will be communicated to the organization and included in the relevant report of examination or inspection. In addition, these findings will be incorporated, as appropriate, into the organization's rating component(s) and subcomponent(s) relating to risk-management, internal controls, and corporate governance under the relevant supervisory rating system, as well as the organization's overall supervisory rating.

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[6] For supervisory purposes, the Agencies segment organizations they supervise into different supervisory portfolios based on, among other things, size, complexity, and risk profile. For purposes of the final guidance, LBOs include, in the case of banking organizations supervised by (i) the Federal Reserve, large, complex banking organizations as identified by the Federal Reserve for supervisory purposes; (ii) the OCC, the largest and most complex national banks as defined in the Large Bank Supervision booklet of the Comptroller's Handbook; (iii) the FDIC, large, complex insured depository institutions (IDIs); and (iv) the OTS, the largest and most complex savings associations and savings and loan holding companies.

[7] This guidance does not apply to banking organizations that do not use incentive compensation.

[8] To facilitate these reviews, where appropriate, a smaller banking organization should review its compensation arrangements to determine whether it uses incentive compensation arrangements to a significant extent in its business operations. A smaller banking organization will not be considered a significant user of incentive compensation arrangements simply because the organization has a firm-wide profit-sharing or bonus plan that is based on the bank's profitability, even if the plan covers all or most of the organization's employees.

An organization's appropriate federal supervisor may take enforcement action against a banking organization if its incentive compensation arrangements or related risk-management, control, or governance processes pose a risk to the safety and soundness of the organization, particularly when the organization is not taking prompt and effective measures to correct the deficiencies. For example, the appropriate federal supervisor may take an enforcement action if material deficiencies are found to exist in the organization's incentive compensation arrangements or related risk-management, control, or governance processes, or the organization fails to promptly develop, submit, or adhere to an effective plan designed to ensure that its incentive compensation arrangements do not encourage imprudent risk-taking and are consistent with principles of safety and soundness. As provided under section 8 of the Federal Deposit Insurance Act (12 U.S.C. 1818), an enforcement action may, among other things, require an organization to take affirmative action, such as developing a corrective action plan that is acceptable to the appropriate federal supervisor to rectify safety-and-soundness deficiencies in its incentive compensation arrangements or related processes. Where warranted, the appropriate federal supervisor may require the organization to take additional affirmative action to correct or remedy deficiencies related to the organization's incentive compensation practices.

Effective and balanced incentive compensation practices are likely to evolve significantly in the coming years, spurred by the efforts of banking organizations, supervisors, and other stakeholders. The Agencies will review and update this guidance as appropriate to incorporate best practices that emerge from these efforts.

II. Scope of Application

The incentive compensation arrangements and related policies and procedures of banking organizations should be consistent with principles of safety and soundness.[9] Incentive compensation arrangements for executive officers as well as for non-executive personnel who have the ability to expose a banking organization to material amounts of risk may, if not properly structured, pose a threat to the organization's safety and soundness. Accordingly, this guidance applies to incentive compensation arrangements for:

- Senior executives and others who are responsible for oversight of the organization's firm-wide activities or material business lines;[10]

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[9] In the case of the U.S. operations of FBOs, the organization's policies, including management, review, and approval requirements for its U.S. operations, should be coordinated with the FBO's group-wide policies developed in accordance with the rules of the FBO's home country supervisor. The policies of the FBO's U.S. operations should also be consistent with the FBO's overall corporate and management structure, as well as its framework for risk-management and internal controls. In addition, the policies for the U.S. operations of FBOs should be consistent with this guidance.

[10] Senior executives include, at a minimum, "executive officers" within the meaning of the Federal Reserve's Regulation O (*see* 12 CFR 215.2(e)(1)) and, for publicly traded companies, "named officers" within the meaning of the Securities and Exchange Commission's rules on disclosure of executive compensation (*see* 17 CFR 229.402(a)(3)). Savings associations should also refer to OTS's rule on loans by saving associations to their executive officers, directors, and principal shareholders. (12 CFR 563.43).

- Individual employees, including non-executive employees, whose activities may expose the organization to material amounts of risk (e.g., traders with large position limits relative to the organization's overall risk tolerance); and
- Groups of employees who are subject to the same or similar incentive compensation arrangements and who, in the aggregate, may expose the organization to material amounts of risk, even if no individual employee is likely to expose the organization to material risk (e.g., loan officers who, as a group, originate loans that account for a material amount of the organization's credit risk).

For ease of reference, these executive and non-executive employees are collectively referred to hereafter as "covered employees" or "employees." Depending on the facts and circumstances of the individual organization, the types of employees or categories of employees that are outside the scope of this guidance because they do not have the ability to expose the organization to material risks would likely include, for example, tellers, bookkeepers, couriers, or data processing personnel.

In determining whether an employee, or group of employees, may expose a banking organization to material risk, the organization should consider the full range of inherent risks arising from, or generated by, the employee's activities, even if the organization uses risk-management processes or controls to limit the risks such activities ultimately may pose to the organization. Moreover, risks should be considered to be material for purposes of this guidance if they are material to the organization, or are material to a business line or operating unit that is itself material to the organization.[11] For purposes of illustration, assume that a banking organization has a structured-finance unit that is material to the organization. A group of employees within that unit who originate structured-finance transactions that may expose the unit to material risks should be considered "covered employees" for purposes of this guidance even if those transactions must be approved by an independent risk function prior to consummation, or the organization uses other processes or methods to limit the risk that such transactions may present to the organization.

Strong and effective risk-management and internal control functions are critical to the safety and soundness of banking organizations. However, irrespective of the quality of these functions, poorly designed or managed incentive compensation arrangements can themselves be a source of risk to a banking organization. For example, incentive compensation arrangements that provide employees strong incentives to increase the organization's short-term revenues or profits, without regard to the short- or long-term risk associated with such business, can place substantial strain on the risk-management and internal control functions of even well-managed organizations.

Moreover, poorly balanced incentive compensation arrangements can encourage employees to take affirmative actions to weaken or circumvent the organization's risk-

[11] Thus, risks may be material to an organization even if they are not large enough to themselves threaten the solvency of the organization.

management or internal control functions, such as by providing inaccurate or incomplete information to these functions, to boost the employee's personal compensation. Accordingly, sound compensation practices are an integral part of strong risk-management and internal control functions. A key goal of this guidance is to encourage banking organizations to incorporate the risks related to incentive compensation into their broader risk-management framework. Risk-management procedures and risk controls that ordinarily limit risk-taking do not obviate the need for incentive compensation arrangements to properly balance risk-taking incentives.

III. Principles of a Sound Incentive Compensation System

Principle 1: Balanced Risk-Taking Incentives

Incentive compensation arrangements should balance risk and financial results in a manner that does not encourage employees to expose their organizations to imprudent risks.

Incentive compensation arrangements typically attempt to encourage actions that result in greater revenue or profit for the organization. However, short-run revenue or profit can often diverge sharply from actual long-run profit because risk outcomes may become clear only over time. Activities that carry higher risk typically yield higher short-term revenue, and an employee who is given incentives to increase short-term revenue or profit, without regard to risk, will naturally be attracted to opportunities to expose the organization to more risk.

An incentive compensation arrangement is balanced when the amounts paid to an employee appropriately take into account the risks (including compliance risks), as well as the financial benefits, from the employee's activities and the impact of those activities on the organization's safety and soundness. As an example, under a balanced incentive compensation arrangement, two employees who generate the same amount of short-term revenue or profit for an organization should not receive the same amount of incentive compensation if the risks taken by the employees in generating that revenue or profit differ materially. The employee whose activities create materially larger risks for the organization should receive less than the other employee, all else being equal.

The performance measures used in an incentive compensation arrangement have an important effect on the incentives provided employees and, thus, the potential for the arrangement to encourage imprudent risk-taking. For example, if an employee's incentive compensation payments are closely tied to short-term revenue or profit of business generated by the employee, without any adjustments for the risks associated with the business generated, the potential for the arrangement to encourage imprudent risk-taking may be quite strong. Similarly, traders who work with positions that close at year-end could have an incentive to take large risks toward the end of a year if there is no mechanism for factoring how such positions perform over a longer period of time. The same result could ensue if the performance measures themselves lack integrity or can be manipulated inappropriately by the employees receiving incentive compensation.

On the other hand, if an employee's incentive compensation payments are determined based on performance measures that are only distantly linked to the employee's activities (e.g., for most employees, organization-wide profit), the potential

for the arrangement to encourage the employee to take imprudent risks on behalf of the organization may be weak. For this reason, plans that provide for awards based solely on overall organization-wide performance are unlikely to provide employees, other than senior executives and individuals who have the ability to materially affect the organization's overall risk profile, with unbalanced risk-taking incentives.

Incentive compensation arrangements should not only be balanced in design, they also should be implemented so that actual payments vary based on risks or risk outcomes. If, for example, employees are paid substantially all of their potential incentive compensation even when risk or risk outcomes are materially worse than expected, employees have less incentive to avoid activities with substantial risk.

- **Banking organizations should consider the full range of risks associated with an employee's activities, as well as the time horizon over which those risks may be realized, in assessing whether incentive compensation arrangements are balanced.**

The activities of employees may create a wide range of risks for a banking organization, such as credit, market, liquidity, operational, legal, compliance, and reputational risks, as well as other risks to the viability or operation of the organization. Some of these risks may be realized in the short term, while others may become apparent only over the long term. For example, future revenues that are booked as current income may not materialize, and short-term profit-and-loss measures may not appropriately reflect differences in the risks associated with the revenue derived from different activities (e.g., the higher credit or compliance risk associated with subprime loans versus prime loans).[12] In addition, some risks (or combinations of risky strategies and positions) may have a low probability of being realized, but would have highly adverse effects on the organization if they were to be realized ("bad tail risks"). While shareholders may have less incentive to guard against bad tail risks because of the infrequency of their realization and the existence of the federal safety net, these risks warrant special attention for safety-and-soundness reasons given the threat they pose to the organization's solvency and the federal safety net.

Banking organizations should consider the full range of current and potential risks associated with the activities of covered employees, including the cost and amount of capital and liquidity needed to support those risks, in developing balanced incentive compensation arrangements. Reliable quantitative measures of risk and risk outcomes ("quantitative measures"), where available, may be particularly useful in developing balanced compensation arrangements and in assessing the extent to which arrangements are properly balanced. However, reliable quantitative measures may not be available for all types of risk or for all activities, and their utility for use in compensation arrangements varies across business lines and employees. The absence of reliable quantitative measures for certain types of risks or outcomes does not mean that banking organizations

[12] Importantly, the time horizon over which a risk outcome may be realized is not necessarily the same as the stated maturity of an exposure. For example, the ongoing reinvestment of funds by a cash management unit in commercial paper with a one-day maturity not only exposes the organization to one-day credit risk, but also exposes the organization to liquidity risk that may be realized only infrequently.

should ignore such risks or outcomes for purposes of assessing whether an incentive compensation arrangement achieves balance. For example, while reliable quantitative measures may not exist for many bad-tail risks, it is important that such risks be considered given their potential effect on safety and soundness. As in other risk-management areas, banking organizations should rely on informed judgments, supported by available data, to estimate risks and risk outcomes in the absence of reliable quantitative risk measures.

Large banking organizations. In designing and modifying incentive compensation arrangements, LBOs should assess in advance of implementation whether such arrangements are likely to provide balanced risk-taking incentives. Simulation analysis of incentive compensation arrangements is one way of doing so. Such analysis uses forward-looking projections of incentive compensation awards and payments based on a range of performance levels, risk outcomes, and levels of risks taken. This type of analysis, or other analysis that results in assessments of likely effectiveness, can help an LBO assess whether incentive compensation awards and payments to an employee are likely to be reduced appropriately as the risks to the organization from the employee's activities increase.

- **An unbalanced arrangement can be moved toward balance by adding or modifying features that cause the amounts ultimately received by employees to appropriately reflect risk and risk outcomes.**

If an incentive compensation arrangement may encourage employees to expose their banking organization to imprudent risks, the organization should modify the arrangement as needed to ensure that it is consistent with safety and soundness. Four methods are often used to make compensation more sensitive to risk. These methods are:

- Risk Adjustment of Awards: The amount of an incentive compensation award for an employee is adjusted based on measures that take into account the risk the employee's activities may pose to the organization. Such measures may be quantitative, or the size of a risk adjustment may be set judgmentally, subject to appropriate oversight.
- Deferral of Payment: The actual payout of an award to an employee is delayed significantly beyond the end of the performance period, and the amounts paid are adjusted for actual losses or other aspects of performance that are realized or become better known only during the deferral period.[13] Deferred payouts may be altered according to risk outcomes either formulaically or judgmentally, subject to appropriate oversight. To be most effective, the deferral period should be sufficiently long to allow for the realization of a substantial portion of the risks from employee activities, and the measures of loss should be clearly explained to

[13] The deferral-of-payment method is sometimes referred to in the industry as a "clawback." The term "clawback" also may refer specifically to an arrangement under which an employee must return incentive compensation payments previously received by the employee (and not just deferred) if certain risk outcomes occur. Section 304 of the Sarbanes-Oxley Act of 2002 (15 U.S.C. 7243), which applies to chief executive officers and chief financial officers of public banking organizations, is an example of this more specific type of "clawback" requirement.

employees and closely tied to their activities during the relevant performance period.

- Longer Performance Periods: The time period covered by the performance measures used in determining an employee's award is extended (for example, from one year to two or more years). Longer performance periods and deferral of payment are related in that both methods allow awards or payments to be made after some or all risk outcomes are realized or better known.
- Reduced Sensitivity to Short-Term Performance: The banking organization reduces the rate at which awards increase as an employee achieves higher levels of the relevant performance measure(s). Rather than offsetting risk-taking incentives associated with the use of short-term performance measures, this method reduces the magnitude of such incentives. This method also can include improving the quality and reliability of performance measures in taking into account both short-term and long-term risks, for example improving the reliability and accuracy of estimates of revenues and long-term profits upon which performance measures depend.[14]

These methods for achieving balance are not exclusive, and additional methods or variations may exist or be developed. Moreover, each method has its own advantages and disadvantages. For example, where reliable risk measures exist, risk adjustment of awards may be more effective than deferral of payment in reducing incentives for imprudent risk-taking. This is because risk adjustment potentially can take account of the full range and time horizon of risks, rather than just those risk outcomes that occur or become more evident during the deferral period. On the other hand, deferral of payment may be more effective than risk adjustment in mitigating incentives to take hard-to-measure risks (such as the risks of new activities or products, or certain risks such as reputational or operational risk that may be difficult to measure with respect to particular activities), especially if such risks are likely to be realized during the deferral period. Accordingly, in some cases two or more methods may be needed in combination for an incentive compensation arrangement to be balanced.

The greater the potential incentives an arrangement creates for an employee to increase the risks associated with the employee's activities, the stronger the effect should be of the methods applied to achieve balance. Thus, for example, risk adjustments used to counteract a materially unbalanced compensation arrangement should have a similarly material impact on the incentive compensation paid under the arrangement. Further, improvements in the quality and reliability of performance measures themselves, for example improving the reliability and accuracy of estimates of revenues and profits upon which performance measures depend, can significantly improve the degree of balance in risk-taking incentives.

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[14] Performance targets may have a material effect on risk-taking incentives. Such targets may offer employees greater rewards for increments of performance that are above the target or may provide that awards will be granted only if a target is met or exceeded. Employees may be particularly motivated to take imprudent risk in order to reach performance targets that are aggressive, but potentially achievable.

Where judgment plays a significant role in the design or operation of an incentive compensation arrangement, strong policies and procedures, internal controls, and ex post monitoring of incentive compensation payments relative to actual risk outcomes are particularly important to help ensure that the arrangements as implemented are balanced and do not encourage imprudent risk-taking. For example, if a banking organization relies to a significant degree on the judgment of one or more managers to ensure that the incentive compensation awards to employees are appropriately risk-adjusted, the organization should have policies and procedures that describe how managers are expected to exercise that judgment to achieve balance and that provide for the manager(s) to receive appropriate available information about the employee's risk-taking activities to make informed judgments.

Large banking organizations. Methods and practices for making compensation sensitive to risk are likely to evolve rapidly during the next few years, driven in part by the efforts of supervisors and other stakeholders. LBOs should actively monitor developments in the field and should incorporate into their incentive compensation systems new or emerging methods or practices that are likely to improve the organization's long-term financial well-being and safety and soundness.

- **The manner in which a banking organization seeks to achieve balanced incentive compensation arrangements should be tailored to account for the differences between employees—including the substantial differences between senior executives and other employees—as well as between banking organizations.**

Activities and risks may vary significantly both across banking organizations and across employees within a particular banking organization. For example, activities, risks, and incentive compensation practices may differ materially among banking organizations based on, among other things, the scope or complexity of activities conducted and the business strategies pursued by the organizations. These differences mean that methods for achieving balanced compensation arrangements at one organization may not be effective in restraining incentives to engage in imprudent risk-taking at another organization. Each organization is responsible for ensuring that its incentive compensation arrangements are consistent with the safety and soundness of the organization.

Moreover, the risks associated with the activities of one group of non-executive employees (e.g., loan originators) within a banking organization may differ significantly from those of another group of non-executive employees (e.g., spot foreign exchange traders) within the organization. In addition, reliable quantitative measures of risk and risk outcomes are unlikely to be available for a banking organization as a whole, particularly a large, complex organization. This factor can make it difficult for banking organizations to achieve balanced compensation arrangements for senior executives who have responsibility for managing risks on an organization-wide basis solely through use of the risk-adjustment-of-award method.

Furthermore, the payment of deferred incentive compensation in equity (such as restricted stock of the organization) or equity-based instruments (such as options to acquire the organization's stock) may be helpful in restraining the risk-taking incentives

of senior executives and other covered employees whose activities may have a material effect on the overall financial performance of the organization. However, equity-related deferred compensation may not be as effective in restraining the incentives of lower-level covered employees (particularly at large organizations) to take risks because such employees are unlikely to believe that their actions will materially affect the organization's stock price.

Banking organizations should take account of these differences when constructing balanced compensation arrangements. For most banking organizations, the use of a single, formulaic approach to making employee incentive compensation arrangements appropriately risk-sensitive is likely to result in arrangements that are unbalanced at least with respect to some employees.[15]

Large banking organizations. Incentive compensation arrangements for senior executives at LBOs are likely to be better balanced if they involve deferral of a substantial portion of the executives' incentive compensation over a multi-year period in a way that reduces the amount received in the event of poor performance, substantial use of multi-year performance periods, or both. Similarly, the compensation arrangements for senior executives at LBOs are likely to be better balanced if a significant portion of the incentive compensation of these executives is paid in the form of equity-based instruments that vest over multiple years, with the number of instruments ultimately received dependent on the performance of the organization during the deferral period.

The portion of the incentive compensation of other covered employees that is deferred or paid in the form of equity-based instruments should appropriately take into account the level, nature, and duration of the risks that the employees' activities create for the organization and the extent to which those activities may materially affect the overall performance of the organization and its stock price. Deferral of a substantial portion of an employee's incentive compensation may not be workable for employees at lower pay scales because of their more limited financial resources. This may require increased reliance on other measures in the incentive compensation arrangements for these employees to achieve balance.

- **Banking organizations should carefully consider the potential for "golden parachutes" and the vesting arrangements for deferred compensation to affect the risk-taking behavior of employees while at the organizations.**

Arrangements that provide for an employee (typically a senior executive), upon departure from the organization or a change in control of the organization, to receive large additional payments or the accelerated payment of deferred amounts without regard to risk or risk outcomes can provide the employee significant incentives to expose the organization to undue risk. For example, an arrangement that provides an employee with a guaranteed payout upon departure from an organization, regardless of performance,

[15] For example, spreading payouts of incentive compensation awards over a standard three-year period may not appropriately reflect the differences in the type and time horizon of risk associated with the activities of different groups of employees, and may not be sufficient by itself to balance the compensation arrangements of employees who may expose the organization to substantial longer-term risks.

may neutralize the effect of any balancing features included in the arrangement to help prevent imprudent risk-taking.

Banking organizations should carefully review any such existing or proposed arrangements (sometimes called "golden parachutes") and the potential impact of such arrangements on the organization's safety and soundness. In appropriate circumstances an organization should consider including balancing features – such as risk adjustment or deferral requirements that extend past the employee's departure – in the arrangements to mitigate the potential for the arrangements to encourage imprudent risk-taking. In all cases, a banking organization should ensure that the structure and terms of any golden parachute arrangement entered into by the organization do not encourage imprudent risk-taking in light of the other features of the employee's incentive compensation arrangements.

Large banking organizations. Provisions that require a departing employee to forfeit deferred incentive compensation payments may weaken the effectiveness of the deferral arrangement if the departing employee is able to negotiate a "golden handshake" arrangement with the new employer.[16] This weakening effect can be particularly significant for senior executives or other skilled employees at LBOs whose services are in high demand within the market.

Golden handshake arrangements present special issues for LBOs and supervisors. For example, while a banking organization could adjust its deferral arrangements so that departing employees will continue to receive any accrued deferred compensation after departure (subject to any clawback or malus[17]), these changes could reduce the employee's incentive to remain at the organization and, thus, weaken an organization's ability to retain qualified talent, which is an important goal of compensation, and create conflicts of interest. Moreover, actions of the hiring organization (which may or may not be a supervised banking organization) ultimately may defeat these or other risk-balancing aspects of a banking organization's deferral arrangements. LBOs should monitor whether golden handshake arrangements are materially weakening the organization's efforts to constrain the risk-taking incentives of employees. The Agencies will continue to work with banking organizations and others to develop appropriate methods for addressing any effect that such arrangements may have on the safety and soundness of banking organizations.

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[16] Golden handshakes are arrangements that compensate an employee for some or all of the estimated, non-adjusted value of deferred incentive compensation that would have been forfeited upon departure from the employee's previous employment.

[17] A malus arrangement permits the employer to prevent vesting of all or part of the amount of a deferred remuneration award. Malus provisions are invoked when risk outcomes are worse than expected or when the information upon which the award was based turns out to have been incorrect. Loss of unvested compensation due to the employee voluntarily leaving the firm is not an example of malus as the term is used in this guidance.

- **Banking organizations should effectively communicate to employees the ways in which incentive compensation awards and payments will be reduced as risks increase.**

In order for the risk-sensitive provisions of incentive compensation arrangements to affect employee risk-taking behavior, the organization's employees need to understand that the amount of incentive compensation that they may receive will vary based on the risk associated with their activities. Accordingly, banking organizations should ensure that employees covered by an incentive compensation arrangement are informed about the key ways in which risks are taken into account in determining the amount of incentive compensation paid. Where feasible, an organization's communications with employees should include examples of how incentive compensation payments may be adjusted to reflect projected or actual risk outcomes. An organization's communications should be tailored appropriately to reflect the sophistication of the relevant audience(s).

Principle 2: Compatibility with Effective Controls and Risk-management

A banking organization's risk-management processes and internal controls should reinforce and support the development and maintenance of balanced incentive compensation arrangements.

In order to increase their own compensation, employees may seek to evade the processes established by a banking organization to achieve balanced compensation arrangements. Similarly, an employee covered by an incentive compensation arrangement may seek to influence, in ways designed to increase the employee's pay, the risk measures or other information or judgments that are used to make the employee's pay sensitive to risk.

Such actions may significantly weaken the effectiveness of an organization's incentive compensation arrangements in restricting imprudent risk-taking. These actions can have a particularly damaging effect on the safety and soundness of the organization if they result in the weakening of risk measures, information, or judgments that the organization uses for other risk-management, internal control, or financial purposes. In such cases, the employee's actions may weaken not only the balance of the organization's incentive compensation arrangements, but also the risk-management, internal controls, and other functions that are supposed to act as a separate check on risk-taking. For this reason, traditional risk-management controls alone do not eliminate the need to identify employees who may expose the organization to material risk, nor do they obviate the need for the incentive compensation arrangements for these employees to be balanced. Rather, a banking organization's risk-management processes and internal controls should reinforce and support the development and maintenance of balanced incentive compensation arrangements.

- **Banking organizations should have appropriate controls to ensure that their processes for achieving balanced compensation arrangements are followed and to maintain the integrity of their risk-management and other functions.**

To help prevent damage from occurring, a banking organization should have strong controls governing its process for designing, implementing, and monitoring incentive compensation arrangements. Banking organizations should create and maintain

sufficient documentation to permit an audit of the effectiveness of the organization's processes for establishing, modifying, and monitoring incentive compensation arrangements. Smaller banking organizations should incorporate reviews of these processes into their overall framework for compliance monitoring (including internal audit).

Large banking organizations. LBOs should have and maintain policies and procedures that (i) identify and describe the role(s) of the personnel, business units, and control units authorized to be involved in the design, implementation, and monitoring of incentive compensation arrangements; (ii) identify the source of significant risk-related inputs into these processes and establish appropriate controls governing the development and approval of these inputs to help ensure their integrity; and (iii) identify the individual(s) and control unit(s) whose approval is necessary for the establishment of new incentive compensation arrangements or modification of existing arrangements.

An LBO also should conduct regular internal reviews to ensure that its processes for achieving and maintaining balanced incentive compensation arrangements are consistently followed. Such reviews should be conducted by audit, compliance, or other personnel in a manner consistent with the organization's overall framework for compliance monitoring. An LBO's internal audit department also should separately conduct regular audits of the organization's compliance with its established policies and controls relating to incentive compensation arrangements. The results should be reported to appropriate levels of management and, where appropriate, the organization's board of directors.

- **Appropriate personnel, including risk-management personnel, should have input into the organization's processes for designing incentive compensation arrangements and assessing their effectiveness in restraining imprudent risk-taking**.

Developing incentive compensation arrangements that provide balanced risk-taking incentives and monitoring arrangements to ensure they achieve balance over time requires an understanding of the risks (including compliance risks) and potential risk outcomes associated with the activities of the relevant employees. Accordingly, banking organizations should have policies and procedures that ensure that risk-management personnel have an appropriate role in the organization's processes for designing incentive compensation arrangements and for assessing their effectiveness in restraining imprudent risk-taking.[18] Ways that risk managers might assist in achieving balanced compensation arrangements include, but are not limited to, (i) reviewing the types of risks associated with the activities of covered employees; (ii) approving the risk measures used in risk adjustments and performance measures, as well as measures of risk outcomes used in deferred-payout arrangements; and (iii) analyzing risk-taking and risk outcomes relative to incentive compensation payments.

[18] Involvement of risk-management personnel in the design and monitoring of these arrangements also should help ensure that the organization's risk-management functions can properly understand and address the full range of risks facing the organization.

Other functions within an organization, such as its control, human resources, or finance functions, also play an important role in helping ensure that incentive compensation arrangements are balanced. For example, these functions may contribute to the design and review of performance measures used in compensation arrangements or may supply data used as part of these measures.

- **Compensation for employees in risk-management and control functions should be sufficient to attract and retain qualified personnel and should avoid conflicts of interest.**

The risk-management and control personnel involved in the design, oversight, and operation of incentive compensation arrangements should have appropriate skills and experience needed to effectively fulfill their roles. These skills and experiences should be sufficient to equip the personnel to remain effective in the face of challenges by covered employees seeking to increase their incentive compensation in ways that are inconsistent with sound risk-management or internal controls. The compensation arrangements for employees in risk-management and control functions thus should be sufficient to attract and retain qualified personnel with experience and expertise in these fields that is appropriate in light of the size, activities, and complexity of the organization.

In addition, to help preserve the independence of their perspectives, the incentive compensation received by risk-management and control personnel staff should not be based substantially on the financial performance of the business units that they review. Rather, the performance measures used in the incentive compensation arrangements for these personnel should be based primarily on the achievement of the objectives of their functions (e.g., adherence to internal controls).

- **Banking organizations should monitor the performance of their incentive compensation arrangements and should revise the arrangements as needed if payments do not appropriately reflect risk.**

Banking organizations should monitor incentive compensation awards and payments, risks taken, and actual risk outcomes to determine whether incentive compensation payments to employees are reduced to reflect adverse risk outcomes or high levels of risk taken. Results should be reported to appropriate levels of management, including the board of directors where warranted and consistent with Principle 3 below. The monitoring methods and processes used by a banking organization should be commensurate with the size and complexity of the organization, as well as its use of incentive compensation. Thus, for example, a small, noncomplex organization that uses incentive compensation only to a limited extent may find that it can appropriately monitor its arrangements through normal management processes.

A banking organization should take the results of such monitoring into account in establishing or modifying incentive compensation arrangements and in overseeing associated controls. If, over time, incentive compensation paid by a banking organization does not appropriately reflect risk outcomes, the organization should review and revise its incentive compensation arrangements and related controls to ensure that the arrangements, as designed and implemented, are balanced and do not provide employees incentives to take imprudent risks.

Principle 3: Strong Corporate Governance

Banking organizations should have strong and effective corporate governance to help ensure sound compensation practices, including active and effective oversight by the board of directors.

Given the key role of senior executives in managing the overall risk-taking activities of an organization, the board of directors of a banking organization should directly approve the incentive compensation arrangements for senior executives.[19] The board also should approve and document any material exceptions or adjustments to the incentive compensation arrangements established for senior executives and should carefully consider and monitor the effects of any approved exceptions or adjustments on the balance of the arrangement, the risk-taking incentives of the senior executive, and the safety and soundness of the organization.

The board of directors of an organization also is ultimately responsible for ensuring that the organization's incentive compensation arrangements for all covered employees are appropriately balanced and do not jeopardize the safety and soundness of the organization. The involvement of the board of directors in oversight of the organization's overall incentive compensation program should be scaled appropriately to the scope and prevalence of the organization's incentive compensation arrangements.

Large banking organizations and organizations that are significant users of incentive compensation. The board of directors of an LBO or other banking organization that uses incentive compensation to a significant extent should actively oversee the development and operation of the organization's incentive compensation policies, systems, and related control processes. The board of directors of such an organization should review and approve the overall goals and purposes of the organization's incentive compensation system. In addition, the board should provide clear direction to management to ensure that the goals and policies it establishes are carried out in a manner that achieves balance and is consistent with safety and soundness.

The board of directors of such an organization also should ensure that steps are taken so that the incentive compensation system--including performance measures and targets--is designed and operated in a manner that will achieve balance.

- **The board of directors should monitor the performance, and regularly review the design and function, of incentive compensation arrangements.**

To allow for informed reviews, the board should receive data and analysis from management or other sources that are sufficient to allow the board to assess whether the overall design and performance of the organization's incentive compensation arrangements are consistent with the organization's safety and soundness. These reviews

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[19] As used in this guidance, the term "board of directors" is used to refer to the members of the board of directors who have primary responsibility for overseeing the incentive compensation system. Depending on the manner in which the board is organized, the term may refer to the entire board of directors, a compensation committee of the board, or another committee of the board that has primary responsibility for overseeing the incentive compensation system. In the case of FBOs, the term refers to the relevant oversight body for the firm's U.S. operations, consistent with the FBO's overall corporate and management structure.

and reports should be appropriately scoped to reflect the size and complexity of the banking organization's activities and the prevalence and scope of its incentive compensation arrangements.

The board of directors of a banking organization should closely monitor incentive compensation payments to senior executives and the sensitivity of those payments to risk outcomes. In addition, if the compensation arrangement for a senior executive includes a clawback provision, then the review should include sufficient information to determine if the provision has been triggered and executed as planned.

The board of directors of a banking organization should seek to stay abreast of significant emerging changes in compensation plan mechanisms and incentives in the marketplace as well as developments in academic research and regulatory advice regarding incentive compensation policies. However, the board should recognize that organizations, activities, and practices within the industry are not identical. Incentive compensation arrangements at one organization may not be suitable for use at another organization because of differences in the risks, controls, structure, and management among organizations. The board of directors of each organization is responsible for ensuring that the incentive compensation arrangements for its organization do not encourage employees to take risks that are beyond the organization's ability to manage effectively, regardless of the practices employed by other organizations.

Large banking organizations and organizations that are significant users of incentive compensation. The board of an LBO or other organization that uses incentive compensation to a significant extent should receive and review, on an annual or more frequent basis, an assessment by management, with appropriate input from risk-management personnel, of the effectiveness of the design and operation of the organization's incentive compensation system in providing risk-taking incentives that are consistent with the organization's safety and soundness. These reports should include an evaluation of whether or how incentive compensation practices may increase the potential for imprudent risk-taking.

The board of such an organization also should receive periodic reports that review incentive compensation awards and payments relative to risk outcomes on a backward-looking basis to determine whether the organization's incentive compensation arrangements may be promoting imprudent risk-taking. Boards of directors of these organizations also should consider periodically obtaining and reviewing simulation analysis of compensation on a forward-looking basis based on a range of performance levels, risk outcomes, and the amount of risks taken.

- **The organization, composition, and resources of the board of directors should permit effective oversight of incentive compensation.**

The board of directors of a banking organization should have, or have access to, a level of expertise and experience in risk-management and compensation practices in the financial services industry that is appropriate for the nature, scope, and complexity of the organization's activities. This level of expertise may be present collectively among the members of the board, may come from formal training or from experience in addressing these issues, including as a director, or may be obtained through advice received from outside counsel, consultants, or other experts with expertise in incentive compensation

and risk-management. The board of directors of an organization with less complex and extensive incentive compensation arrangements may not find it necessary or appropriate to require special board expertise or to retain and use outside experts in this area.

In selecting and using outside parties, the board of directors should give due attention to potential conflicts of interest arising from other dealings of the parties with the organization or for other reasons. The board also should exercise caution to avoid allowing outside parties to obtain undue levels of influence. While the retention and use of outside parties may be helpful, the board retains ultimate responsibility for ensuring that the organization's incentive compensation arrangements are consistent with safety and soundness.

Large banking organizations and organizations that are significant users of incentive compensation. If a separate compensation committee is not already in place or required by other authorities,[20] the board of directors of an LBO or other banking organization that uses incentive compensation to a significant extent should consider establishing such a committee--reporting to the full board--that has primary responsibility for overseeing the organization's incentive compensation systems. A compensation committee should be composed solely or predominantly of non-executive directors. If the board does not have such a compensation committee, the board should take other steps to ensure that non-executive directors of the board are actively involved in the oversight of incentive compensation systems. The compensation committee should work closely with any board-level risk and audit committees where the substance of their actions overlap.

- **A banking organization's disclosure practices should support safe and sound incentive compensation arrangements.**

If a banking organization's incentive compensation arrangements provide employees incentives to take risks that are beyond the tolerance of the organization's shareholders, these risks are likely to also present a risk to the safety and soundness of the organization.[21] To help promote safety and soundness, a banking organization should provide an appropriate amount of information concerning its incentive compensation arrangements for executive and non-executive employees and related risk-management, control, and governance processes to shareholders to allow them to monitor and, where appropriate, take actions to restrain the potential for such arrangements and processes to encourage employees to take imprudent risks. Such disclosures should include information relevant to employees other than senior executives. The scope and level of the information disclosed by the organization should be tailored to the nature and complexity of the organization and its incentive compensation arrangements.[22]

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[20] *See*, New York Stock Exchange Listed Company Manual Section 303A.05(a); Nasdaq Listing Rule 5605(d); Internal Revenue Code section 162(m) (26 U.S.C. 162(m)).

[21] On the other hand, as noted previously, compensation arrangements that are in the interests of the shareholders of a banking organization are not necessarily consistent with safety and soundness.

[22] A banking organization also should comply with the incentive compensation disclosure requirements of the federal securities law and other laws as applicable. *See*, e.g., Proxy Disclosure Enhancements, SEC Release Nos. 33-9089, 34-61175, 74 F.R 68334 (Dec. 23, 2009) (to be codified at 17 CFR pts. 229 and 249).

- **Large banking organizations should follow a systematic approach to developing a compensation system that has balanced incentive compensation arrangements.**

At banking organizations with large numbers of risk-taking employees engaged in diverse activities, an ad hoc approach to developing balanced arrangements is unlikely to be reliable. Thus, an LBO should use a systematic approach--supported by robust and formalized policies, procedures, and systems--to ensure that those arrangements are appropriately balanced and consistent with safety and soundness. Such an approach should provide for the organization effectively to:

- Identify employees who are eligible to receive incentive compensation and whose activities may expose the organization to material risks. These employees should include (i) senior executives and others who are responsible for oversight of the organization's firm-wide activities or material business lines; (ii) individual employees, including non-executive employees, whose activities may expose the organization to material amounts of risk; and (iii) groups of employees who are subject to the same or similar incentive compensation arrangements and who, in the aggregate, may expose the organization to material amounts of risk;
- Identify the types and time horizons of risks to the organization from the activities of these employees;
- Assess the potential for the performance measures included in the incentive compensation arrangements for these employees to encourage the employees to take imprudent risks;
- Include balancing elements, such as risk adjustments or deferral periods, within the incentive compensation arrangements for these employees that are reasonably designed to ensure that the arrangement will be balanced in light of the size, type, and time horizon of the inherent risks of the employees' activities;
- Communicate to the employees the ways in which their incentive compensation awards or payments will be adjusted to reflect the risks of their activities to the organization; and
- Monitor incentive compensation awards, payments, risks taken, and risk outcomes for these employees and modify the relevant arrangements if payments made are not appropriately sensitive to risk and risk outcomes.

III. Conclusion

Banking organizations are responsible for ensuring that their incentive compensation arrangements do not encourage imprudent risk-taking behavior and are consistent with the safety and soundness of the organization. The Agencies expect banking organizations to take prompt action to address deficiencies in their incentive compensation arrangements or related risk-management, control, and governance processes.

The Agencies intend to actively monitor the actions taken by banking organizations in this area and will promote further advances in designing and implementing balanced incentive compensation arrangements. Where appropriate, the Agencies will take supervisory or enforcement action to ensure that material deficiencies that pose a threat to the safety and soundness of the organization are promptly addressed. The Agencies also will update this guidance as appropriate to incorporate best practices as they develop over time.

This concludes the text of the Guidance on Sound Incentive Compensation Policies.

[THIS SIGNATURE PAGE PERTAINS TO THE FINAL GUIDANCE ENTITLED "GUIDANCE ON SOUND INCENTIVE COMPENSATION POLICIES."]

Dated: June 17, 2010

John C. Dugan (signed)

John C. Dugan,
Comptroller of the Currency

[THIS SIGNATURE PAGE PERTAINS TO THE FINAL GUIDANCE ENTITLED "GUIDANCE ON SOUND INCENTIVE COMPENSATION POLICIES."]

By order of the Board of Governors of the Federal Reserve System, June 21, 2010.

Robert deV. Frierson (signed)

Robert deV. Frierson
Deputy Secretary of the Board

[THIS SIGNATURE PAGE PERTAINS TO THE FINAL GUIDANCE ENTITLED "GUIDANCE ON SOUND INCENTIVE COMPENSATION POLICIES."]

Dated: June 21, 2010

Valerie J. Best (signed)

Valerie J. Best
Assistant Executive Secretary
Federal Deposit Insurance Corporation

[THIS SIGNATURE PAGE PERTAINS TO THE FINAL GUIDANCE ENTITLED "GUIDANCE ON SOUND INCENTIVE COMPENSATION POLICIES."]

Dated: June 10, 2010

By the Office of Thrift Supervision.

John E. Bowman (signed)

John E. Bowman,
Acting Director

UNITED STATES OF AMERICA
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2014-CFPB- 0004

In the Matter of: **Bank of America, N.A.; and** **FIA Card Services, N.A.**	**CONSENT ORDER**

The Consumer Financial Protection Bureau ("CFPB") has reviewed the practices of Respondents Bank of America, N.A. and FIA Card Services, N.A. ("the Bank," as defined below) relating to add-on products and has identified violations of law. The CFPB hereby issues, pursuant to Sections 1053 and 1055 of the Consumer Financial Protection Act of 2010 ("CFPA"), 12 U.S.C. §§ 5563 and 5565, this Consent Order ("Order").

ARTICLE I
OVERVIEW

1. The CFPB finds that the Bank and its Service Providers (as defined below) have engaged in violations of Sections 1031 and 1036 of the CFPA (collectively, "Section 1036"), 12 U.S.C. §§ 5531, 5536 in connection with the marketing, sales, delivery, servicing, and/or fulfillment of the Bank's Credit Protection Covered Products (as defined below) and the billing of Identity Protection Covered Products (as defined below).

ARTICLE II
JURISDICTION

2. The CFPB has jurisdiction over this matter pursuant to Sections 1053 and 1055 of the Consumer Financial Protection Act ("CFPA"), 12 U.S.C. §§ 5563, 5565.

ARTICLE III
STIPULATION

3. The Bank has executed a Stipulation and Consent to the Issuance of Consent Order ("Stipulation"), which is incorporated by reference and is accepted by the CFPB. By this Stipulation, the Bank has consented to the issuance of this Order by the CFPB pursuant to Sections 1053 and 1055 of the CFPA, 12 U.S.C. §§ 5563 and 5565, without admitting or denying any findings of fact or violations of law or wrongdoing, except that the Bank admits to the CFPB's jurisdiction over the Bank and the subject matter of this action.

ARTICLE IV
DEFINITIONS

4. For purposes of this Order, the following definitions shall apply:

(a) "Add-On Product" shall mean any Bank-branded or co-branded consumer financial product or service, as defined by Section 1002(5) of the CFPA, 12 U.S.C. § 5481(5), which is sold by the Bank or its Service Providers as an optional add-on product to Bank credit cards and/or as an optional add-on product to consumer financial products of the Bank.

(b) "Bank of America" or the "Bank" shall mean Bank of America, N.A., Charlotte, North Carolina, and FIA Card Services, N.A., and their successors and assigns, and excludes Service Providers, as defined in Paragraph 4(t), below.

(c) "Board" shall mean the Boards of Directors of Bank of America, N.A. and FIA Card Services, N.A.

(d) "Class Action Settlement" shall mean the settlement agreement FIA Card Services, N.A. and Bank of America Corporation entered into to resolve seven putative class actions related to its credit protection products that

had been consolidated into a multidistrict litigation in the Northern District of California, *In re Bank of America Credit Protection Marketing and Sales Practices Litigation,* No. 3:11-md-02269.

(e) "Covered Products" shall mean, collectively, "Credit Protection Covered Products" and "Identity Protection Covered Products."

(f) "Customer" means any person who was enrolled in a Covered Product.

(g) "Credit Protection Covered Products" shall mean the Bank's Credit Protection Plus and Credit Protection Deluxe products.

(h) "Credit Protection Product" shall mean any Add-On Product that purports to allow a Customer enrolled in the Credit Protection Product to request (i) cancellation of some or all of the credit card balance in certain circumstances, such as death, or (ii) cancellation of minimum credit card payments in certain circumstances such as unemployment, disability, or other enumerated events. "Credit Protection Product" includes the Credit Protection Covered Products.

(i) "Credit Protection Product Fees" shall mean the fees charged by the Bank or a Credit Protection Service Provider to a Credit Protection Eligible Customer's Account for any Credit Protection Product or Products. Credit Protection Product Fees shall not include finance charges, over-limit fees, or interest associated with Credit Protection Products.

(j) "Credit Protection Relevant Time Period" shall mean October 1, 2010 through March 31, 2013.

(k) "Credit Protection Service Provider" refers to any direct customer-facing Service Provider that provided marketing, sales, delivery, servicing, and/or fulfillment of Credit Protection Products to Bank Customers.

(l) "Effective Date" shall mean the date on which the Order is issued.

(m) "Identity Protection Covered Products" refers to the identity theft protection products, "Privacy Guard," "PrivacySource" and "Privacy Assist," which included but were not limited to credit monitoring and credit report retrieval services and were marketed and sold to Bank Customers or other consumers by the Bank or its Identity Protection Service Providers pursuant to a contract between the Bank and an Identity Protection Service Provider.

(n) "Identity Protection Products" shall mean any Add-On Product that purported to provide credit monitoring and credit report retrieval services. "Identity Protection Product" includes the Identity Protection Covered Products.

(o) "Identity Protection Service Provider" refers to the Bank's Service Providers, including, but not limited to, Trilegiant Corporation and Intersections, Inc., that provided marketing, sales, delivery, servicing, and/or fulfillment of Identity Protection Covered Products to Bank Customers and/or other consumers.

(p) "Identity Protection Product Fees" are the fees charged by the Bank or Identity Protection Service Provider for an Identity Protection Covered Product.

(q) "Products" shall mean, collectively, "Credit Protection Products" and "Identity Protection Products."

(r) "Regional Director" shall mean the Regional Director for the Office of Supervision for the Southeast Region for the Consumer Financial Protection Bureau.

(s) "Related Consumer Action" shall mean a private damages action by or on behalf of one or more consumers brought against the Bank based on substantially the same facts as set forth in Article V of this Order, including, but not limited to, *In re Bank of America Credit Protection Marketing and Sales Practices Litigation*, No. 3:11-md-02269.

(t) "Service Provider" shall mean any service provider, as defined in Section 1002(26) of the CFPA, 12 U.S.C. § 5481, that provides services for Add-On Products pursuant to a contractual obligation to the Bank.

ARTICLE V
FINDINGS AND CONCLUSIONS

The CFPB finds the following:

5. Bank of America, N.A. is a "covered person" as that term is defined by 12 U.S.C. § 5481(6) and is an insured depository institution with assets greater than $10 billion within the meaning of 12 U.S.C. § 5515(a).

6. FIA Card Services, N.A. is a "covered person" as that term is defined by 12 U.S.C. § 5481(6) and is an insured depository institution with assets greater than $10 billion within the meaning of 12 U.S.C. § 5515(a).

Credit Protection Products

7. Credit Protection Plus was an optional debt cancellation product offered to Bank of America credit card customers. The last version of Credit Protection Plus that the Bank marketed to customers was marketed as being able to cancel up to twice the customer's minimum monthly payment for up to 18 months for Involuntary Unemployment, Disability, Hospitalization, and Leave of Absence (each as defined in the product's terms and conditions); up to three minimum monthly payments for certain defined Life Events, including Marriage, Divorce, Birth/Adoption, New Residence, Graduation, Entering College, and Retirement; and up to $25,000 of the customer's balance upon the customer's death. When last marketed to customers, the monthly fee for this product was 0.85 percent of the customer's monthly balance.

8. Credit Protection Deluxe was an optional, flat-fee debt cancellation product offered to Bank of America credit card customers. The last version of Credit Protection Deluxe that the Bank marketed to customers was marketed as being able to cancel up to $500 per month (up to $2000) for Involuntary Unemployment, Disability, Hospitalization, and Leave of Absence (each as defined in the product's terms and conditions), and up to $200 for the same Life Events covered by Credit Protection Plus. When last marketed to customers, the fee for this product was $15.99 per month.

9. To obtain Credit Protection Plus or Credit Protection Deluxe benefits for either hardship or life events, the Bank required customers to request benefits through the Bank's benefit approval process. To continue receiving Credit Protection Plus or Credit Protection Deluxe benefits for certain hardship events, customers had to resubmit forms and documentation throughout their benefit period.

10. During the Credit Protection Relevant Time Period, Bank of America Call Center Representatives (CSRs) solicited cardholders who called the Bank to activate their cards, or to obtain other customer service, to enroll in the Credit Protection Covered Products.

11. During the Credit Protection Relevant Time Period, the Bank also engaged Credit Protection Service Providers to conduct inbound and outbound telemarketing of the Credit Protection Covered Products to customers.

12. During the Credit Protection Relevant Time Period, the Bank and its Service Providers failed to adequately inform some customers that they were purchasing the Credit Protection Covered Products, or misrepresented to some customers the costs, terms, benefits, and benefits process of the Credit Protection Covered Products. During the relevant time period improper telemarketing practices included:

(a) representing that the first 30 days of coverage were free of charge when, in fact, by enrolling, Customers were agreeing to purchase the Credit Protection Covered Products and to begin incurring charges unless they cancelled within the 30-day review period, in which case any fees previously paid would be reimbursed;

(b) representing that additional steps were required to enroll in or purchase the Credit Protection Covered Products after the telemarketing call;

(c) representing that customers were consenting to receive additional information about the Credit Protection Covered Products, when, in fact, the Bank was enrolling Customers in the Credit Protection Covered Products;

(d) representing that Customers could receive benefits for a duration longer than permitted under the terms and conditions of the Credit Protection Covered Products; and

(e) representing that Customers would be entitled to an "up to $25,000 death benefit" by enrolling in Credit Protection Plus when, in fact, enrollment in Credit Protection Plus did not entitle Customers or their survivors to $25,000 upon the Customer's death; Credit Protection Plus could only cancel the amount owed on the decedent Customer's credit card account up to $25,000.

(f) representing that the benefits covered by the Credit Protection Covered Products were automatic upon notice of the qualifying event when, in fact, the programs required a benefit request submission and approval process.

13. The Bank's compliance monitoring, Service Provider management, and quality assurance yielded ineffective oversight and did not, in certain instances, prevent, identify, or correct the improper sales practices in marketing the Credit Protection Covered Products.

14. The Bank voluntarily ceased marketing and selling Credit Protection Products. The Bank stopped marketing and selling Credit Protection Products in August 2012 and canceled all existing accounts as of September 1, 2013.

15. Section 1036(a)(1)(B) of the CFPA prohibits "unfair, deceptive, or abusive" acts or practices. 12 U.S.C. § 5536(a)(1)(B).

16. Statements and omissions by the Bank or its Service Providers, as set forth in the preceding Paragraphs, are material because they are likely to affect a consumer's choice or

conduct regarding the Credit Protection Covered Products and are likely to mislead consumers acting reasonably under the circumstances.

17. The representations of the Bank, through its CSRs and Credit Protection Service Providers with respect to Credit Protection Covered Products during the Credit Protection Relevant Time Period, constitute deceptive practices in violation of Sections 1031(a) and 1036(a)(1)(B) of the CFPA, 12 U.S.C. §§ 5531(a), 5536(a)(1)(B). These violations affected approximately 1.4 million Customers.

Identity Protection Products

18. From at least October 2000 to approximately December 2011, the Bank and its Service Providers marketed and sold the Identity Protection Covered Products, which included credit monitoring and credit report retrieval, to Bank Customers and other consumers.

19. To provide the credit monitoring and credit report retrieval services, the Bank, through its Service Providers, was required by the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681b to have a "permissible purpose" to obtain Customers' credit information from the credit reporting agencies. Among other reasons, a credit reporting agency may release a credit report in accordance with a consumer's "written instructions." 15 U.S.C. § 1681b(a)(2).

20. Accordingly, Customers and other consumers who enrolled in the Identity Protection Covered Products were required to provide sufficient authorization before their credit bureau reports could be accessed. Customers of the Identity Protection Covered Products were provided the materials necessary to submit this authorization, but until the authorization was submitted, the Bank and its Service Providers could not provide Customers the full credit monitoring and/or credit report retrieval services of the Identity Protection Covered Product in which they were enrolled.

21. In many cases, however, some period of time passed before the Bank or its Service Providers obtained the Customers' authorizations, or the Bank or its Service Providers never obtained the Customers' authorizations. From at least October 2000 to approximately September 2011, the Bank, through its Service Providers, billed the full fee of the Identity Protection Covered Product to customers who were not receiving all of the credit monitoring and/or credit report retrieval benefits of the product.

22. Section 1036(a)(1)(B) of the CFPA prohibits "unfair, deceptive, or abusive" acts or practices. 12 U.S.C. § 5536(a)(1)(B).

23. The Bank's and Service Providers' acceptance of monthly payments while failing to provide credit monitoring and/or credit report retrieval services has resulted in substantial injury to approximately 1.5 million consumers in the amount of at least $459 million for Identity Protection Covered Products. This injury was not reasonably avoidable by consumers and is not outweighed by any countervailing benefit to the consumers or to competition.

24. By reason of the foregoing billing practices for its Identity Protection Covered Products, the Bank and its Service Providers engaged in unfair practices in violation of Sections 1031(a) and 1036(a)(1)(B) of the CFPA, 12 U.S.C. §§ 5531(a), 5536(a)(1)(B).

ARTICLE VI
ORDER TO CEASE AND DESIST AND TO TAKE AFFIRMATIVE ACTIONS

IT IS HEREBY ORDERED, pursuant to Sections 1053 and 1055 of the CFPA, that:

25. The Bank and its officers, agents, servants, employees, and attorneys, whether acting directly or indirectly, shall cease and desist and shall take reasonable measures to ensure that its Service Providers and other agents cease and desist from engaging in violations of law or

regulation in connection with the marketing and administration of Credit Protection Products and in the billing and administration of Identity Protection Products.

26. The Bank shall correct all violations of law, as described herein, and shall implement procedures to prevent their recurrence. The Bank's actions as required by this Article shall be satisfactory to the Regional Director as determined at subsequent examinations and/or visitations.

27. The Bank shall not make, or allow to be made, any material deceptive representation, statement, or omission, expressly or by implication, in the marketing materials, telemarketing scripts, and/or sales presentation used to solicit any customer or prospective customer in connection with any Credit Protection Product, including but not limited to misrepresentations or omissions as to the following:

(a) any and all fees, costs, expenses and charges associated with the Credit Protection Product;

(b) that a product is optional and not required for the customer to activate or use his or her credit card;

(c) that accessing the Credit Protection Product's benefits requires minimal action by the consumer;

(d) the benefits of any Credit Protection Product;

(e) any material conditions and restrictions related to the Credit Protection Product;

(f) the purpose of sales calls and/or sales portions of servicing or other calls; or

(g) payment terms for a Credit Protection Product, including the actual date a Customer will be charged for a Credit Protection Product or incur charges for a Credit Protection Product.

28. The Bank represents that it stopped substantially all marketing, soliciting, offering for sale, and selling the Identity Protection Products to new enrollees by December 2011 and stopped marketing, soliciting, offering for sale, and selling Credit Protection Products on or before August 2012.

29. The Bank and its officers, agents, servants, employees, and attorneys, whether acting directly or indirectly, shall be prohibited from marketing, soliciting, offering for sale and selling Credit Protection Products and Identity Protection Products, unless it submits to the CFPB a compliance plan (the "Compliance Plan") specifically designed to prevent all violations of applicable Federal consumer financial laws in the sale and administration of Identity Protection Products and/or Credit Protection Products, as applicable.

(a) Any Compliance Plan concerning Credit Protection Products shall:

(i) Address the manner in which marketing and soliciting of Credit Protection Products may occur, including, but not limited to, prohibiting the Bank or its representatives or Service Providers from marketing or soliciting the Products until after activation is completed and the consumer is informed that listening to the solicitation is optional;

(ii) Address the manner in which the Bank informs Customers and prospective customers of any and all fees, costs, expenses and charges associated with the Credit Protection Product; the payment

terms for a Credit Protection Product, including the actual date a Customer will be charged for a Product or incur charges for the Product; the benefits of any Credit Protection Product; the process of accessing the benefits of any Credit Protection Product; and any material conditions, benefits, and restrictions related to the Credit Protection Products;

(iii) Describe how the Bank will disclose that a product is optional and not required for the Customer to activate or use his or her credit card.

(b) Any Compliance Plan concerning Identity Protection Products shall:

(i) Address the manner in which the Bank informs Customers and prospective customers that any credit monitoring services will not be activated until receipt of customer authorization for the Bank to access their credit information at credit reporting agencies;

(ii) Describe how the Bank will avoid billing Customers during a period before the Bank or Service Provider receives authorization to access credit information from each credit reporting agency and during a period when the credit reporting agency has not yet processed authorizations submitted by Customers.

30. The Bank shall submit any Compliance Plan to the Regional Director at least ninety (90) days prior to marketing, soliciting, offering for sale, or selling Credit Protection Products and/or Identity Protection Products to new enrollees, as applicable, for prior determination of supervisory non-objection. The Bank shall adhere to the Compliance Plan.

31. Within one-hundred twenty (120) days of the Effective Date, the Bank shall submit to the Regional Director, for review and written determination of supervisory non-objection, an acceptable plan containing a description of the actions that are necessary and appropriate to achieve compliance with this Order (the "Action Plan"). The Board or a Committee thereof shall ensure the Action Plan is submitted to the Regional Director for prior determination of supervisory non-objection.

32. The Action Plan shall specify timelines for completion of each of the requirements of this Order. The timelines in the Action Plan shall be consistent with any deadlines set forth in this Order, unless modified in writing by the Regional Director.

33. The Action Plan shall include a review, and if necessary, the revision of the Add-On Products related portions of its written Service Provider Management Program to ensure that all Add-On Products which are marketed and sold by the Bank comply with applicable Federal consumer financial law. At a minimum, the Service Provider Management Program shall require:

(a) An analysis to be conducted by the Bank, prior to the Bank entering into a contract with the Service Provider, of the ability of the Service Provider to perform the marketing, sales, delivery, servicing, and fulfillment of services for the Add-On Product(s) in compliance with all applicable Federal consumer financial laws and the Bank's related policies and procedures;

(b) For new and renewed contracts, a written contract between the Bank and the Service Provider, which sets forth the responsibilities of each party, especially:

(i) the Service Provider's specific performance responsibilities and duty to maintain adequate internal controls over the marketing, sales, delivery, servicing, and fulfillment of services for the Add-On Products;

(ii) the Service Provider's responsibilities and duty to provide adequate training on compliance with all applicable Federal consumer financial laws and the Bank's related policies and procedures to all Service Provider employees or agents engaged in the marketing, sales, delivery, servicing, and fulfillment of services for the Add-On Product(s);

(iii) granting the Bank the authority to conduct periodic onsite reviews of the Service Provider's controls, performance, and information systems as they relate to the marketing, sales, delivery, servicing, and fulfillment of services for the Add-On Product(s); and

(iv) the Bank's right to terminate the contract if the Service Provider materially fails to comply with the terms specified in the contract, including the terms required by this Paragraph.

(c) Periodic review by the Bank of the Service Provider's controls, performance, and information systems related to Add-On Products.

34. In addition, within one-hundred twenty (120) days of this Order, an appropriate independent qualified group within the Bank shall review and, if necessary, revise the written Unfair, Deceptive, or Abusive Acts or Practices Policy statement ("UDAAP Policy") to ensure the UDAAP Policy requires, at minimum:

(a) A written comprehensive assessment, to be conducted on an annual basis, of the unfair, deceptive, and abusive practices ("UDAAP") risk for existing or new Add-On Products and for any changes to existing Add-On Products, including, but not limited to the UDAAP risk of the governance, control, marketing, sales, delivery, servicing, and fulfillment of services for new Add-On Products and existing Add-On Products, including the UDAAP risk of marketing and sales practices;

(b) The development and implementation of written policies and procedures to effectively manage, prevent, detect, and mitigate, on an on-going basis, the risks identified in the written assessment required by the preceding Paragraph;

(c) The recording of all telephone calls in which Add-On Products are marketed or sold following the Effective Date by the Bank or through a Service Provider to Bank customers, which recordings shall be retained for a period of at least 25 months from the date of the call;

(d) The recording of all telephone calls in which a customer enrolled in an Add-On Product marketed or sold following the Effective Date by the Bank or through a Service Provider indicates that he or she did not authorize, does not want, does not need, or wishes to cancel the Add-On Product, which recordings shall be retained for a period of at least 25 months from the date of the call;

(e) Comprehensive written procedures for providing appropriate training on applicable Federal consumer financial laws and the Bank's related policies

and procedures, including, but not limited to, unfair, deceptive, and abusive acts and practices, to appropriate Bank employees and Service Provider call agents who market or sell Add-On Products during in-bound or out-bound telephone calls or who engage in retention efforts during telephone calls in which a Bank customer indicates that he or she did not authorize, does not want, does not need, or wishes to cancel the Add-On Product;

(f) Comprehensive written procedures for providing appropriate training on applicable Federal consumer financial laws and the Bank's related policies and procedures as related to Add-On Products to appropriate Bank employees and Service Provider's employees or agents who monitor telephone calls as required by Paragraph 34(i);

(g) Comprehensive written policies and procedures for identifying and reporting any violation of applicable Federal consumer financial laws and the Bank's related policies and procedures as related to Add-On Products by the Bank's employees and Service Provider's employees or agents, in a timely manner, to a specified executive risk or compliance manager at the Bank. The manager to whom such reports are made shall be independent of the unit overseeing the sale and marketing of Add-On Products;

(h) Development of training materials relating to identifying and responding to violations of applicable Federal consumer financial laws as related to Add-On Products that will be incorporated into the existing annual compliance training for appropriate employees;

(i) Independent telephone call monitoring of Bank employees and Service Provider's employees or agents who are engaged in the marketing or sale of Add-On Products by qualified personnel who have training in identifying and reporting violations of applicable Federal consumer financial laws and the Bank's related policies and procedures;

(j) Reporting, on at least a monthly basis by the independent unit responsible for conducting the monitoring required by Paragraph 34(i), of its findings from the telephone call monitoring described in Paragraph 34(i) to a specified executive risk or compliance manager at the Bank who is independent of the unit overseeing the sales and marketing of these Add-On Products; and

(k) Written policies and procedures to ensure that the risk management, internal audit, Service Provider administration, and corporate compliance programs have the requisite authority and status within the Bank so that appropriate reviews of Add-On Products marketed or sold by the Bank or through Service Providers may occur and deficiencies are identified and properly remedied.

35. Within one-hundred twenty (120) days of the Effective Date, the Bank shall submit its Action Plan, the Add-On Products related portions of the Service Provider Management Program, and the Add-On Products related portions of the UDAAP Policy to the Regional Director for prior determination of supervisory non-objection.

36. Upon receipt by the Bank of a determination of supervisory non-objection from the CFPB to the Action Plan, the Add-On Products related portions of the Service Provider

Management Program, and the Add-On Products related portions of the UDAAP Policy, the Board, or a Committee thereof, shall ensure the Bank's adoption, implementation, and adherence to the Action Plan, the Add-On Products related elements of the Service Provider Management Program, and the Add-On Products related portions of the UDAAP Policy.

37. Any material proposed changes to or deviations from the approved Service Provider Management Program and UDAAP Policy, where such proposed changes or deviations relate to Add-On Products, shall be submitted in writing to the CFPB for determination of supervisory non-objection.

38. The Bank's Internal Audit department shall periodically conduct an assessment of the Bank's compliance with the Service Provider Management Program and its UDAAP Policy in connection with the marketing, sales, delivery, servicing, and fulfillment of services for Add-On Products. Such assessments shall occur within one-hundred twenty (120) days after the Bank's receipt of a determination of supervisory non-objection to the Service Provider Management Policy and the UDAAP Policy, and periodically thereafter, and the findings shall be memorialized in writing. Within thirty (30) days of completing each assessment, Internal Audit shall provide its written findings to the Audit Committee and the Regional Director.

ARTICLE VII
THE AUDIT COMMITTEE

39. The Bank's existing Audit Committee, which is composed of a majority of independent directors of the Bank or its holding company, shall be responsible for monitoring and coordinating the Bank's compliance with the provisions of this Order, and approving measures necessary to ensure compliance with the remaining Articles of this Order (unless other specific approvals are required).

40. Within one-hundred twenty (120) days of the Effective Date, and thereafter within thirty (30) days after the end of each calendar quarter, the Audit Committee shall submit a written progress report to the Board setting forth in detail the actions taken to comply with this Order, and the results and status of those actions.

41. The Board shall forward a copy of the Audit Committee's report, with any additional comments by the Board, to the Regional Director within ten (10) days of the first Board meeting following receipt of such report, unless additional time is granted by the Regional Director through a written determination of supervisory non-objection.

ARTICLE VIII
ROLE OF THE BOARD

42. The Board shall ensure that all submissions (including plans, reports, programs, policies, and procedures) required by this Order are submitted to the Regional Director.

43. Although this Order requires the Bank to submit certain documents for the determination of non-objection by the Regional Director, the Board shall have the ultimate responsibility for proper and sound management of the Bank and for ensuring that the Bank complies with Federal consumer financial laws and this Order. With the prior non-objection of the Regional Director, the Board may delegate certain of the approval or reporting obligations included herein to the Audit Committee.

44. In each instance in this Order in which the Board is required to ensure adherence to, or undertake to perform certain obligations of the Bank, the Board, directly or through the Audit Committee, shall:

(a) Authorize and adopt such actions on behalf of the Bank as may be necessary for the Bank to perform its obligations and undertakings under the terms of this Order;

(b) Require the timely reporting by the Bank management of such actions directed by the Board to be taken under this Order;

(c) Follow up on any material non-compliance with such actions in a timely and appropriate manner; and

(d) Require corrective action be taken in a timely manner of any material non-compliance with such actions.

ARTICLE IX
ORDER FOR REDRESS

45. The Bank shall make redress, as set forth in Paragraphs 47 through 52 of this Article, in accordance with the Redress Plan required by Paragraph 53 of this Article, to all Credit Protection Eligible Customers and Identity Protection Eligible Customers as defined in Paragraphs 47(a) and 50(a) of this Article.

46. If the Bank claims to have made any restitution prior to the Effective Date of this Order that complies with the requirements of this Order, the Bank shall provide appropriate proof of such restitution to the Regional Director concurrent with the Redress Plan required by Paragraph 53 of this Article. Any redress paid to an Identity Protection Eligible Customer pursuant to the order issued by the Comptroller of the Currency, shall not be construed as requiring the Bank to provide a duplicative restitution payment to that Customer under this Order.

Credit Protection Redress

47. For purposes of Credit Protection Redress, the following definitions shall apply:

(a) "Credit Protection Eligible Customer" is a Customer who, with respect to each Credit Protection Covered Product, was enrolled in a Credit Protection Covered Product through inbound or outbound telemarketing,

and was billed a Credit Protection Product Fee during the Credit Protection Relevant Time Period, and either (1) did not activate and receive Credit Protection Covered Product benefits at any time while enrolled in the product, or (2) activated and received Credit Protection Covered Product benefits while enrolled, but made a separate request for benefits that was denied or closed.

48. Credit Protection Redress shall include the following:

(a) The redress amount paid to each Credit Protection Eligible Customer shall include, as applicable to each Credit Protection Eligible Customer:

(i) If the Credit Protection Eligible Customer was enrolled in the product for 364 days or less and did not make a benefit request that was denied or closed, all Credit Protection Product Fees charged during the Credit Protection Relevant Time Period;

(ii) If the Credit Protection Eligible Customer was enrolled in the product for 365 days or more and did not make a benefit request that was denied or closed, or lodge a complaint, of which the Bank has a record, stating that he or she did not authorize enrollment, 300 days of Credit Protection Product Fees charged during the Credit Protection Relevant Time Period (based on the average daily fee paid by the consumer during the Credit Protection Relevant Time Period);

(iii) If the Credit Protection Eligible Customer made any request for benefits that was either denied or closed (including Credit

Protection Eligible Customers who may have received a benefit in response to another request), all Credit Protection Product Fees charged during the Credit Protection Relevant Time Period; or

(iv) If, prior to the Effective Date, the Credit Protection Eligible Customer lodged with the Bank or the CFPB a complaint, of which the Bank has a record, stating that he or she did not authorize enrollment in the Credit Protection Covered Products, all Credit Protection Product Fees charged during the Credit Protection Relevant Time Period.

(b) Credit Protection Redress shall also include: (1) a reduction in charged-off balances for Credit Protection Eligible Customers that is attributable to Credit Protection Product Fees charged during the Credit Protection Relevant Time Period not included in the redress amounts described above; and (2) the benefits provided to customers as a result of a six-month no-cost protection period (March 1, 2013 through September 1, 2013) provided to all Customers who were enrolled in the Credit Protection Covered Products as of March 1, 2013.

(c) Credit Protection Redress shall allow for a reduction in the amount of redress provided to a Credit Protection Eligible Customer by: (1) the amount of any refunded Credit Protection Product Fees a Credit Protection Eligible Customer received prior to the Effective Date and (2) the amount of any award a Credit Protection Eligible Customer received through the Class Action Settlement.

49. The estimated value of the restitution and additional redress to Credit Protection Eligible Customers as set forth in Paragraphs 48(a) and 48(b), after applicable reductions as set forth in Paragraph 48(c), is $268 million. The estimated value of the restitution and additional redress to Credit Protection Eligible Customers will be validated as part of the Redress Review.

Identity Protection Redress

50. For the purposes of Identity Protection Redress, the following definitions shall apply:

(a) "Identity Protection Eligible Customer" is any customer who, between October 2000 and September 2011, enrolled in an Identity Protection Covered Product and who was Unprocessable during any portion of his or her enrollment.

(b) "Identity Protection Reimbursement End Date" is the date on which the Identity Protection Eligible Customer's Unprocessable status ended.

(c) "Identity Protection Reimbursement Start Date" is the date on which the Identity Protection Eligible Customer entered Unprocessable status.

(d) "Unprocessable" refers to the status of a Customer who, at a given time, was being billed for an Identity Protection Covered Product but who, for any reason (i) was not receiving full credit monitoring; (ii) was receiving partial credit monitoring and/or credit report retrieval and had not received notice of the partial monitoring or credit report retrieval; and/or (iii) was not receiving credit report retrieval benefits.

51. The redress amount paid to each Identity Protection Eligible Customer shall include, as applicable to each Identity Protection Eligible Customer:

(a) The sum of:

(i) The full amount of Identity Protection Covered Product Fees paid by an Identity Protection Eligible Customer from his or her Identity Protection Reimbursement Start Date through his or her Identity Protection Reimbursement End Date;

(ii) The full amount of any overlimit fees, as calculated pursuant to the methodology in the Redress Plan, paid by an Identity Protection Eligible Customer from his or her Identity Protection Reimbursement Start Date through his or her Identity Protection Reimbursement End Date; and

(iii) The amount of the estimated finance charges, as calculated pursuant to the methodology in the Redress Plan concerning Identity Protection Redress, paid by an Identity Protection Eligible Customer on Identity Protection Covered Product Fees from his or her Identity Protection Reimbursement Start Date through his or her Identity Protection Reimbursement End Date.

(b) Less any amount that was a previous refund of the fees and charges described above in Subection (a) of this Paragraph.

52. Notwithstanding Paragraphs 48 and 51, no Customer shall be precluded from receiving redress with respect to more than one Covered Product. For any Customer who is eligible with respect to more one than Covered Product, the Customer's redress will be determined for each Covered Product separately pursuant to Paragraphs 48 and 51 above.

Redress Plan

53. Within ninety (90) days of the Effective Date, the Bank shall prepare and submit a Redress Plan ("Redress Plan") to the Regional Director for review and non-objection. The Regional Director shall have the discretion to make a determination of non-objection to the Redress Plan or to direct the Bank to revise the Plan, consistent with the terms of this Order. The Regional Director shall notify the Bank in writing of his or her objection or non-objection to the Plan. In the event the Regional Director directs the Bank to revise the Redress Plan, the Bank shall make revisions and resubmit the Redress Plan to the Regional Director within twenty (20) days.

54. The Redress Plan shall provide processes covering all Credit Protection Eligible and Identity Protection Eligible Customers regardless of their current account status with the Bank, including open accounts, closed accounts with and without a balance, and charged off accounts.

55. The Bank represents that it has completed a plan to reimburse Identity Protection Eligible Customers for certain Identity Protection Covered Product Fees and associated fees and charges that they paid. This plan shall be documented as part of the Redress Plan, and shall be subject to the requirements of this Order. The Redress Plan shall include an accounting of amounts the Bank has already reimbursed to Identity Protection Eligible Customers. If any additional redress is required, it shall be provided consistent with the process previously used to provide redress to Identity Protection Eligible Customers.

56. The process for providing Credit Protection Redress shall include the following requirements:

(a) For any open credit card account, the Bank shall provide a credit posted to the account, regardless of whether the crediting of a Customer results in a credit balance.

(b) For any closed credit card account with no balance outstanding, the Bank shall mail a certified or Bank check to any Eligible Customer.

(c) For any closed credit card account with a balance outstanding, the Bank shall provide a credit posted to the account. Where a credit is issued that is greater than the existing balance, the Bank shall mail to the Customer a certified or Bank check in the amount of the excess.

(d) For any charged-off account, either a credit shall be issued decreasing the charged-off balance by the amount of redress, or the Bank shall issue redress consistent with the requirements for closed credit card accounts set forth in Paragraph 56(b). Where a credit is issued that is greater than the existing charged-off balance, the Bank shall mail to the Customer a certified or Bank check in the amount of the excess. Any Redress Notification Letter, as described in Paragraph 57 below, sent with regard to a charged-off account will notify the Customer of the credit decreasing the charged-off balance as well as any additional money the Customer is receiving.

(e) With respect to any bankruptcy, estate, accounts in litigation, or account where the account holder is deceased, if the account remains open and the balance is greater than the refund, the Bank shall provide a statement

credit to the account, and otherwise a refund check for the remaining refund shall be sent in accordance with applicable law.

57. With respect to redress paid to Credit Protection Eligible Customers, the Redress Plan shall include: (1) the form of the letter ("Redress Notification Letter") to be sent notifying Credit Protection Eligible Customers of the redress; and (2) the form of the envelope that will contain the Redress Notification Letter. The letter shall include language explaining the manner in which the amount of redress was calculated; an explanation of the use of a credit and/or check as applicable; and a statement that the provision of refund payment is in accordance with the terms of this Order. The Bank shall not include in any envelope containing a "Redress Notification Letter" any materials other than the approved letters, and when appropriate, redress checks, unless the Bank has obtained written confirmation from the Regional Director that the CFPB does not object to the inclusion of such additional materials.

58. The Redress Plan shall include a description of the following:

(a) methods used and the time necessary to compile a list of potential Credit Protection Eligible and Identity Protection Eligible Customers;

(b) methods used to calculate the amount of redress to be paid to each Credit Protection Eligible and Identity Protection Eligible Customers as required herein;

(c) procedures for issuance and tracking of redress to Credit Protection Eligible and Identity Protection Eligible Customers; and

(d) procedures for monitoring compliance with the Redress Plan.

59. The Bank shall not attach any conditions to the provision of any credit or check for redress to a Credit Protection and Identity Protection Eligible Customer, including requiring the Credit Protection and Identity Protection Eligible Customer to waive any right.

60. The Bank has made or shall make reasonable attempts to locate Credit Protection and Identity Protection Eligible Customers, including standard address search using the National Change of Address System, whose Redress Notification Letter and/or check is returned for any reason. The Bank has re-mailed, or shall re-mail to corrected addresses, any returned letters and any redress checks, within ninety (90) days of receiving such return. Any unclaimed funds will be disposed of in accordance with the Redress Plan.

61. With respect to any Credit Protection and Identity Protection Eligible Customer's account that receives redress as a credit that decreases the existing balance or charged-off balance, the Bank shall, as permitted by law and in accordance with existing procedures:

(a) report the updated balance to each credit reporting agency to which the Bank had previously furnished balance information for the account;

(b) delete the account trade line at each credit reporting agency to which the Bank had previously furnished balance information for the account; or

(c) in the case of an account sold to an unaffiliated third party, request that such third party owner of the debt report the updated balance to, or delete the account trade line at, each credit reporting agency to which the Bank or the third party owner of the debt had previously furnished balance information for the account.

62. Upon notification that the Regional Director has made a determination of non-objection to the Redress Plan, the Bank shall implement and adhere to the steps,

recommendations, deadlines, and timeframes set forth in the Redress Plan. Any proposed changes, to or deviation from, the approved Redress Plan shall be submitted in writing to the Regional Director for review and non-objection.

Assessment of Redress

63. Within ninety (90) days from completion of the Redress Plan, the Bank's Internal Audit department shall review and assess compliance with the terms of the Redress Plan (the "Redress Review").

64. The Redress Review shall include an assessment of the Redress Plan and the methodology used to determine the population of Eligible Customers, the amount of redress for each Eligible Customer, the procedures used to issue and track redress payments, the procedures used for reporting and requesting the reporting of updated balances, deleting or requesting the deletion of account trade lines, as applicable, to the credit reporting agencies, and the work of any independent consultants that the Bank has used to assist and review its execution of the Redress Plan.

65. The Redress Review shall be completed and summarized in a written report (the "Redress Review Report"), which shall be completed within sixty (60) days of completion of the Redress Review. Within ten (10) days of its completion, the Redress Review Report shall be submitted to the Regional Director and the Board.

Payment Floor For Credit Protection Eligible Customers

66. For the purpose of providing restitution as required by this Order, the Bank shall provide restitution as set forth in Paragraph 48(a), in an amount not less than two-hundred fifteen million dollars ($215,000,000), less any restitution made by the Bank prior to the Effective Date of this Order that complies with the requirements of this Order ("Payment Floor"). If the Bank

claims to have made any restitution prior to the Effective Date of this Order that complies with the requirements of this Order, the Bank shall provide appropriate proof of such restitution to the Regional Director within thirty (30) days of the Effective Date.

67. The Bank shall make all restitution to Credit Protection Eligible Customers required by this Order, regardless of whether the total of such restitution exceeds the Payment Floor.

68. Upon completion of all restitution pursuant to Paragraph 56, if the amount of restitution provided to Credit Protection Eligible Customers is less than two-hundred fifteen million dollars ($215,000,000), the Bank shall pay the difference in accordance with the processes set forth in Paragraph 56, through a *pro rata* distribution, as appropriate, to the restitution group set forth in Paragraph 48(a)(ii).

ARTICLE X
CIVIL MONEY PENALTY

IT IS FURTHER ORDERED that:

69. Pursuant to Section 1055(c) of the CFPA, 12 U.S.C. § 5565(c), by reason of the violations of law and/or regulations set forth in the Findings and Conclusions, and taking into account the factors set forth in 12 U.S.C. § 5565(c)(3), the Bank shall pay to the CFPB a civil money penalty of fifteen million dollars ($15,000,000) with respect to Credit Protection, and five million dollars ($5,000,000) with respect to Identity Protection, as directed by the CFPB and as set forth herein.

70. Within ten (10) days of the Effective Date, the Bank shall pay the civil money penalty in the form of a wire transfer to the CFPB or to such agent as the CFPB may direct, and in accordance with wiring instructions to be provided by counsel for the CFPB.

71. The civil money penalty paid pursuant to this Order shall be deposited in the Civil Penalty Fund of the CFPB in accordance with Section 1017(d) of the CFPA, 12 U.S.C. § 5497(d), and 12 C.F.R. part 1075.

72. In the event of any default on the Bank's obligations under this Section, interest, computed pursuant to 28 U.S.C. § 1961, as amended, shall accrue on any outstanding amounts not paid from the date of default to the date of payment, and shall immediately become due and payable.

73. The Bank shall treat the civil money penalty as a penalty paid to the government for all purposes. Regardless of how the Bureau ultimately uses those funds, the Bank shall not:

(a) Claim, assert, or apply for a tax deduction or tax credit with regard to any federal, state, or local tax for any civil money penalty that the Bank pays pursuant to this Order; or

(b) Seek or accept, directly or indirectly, reimbursement or indemnification from any source, including, but not limited to, payment made pursuant to any insurance policy, with regard to any civil money penalty that the Bank pays pursuant to this Order.

74. To preserve the deterrent effect of the civil money penalty, in any Related Consumer Action, the Bank shall not argue that the Bank is entitled to, nor shall the Bank benefit by, any offset or reduction of any compensatory damages imposed in any Related Consumer Action, by any amount of the civil money penalty paid in this action ("Penalty Offset"). If the court in any Related Consumer Action grants such a Penalty Offset, the Bank shall, within thirty (30) days after entry of a final order granting the Penalty Offset, notify the Regional Director, and pay the amount of the Penalty Offset to the U.S. Treasury. Such a payment shall not be

deemed an additional civil money penalty and shall not be deemed to change the amount of the civil money penalty imposed in this action.

75. The Bank shall relinquish all dominion, control, and title to the funds paid to the fullest extent permitted by law. The Bank shall make no claim to or demand for return of the funds, directly or indirectly, through counsel or otherwise.

ARTICLE XI
RECORDKEEPING

IT IS FURTHER ORDERED that:

76. Beginning on the Effective Date, for a period of at least two years from the date a Customer is no longer enrolled in an Identity Protection Product or Credit Protection Product program, the Bank must ensure that the following records, to the extent they exist, are retained:

(a) For each individual Customer and his or her enrollment in that program:

(i) Records containing, with respect to each Customer, his or her name, addresses, email addresses, phone numbers, dollar amounts paid, benefits applied for and/or received, quantity of products purchased, description of the product purchased, the date on which the product was purchased, and a copy of the welcome kit mailed to each Customer (if a Customer left the program, include the date the Customer left a program and the reason the Customer left the program);

(ii) Records for each Customer reflecting that the Customer expressly agreed to purchase the product, including audio recordings of telephone calls during which a Customer purchased the Add-On Product;

(iii) For Identity Protection Products, a copy of the Customer's authorization to access his or her credit information from the credit reporting agencies for purposes of activating credit monitoring or retrieval, and the date the Customer was first charged for Identity Protection Products.

(b) For each Identity Protection Product or Credit Protection Product in general:

(i) Records reflecting the expenses and revenues related to the Identity Protection Product or Credit Protection Product;

(ii) Records reflecting, on an annual basis, the number of Customers who canceled the Identity Protection Product or Credit Protection Product, and the number of Customers whose Customer accounts were charged off by the Bank;

(iii) Records of all Customer complaints that are recorded and tracked by the Bank in accordance with Bank policies and refund requests (whether received directly or indirectly, such as through a Service Provider), and any responses to those complaints or requests; and

(iv) Copies of all sales scripts; sales/marketing training materials; advertisements; or other marketing materials, including terms and conditions, fulfillment packages, and welcome kits; and including any such materials used by Service Providers on the Bank's behalf.

77. For a period of six years from the Effective Date, the Bank must retain the following records:

(a) All documents and records necessary to demonstrate full compliance with each provision of this Order; and

(b) All records pertaining to the redress, described above in Article IX, including, but not limited to, documentation of the processes and procedures used to determine the Eligible Customers, as that term is defined in Article IX above, the names, contact and account information of the Eligible Customers, any mailing records, and documentation that the appropriate restitution was made.

ARTICLE XII
DISTRIBUTION OF ORDER

IT IS FURTHER ORDERED that:

78. Within thirty (30) days of the Effective Date, the Bank shall deliver a copy of this Order to each member of the Board and the executive officers, as well as to any Service Providers or other agents providing services related to the marketing or administration of Add-On Products as of the Effective Date.

79. For a period of three years from the Effective Date, the Bank shall deliver a copy of this Order to any future board members and executive officers, as well as any Service Providers or other agents providing services related to the marketing or administration of Add-On Products, before they assume their responsibilities.

80. The Bank shall secure a signed and dated statement acknowledging receipt of a copy of this Order with any electronic signatures complying with the requirements of the E-Sign Act, 15 U.S.C. § 7001 et seq., within thirty (30) days of delivery, from all persons receiving a copy of this Order pursuant to this Section.

ARTICLE XIII
NOTICES

IT IS FURTHER ORDERED that:

81. Unless otherwise directed in writing by a CFPB representative, all submissions, requests, communications, consents or other documents relating to this Order shall be in writing and shall be sent by overnight courier (not the U.S. Postal Service), as follows:

To the CFPB:

Regional Director, CFPB Southeast Region
Consumer Financial Protection Bureau
1700 G Street, N.W. Washington D.C. 20552

The subject line shall begin: *In re Bank of America, N.A., et al.* Provided, however, that the Bank may send such reports or notifications by first-class mail, but only if the Bank contemporaneously sends an electronic version of such report or notification to Enforcement_Compliance@cfpb.gov.

ARTICLE XIV
EXTENSIONS OF TIME

IT IS FURTHER ORDERED that:

82. Upon a written showing of good cause, the Regional Director may, in his/her discretion, modify any non-material provisions of this Order (e.g., reasonable extensions of time). Any such modification by the Regional Director shall be in writing.

ARTICLE XV
ADMINISTRATIVE PROVISIONS

83. Except as set forth in Paragraph 88, the provisions of this Order shall not bar, estop, or otherwise prevent the CFPB, or any other federal or state agency or department, from taking any other action against the Bank.

84. This Order is intended to be, and shall be construed to be, a final order issued pursuant to 12 U.S.C. § 5563(b), and expressly does not form, and may not be construed to form, a contract binding the CFPB or the United States.

85. This Order shall be effective on the date of issuance, and shall remain effective and enforceable, except to the extent that, and until such time as, any provisions of this Order shall have been amended, suspended, waived, or terminated in writing by the CFPB or its designated agent.

86. Calculation of time limitations shall run from the Effective Date and shall be based on calendar days, unless otherwise noted.

87. The provisions of this Order shall be binding upon the Bank, its officers, agents, servants, employees, and/or attorneys, and any successors and assigns thereof.

88. This Order constitutes a settlement of the administrative proceeding against the Bank contemplated by the CFPB, based on the conduct described in the Findings and Conclusions set forth in this Order. The CFPB releases and discharges the Bank from all potential liability (other than as set forth in this Order) for a cease and desist or other order or civil money penalty that has or might have been asserted by the CFPB based on the conduct described in the Findings and Conclusions, to the extent such practices occurred prior to the Effective Date and are known to the CFPB as of the Effective Date of the Order. Notwithstanding the foregoing, the practices alleged in this Order may be utilized by the CFPB in future enforcement actions against the Bank and its affiliates, including, without limitation, to establish a pattern or practice of violations or the continuation of a pattern or practice of violations or to calculate the amount of any penalty. This release shall not preclude or affect any

right of the CFPB to determine and ensure compliance with the terms and provisions of the Order, or to seek penalties for any violations thereof.

89. The provisions of this Order shall be enforceable by the CFPB. Any violation of this Order may result in the imposition by the CFPB of the maximum amount of civil money penalties allowed under Section 1055(c) of the CFPA, 12 U.S.C. § 5565(c).

90. The provisions of this Order shall be severable and, should any provisions be declared by a court of competent jurisdiction to be unenforceable, the other provisions shall remain in full force.

91. No promises, representations or warranties other than those set forth in this Order and the accompanying Stipulation have been made by any of the parties. This Order and the accompanying Stipulation supersede all prior communications, discussions, or understandings, if any, of the parties, whether oral or in writing.

92. Nothing in this Order or the accompanying Stipulation shall be construed as allowing the Bank, its Board, officers, or employees to violate any law, rule, or regulation.

IT IS SO ORDERED, this 7th day of April, 2014.

Richard Cordray

Richard Cordray
Director
Consumer Financial Protection Bureau

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Consumer Financial Protection Bureau, Plaintiff, v. Affinion Group Holdings, Inc., Affinion Group Inc., Affinion Group, LLC, Affinion Benefits Group, LLC, Trilegiant Corporation, Watchguard Registration Services, Inc., and Global Protection Solutions, LLC, Defendants.	Civil Action No. COMPLAINT

Complaint

The Consumer Financial Protection Bureau ("Bureau") brings this action against Affinion Group Holdings, Inc., Affinion Group, Inc., Affinion Group, LLC, Affinion Benefits Group, LLC, Trilegiant Corporation, Watchguard Registration Services, Inc., and Global Protection Solutions, LLC (collectively, "Defendants") under §§ 1031, 1036, 1054, and 1055 of the Consumer Financial Protection Act of 2010 ("CFPA"), 12 U.S.C. §§ 5531, 5536, 5564, and 5565, to obtain permanent injunctive relief, restitution, disgorgement for unjust enrichment, civil money penalties, and other appropriate relief for Defendants' acts or practices in violation of the CFPA in connection with their marketing, sales, enrollment, billing, and administration of identity theft protection products sold to customers of partnering financial institutions.

Jurisdiction and Venue

1. This Court has subject-matter jurisdiction over this action because it is "brought under Federal consumer financial law," 12 U.S.C. § 5565(a)(1); presents a federal question, 28 U.S.C. § 1331; and is brought by an agency of the United States, 28 U.S.C. § 1345.

2. Venue is proper in this district because Defendants do business in this district, and because a substantial part of the events or omissions giving rise to the claims occurred in this district. 28 U.S.C. § 1391(b) and 12 U.S.C. § 5564(f).

Parties

3. The Bureau is an agency of the United States charged with regulating the offering and provision of consumer financial products and services under Federal consumer financial law. 12 U.S.C. § 5491(a). It has independent litigating authority to enforce the CFPA and Federal consumer financial laws. 12 U.S.C. § 5564.

4. Trilegiant Corporation ("Trilegiant") is a Delaware corporation and a wholly-owned subsidiary of Affinion Group, LLC. Trilegiant transacts business in this district and throughout the United States, and is based in Stamford, CT.

5. Watchguard Registration Services, Inc. ("Watchguard") is a Delaware corporation and a wholly-owned subsidiary of Trilegiant. Watchguard transacts business in this district and throughout the United States, and is based in Stamford, CT.

6. Global Protection Solutions, LLC ("GPS") is a Delaware corporation and a wholly-owned subsidiary of Trilegiant. GPS transacts business in this district and throughout the United States, and is based in Franklin, TN.

7. Affinion Group Holdings, Inc. ("AGH") is a Delaware corporation that transacts business in this district and throughout the United States, and is based in Stamford, CT. It is the parent company of Affinion Group Inc. and is under common control with all Defendants.

8. Affinion Group Inc. ("AGI") is a Delaware corporation and a wholly-owned subsidiary of AGH. AGI transacts business in this district and throughout the United States, and is based in Stamford, CT.

9. Affinion Group, LLC ("AGL") is a Delaware corporation and a wholly-owned subsidiary of AGI. AGL transacts business in this district and throughout the United States, and is based in Stamford, CT.

10. Affinion Benefits Group, LLC ("ABG") is a Delaware corporation and a wholly-owned subsidiary of AGL. ABG transacts business in this district and throughout the United States, and is based in Franklin, TN.

11. The identity theft protection products offered or provided to customers of partnering financial institutions by Defendants included the following benefits: credit information (credit reports and monitoring), and financial advisory services (Credit Information Hotline service). These benefits are "consumer financial products or services" under the CFPA. 12 U.S.C. § 5481(5); 12 U.S.C. § 5481(15)(A)(i), (viii), (ix). Defendants' identity theft protection products were offered in connection with these benefits, as well as in connection with credit cards or other consumer financial products or services offered by partnering financial institutions.

12. Defendants are "covered persons" under the CFPA because they offered or provided consumer financial products or services. 12 U.S.C. § 5481(6).

13. Defendants are "service providers" under the CFPA. 12 U.S.C.

§ 5481(26)(A).

14. Defendants are "affiliates" of each other under the CFPA because they control, are controlled by, or are under common control with each other. 12 U.S.C. § 5481(1).

Facts

15. At all times material to this complaint, Defendants have offered or provided financial advisory services through their Credit Information Hotline service, and analyzed, maintained and provided consumer report information through credit report, credit score, and credit monitoring benefits. These benefits were offered with other identity theft protection benefits as product bundles (Protection Products).

16. Defendants use codes called PDEF's to identify specific Protection Product bundles.

17. The following PDEF's are defined as "Specified Protection Products": ITY54, ITY56, PGP120AF, ITY100, PGP151, PGPA60, ITY102, PGP144, ITYSC11, PGPA50, ITY73, PGPA85AF, PGPA86, ITY33, ITY72AF, ITY91AF, ITY70, PGP146AF, PGPA81AF, PGP113, PGP114, PGP124, PGP125, PGP137AF, PGP138, PGP139AF, PGP140, PGP168, PGP170, PGPA53AF, PGPA54AF, and PGPA94AF.

18. Trilegiant, ABG, GPS, and Watchguard (collectively, the "Affinion Subsidiaries") advertised, sold and delivered Protection Products to consumers by establishing marketing and service agreements with financial institutions ("Marketing Partners").

19. The Affinion Subsidiaries sold Protection Products to the Marketing Partners' customers in connection with the Marketing Partners' offer or servicing of a credit card, checking account, or home mortgage loan, or as stand-alone products to the customers of those Marketing Partners.

20. Consumers enrolling in Protection Products were billed a monthly or annual fee for the cost of their membership until they contacted Defendants to cancel.

21. Consumers generally paid between $6.95 and $15.99 per month (or an equivalent annualized amount) for Affinion's Protection Products, which typically were billed directly to the consumer's credit card account or deposit account.

22. The Affinion Subsidiaries provided material services to Marketing Partners in connection with the offering or provision of Protection Products by those financial institutions, including by participating in the design, operation, administration, or maintenance of the Protection Products.

23. AGH, AGI, and AGL provided material services to the Affinion Subsidiaries in connection with the offering or provision of Protection Products, including by participating in the design, operation, administration, or maintenance of the Protection Products.

24. AGH and AGI shared the same board of directors, which provided oversight for the Affinion Subsidiaries' Protection Product operations.

25. AGL provided corporate client marketing services on behalf of the Affinion Subsidiaries.

26. Defendants conducted the business practices described in this complaint through an interrelated network of companies.

27. Defendants share common control, ownership, officers, managers, office locations, marketing and advertising.

Incoming Telephone Calls Requesting Cancellation

28. Since at least 2010, Defendants handled telephone calls from

consumers wishing to cancel their Protection Product membership.

29. Defendants evaluated their employees who handled incoming cancellation calls primarily on their ability to prevent consumers from cancelling the product membership.

30. Defendants referred to calls in which their employees prevented a consumer from cancelling as "saves."

31. Defendants rewarded employees with positive evaluations and bonuses for maintaining a save percentage above a certain threshold.

32. Defendants' employees who failed to maintain the minimum threshold were subject to discipline leading up to termination.

33. During telephone calls in which consumers requested cancellation of their Protection Product membership, Defendants claimed that product credit scores came "from" one or three of the major credit reporting agencies, when those scores were not developed by any of the major credit reporting agencies.

34. During telephone calls in which consumers requested cancellation of their Protection Product membership, Defendants claimed that its identity theft insurance benefit covered "any" or "all" expenses caused by identity theft. In reality, the Protection Products had material coverage limitations and exclusions and did not cover "any" or "all" identity theft-related expenses.

35. During telephone calls in which consumers requested cancellation of Protection Products, Defendants claimed that the identity theft insurance benefit covered specific related expenses, such as legal fees, court costs and lost wages. Defendants failed to disclose during the calls that the Protection Products had material coverage limitations and exclusions in connection with those expenses.

36. During telephone calls in which consumers requested cancellation of Protection Products, Defendants expressly claimed or implied that the identity theft insurance benefit provided a broader range of coverage than available. Defendants failed to disclose significant coverage exclusions and limitations.

37. During telephone calls in which consumers requested cancellation of Protection Products, Defendants claimed its Credit Information Hotline service could improve the consumer's credit score by directly removing inaccurate information from the consumer's credit reports. In fact, Defendants lacked the ability to directly remove inaccurate information from a consumer's credit report or ensure improvement to the consumer's credit score by removal of such inaccurate information.

38. During telephone calls in which consumers requested cancellation of Protection Products, Defendants emphasized that the fraud liability protection benefit provided $5,000 coverage for unauthorized use of a member's credit or debit cards. But Defendants failed to disclose that federal law significantly limited the amount of liability a consumer could actually incur for unauthorized use of their credit or debit cards.

39. Defendants' misrepresentations and omissions relating to Protection Product benefits during retention calls resulted in a significant overstatement of product value.

Credit Information Billing Practices

40. From at least July 2, 2010 through August 20, 2012, Defendants and their Marketing Partners enrolled consumers in Protection Products with benefits that purported to provide the consumers with credit monitoring, credit report retrieval, or both.

41. To access the consumers' credit files at the major credit

reporting agencies so as to provide these benefits, Defendants needed the consumer's written authorization, which in turn authorized the credit reporting agencies to release the credit information to Defendants under the Fair Credit Reporting Act, 15 U.S.C. § 1681b(a)(2).

42. For consumers who enrolled over the telephone, Defendants and their Marketing Partners attempted to obtain the consumer's written authorization after the enrollment call by mail.

43. In many cases, however, significant time elapsed before Defendants or their Marketing Partners obtained the consumer's authorization, or Defendants or their Marketing Partners never obtained the consumer's authorization at all.

44. Defendants and their Marketing Partners billed numerous Specified Protection Product consumers the full product fee despite not receiving the consumer's written authorization and not providing full credit monitoring or credit report retrieval services.

45. Even when they had obtained the consumer's written authorization, Defendants and their Marketing Partners often failed to deliver full credit monitoring and credit report retrieval services in certain circumstances, including when the consumer's personal information did not match the information on file at one or more of the credit reporting agencies, when the consumer did not have a credit file at one or more of the credit reporting agencies, or when Defendants unilaterally withheld services when they determined the consumer lacked sufficient credit history to warrant activation of credit monitoring or credit report retrieval services.

46. Defendants and their Marketing Partners billed the full product fee to Specified Protection Product members who were not receiving full credit monitoring or credit report retrieval services in those circumstances.

47. For consumers enrolled in Specified Protection Products between July 2, 2010 and August 20, 2012, Defendants and their Marketing Partners billed full product fees to at least 73,000 accounts when Defendants and their Marketing Partners failed to provide the full credit monitoring or credit report retrieval services offered, and failed to provide corresponding refunds.

Count I

(Violations of CFPA's Prohibition of Deceptive Acts or Practices)

48. The Bureau incorporates by reference the allegations of ¶¶ 1-47.

49. In numerous instances, in connection with transactions with consumers for a consumer financial product or service, or the offering of a consumer financial product or service, Defendants misrepresented, directly or by implication, during telephone calls with consumers attempting to cancel their Protection Product memberships:

a. that the credit score benefit provided came "from" one or all three major credit reporting agencies;
b. that the identity theft insurance benefit provided covered "any" or "all" expenses caused by identity theft;
c. that the identity theft insurance benefit provided covered specific related expenses, such as legal fees, court costs and lost wages, without disclosing material coverage limitations and exclusions;
d. that the identity theft insurance benefit provided a broader range of coverage than actually available;
e. that the Credit Information Hotline benefit would improve the consumer's credit score by directly removing inaccurate information from the consumer's credit reports; and

f. that the fraud liability protection benefit included $5,000 coverage for unauthorized use of credit or debit cards without disclosing material information that would convey to consumers that their potential individual liability for unauthorized use of credit or debit cards was much less than what Defendants suggested.

50. The representations set forth in ¶ 49 were false or misleading and were material to consumer decisions to eschew cancelation of their product membership. Defendants' acts and practices are deceptive under the CFPA. Because each Defendant is a "covered person" or "service provider," their conduct is unlawful under §§ 1031(a) and 1036(a)(1) of the CFPA. 12 U.S.C. §§ 5531(a), 5536(a)(1).

Count II

(Violations of CFPA Prohibition of Unfair Acts or Practices)

51. The Bureau incorporates by reference the allegations of ¶¶ 1-50.

52. In numerous instances, in connection with transactions with consumers for a consumer financial product or service, or the offering of a consumer financial product or service, Defendants billed consumers for full Specified Protection Product fees while failing to provide full credit monitoring or credit report retrieval services.

53. These acts and practices caused or were likely to cause substantial injury to consumers. This injury was not reasonably avoidable by consumers and is not outweighed by countervailing benefits to consumers or to competition.

54. Defendants' acts and practices are unfair under the CFPA. Because each Defendant is a "covered person" or "service provider," their

conduct is unlawful under §§ 1031(a) and 1036(a)(1) of the CFPA. 12 U.S.C. §§ 5531(a), 5536(a)(1).

Request for Relief

55. The Bureau requests that the Court:

a. permanently enjoin Defendants from committing future violations of the CFPA;

b. award such relief as the Court finds necessary to redress injury to consumers resulting from Defendants' violations of the CFPA, including, but not limited to, rescission or reformation of contracts, the refund of moneys paid, restitution, disgorgement or compensation for unjust enrichment, and payment of damages;

c. award Plaintiff civil money penalties; and

d. award Plaintiff the costs of bringing this action, as well as such other and additional relief as the Court may determine to be just and proper.

Dated: July 1, 2015

Respectfully submitted,

Anthony Alexis
Enforcement Director

Deborah Morris
Deputy Enforcement Director

Michael G. Salemi
Assistant Litigation Deputy

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Consumer Financial Protection Bureau
1700 G Street, NW
Washington, DC 20552

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Consumer Financial Protection Bureau, Plaintiff, v. Affinion Group Holdings, Inc., Affinion Group Inc., Affinion Group, LLC, Affinion Benefits Group, LLC, Trilegiant Corporation, Watchguard Registration Services, Inc., and Global Protection Solutions, LLC, Defendants.	Case No. 15-cv-01005 STIPULATED FINAL JUDGMENT AND ORDER

STIPULATED FINAL JUDGMENT AND ORDER

Plaintiff, the Consumer Financial Protection Bureau ("Bureau") commenced this civil action against Defendants Affinion Group Holdings, Inc., Affinion Group, Inc., Affinion Group, LLC, Affinion Benefits Group, LLC, Trilegiant Corporation, Watchguard Registration Services, Inc., and Global Protection Solutions, LLC (collectively, "Defendants") on July 1, 2015, to obtain injunctive relief, redress, and civil money penalties.

The Complaint alleges violations of §§ 1031(a) and 1036(a)(1) of the Consumer Financial Protection Act of 2010 ("CFPA"), 12 U.S.C. §§ 5531(a), 5536(a)(1).

Plaintiff and Defendants request that the Court enter this Stipulated Final Judgment and Order ("Order").

FINDINGS

1. This Court has jurisdiction over the parties and the subject matter of this action.

2. Plaintiff and Defendants agree to entry of this Order, without adjudication of any issue of fact or law, to settle and resolve all matters in this dispute arising from the conduct alleged in the Complaint to the date this Order is entered.

3. Defendants neither admit nor deny any allegation in the Complaint, except as stated in this Order. For purposes of this Order, Defendants admit the facts necessary to establish the Court's jurisdiction over Defendants and the subject matter of this action.

4. Defendants waive service under Rule 4(d) of the Federal Rules of Civil Procedure and waive all rights to seek judicial review or otherwise challenge or contest the validity of this Order. Defendants also waive any claim they may have under the Equal Access to Justice Act, 28 U.S.C. § 2412, concerning the prosecution of this action to the date of this Order. Each party will bear its own costs and expenses, including without limitation attorneys' fees.

5. Entry of this Order is in the public interest.

DEFINITIONS

6. The following definitions apply to this Order:

a. "**Affected Consumer**" means a consumer that enrolled in a Specified Protection Product between July 2, 2010 and August 20, 2012.

b. "**Board**" means each of the Defendants' duly-elected and acting Boards of Directors.

c. "**Defendants**" means Affinion Group Holdings, Inc., Affinion Group, Inc., Affinion Group, LLC, Affinion Benefits Group, LLC, Trilegiant Corporation, Watchguard Registration Services, Inc., and Global Protection Solutions, LLC and any successors or assigns.

d. "**Effective Date**" means the date on which the Order is entered on the docket.

e. "**Enforcement Director**" means the Assistant Director of the Office of Enforcement for the Consumer Financial Protection Bureau, or his delegate.

f. "**Financial Institution**" means an insured bank (as defined in section 3(h) of the Federal Deposit Insurance Act, 12 U.S.C. § 1813(h)); a commercial bank or trust company; a private banker; an agency or branch of a foreign bank in the United States; any credit union; a thrift institution; an issuer,

redeemer, or cashier of travelers' checks, checks, money orders, or similar instruments; an operator of a credit card system; a loan or finance company; or any business or agency which engages in activity which is similar to, related or a substitution for activity in which any business described in this is authorized to engage.

g. "**Protection Product**" means a consumer financial product or service, as defined by § 1002(5) of the CFPA, 12 U.S.C. § 5481(5), that includes at least one feature relating to credit reports, credit monitoring, credit scores, or identity fraud assistance, and was sold to the customers of a Financial Institution, and serviced directly or indirectly by the Defendants.

h. "**Related Consumer Action**" means a private action by or on behalf of one or more consumers or an enforcement action by another governmental agency brought against Defendant based on substantially the same facts as described in this Order or the Complaint.

i. "**Relevant Period**" means July 2, 2010 until August 20, 2012.

j. "**Specified Protection Product**" means a Protection Product identified in ¶ 17 of the Complaint.

ORDER

IT IS ORDERED that:

I. Conduct Prohibition

7. Under §§ 1053 and 1055 of the CFPA, Defendants and its officers, agents, servants, employees, and attorneys who have actual notice of this Order, whether acting directly or indirectly, may not violate §§ 1031 and 1036 of the CFPA, 12 U.S.C. §§ 5531 and 5536.

8. Defendants must take reasonable measures to ensure that Defendants and service providers, affiliates, and other agents of Defendants do not violate §§ 1031 and 1036 of the CFPA 12 U.S.C. §§ 5531 and 5536, regarding the billing and administration of Protection Products.

9. Defendants may not make, or allow to be made, any material deceptive representation, statement, or omission, expressly or by implication, in connection with the marketing, solicitation, or administration of any Protection Product or during membership retention for such products.

10. Defendants must correct all alleged violations of law, as described in the Complaint and addressed in this Order and implement procedures to prevent their recurrence.

11. If a customer enrolled in a Protection Product as of the Effective Date contacts Defendants and requests to cancel the customer's

membership in a Protection Product, Defendants will immediately cancel the Protection Product and will not make any rebuttal or other attempt to persuade the customer to retain the Protection Product.

12. Defendants will immediately begin efforts to comply with this Section, but detailed steps for fully addressing the restrictions and requirements of this Section, and specific timeframes and deadlines for implementing the restrictions and requirements of this Section will be set forth in the Compliance Plan described in § II.

II. Compliance Plan

13. Within 90 days of the Effective Date, Defendants must submit to the Enforcement Director for review and determination of nonobjection a comprehensive compliance plan designed to ensure that Defendants' practices that relate to Protection Products complies with all applicable Federal consumer financial laws and the terms of this Order ("Compliance Plan"). The Compliance Plan must include, at a minimum:

a. Detailed steps for addressing each action required by this Order; and

b. Specific timeframes and deadlines for implementation of the steps described above.

14. The Enforcement Director will have the discretion to make a determination of nonobjection to the Compliance Plan or direct the

Defendants to revise it. If the Enforcement Director directs the Defendants to revise the Compliance Plan, the Defendants must make the revisions and resubmit the Compliance Plan to the Enforcement Director within 45 days.

15. After receiving notification that the Enforcement Director has made a determination of nonobjection to the Compliance Plan, the Defendants must implement and adhere to the steps, recommendations, deadlines, and timeframes outlined in the Compliance Plan.

III. Role of the Board

16. The Board must review all submissions required by this Order before the materials are submitted to the Bureau.

17. Although this Order requires the Defendants to submit certain documents for the review or nonobjection by the Enforcement Director, the Board will have the ultimate responsibility for proper and sound management of Defendants and for ensuring that Defendants comply with Federal consumer financial law and this Order.

18. In each instance that this Order requires the Board to ensure adherence to, or perform certain obligations of the Defendants, the Board must:

a. Authorize whatever actions are necessary for Defendants to fully comply with the Order;

b. Require timely reporting by management to the Board on the status of compliance obligations; and

c. Require timely and appropriate corrective action to remedy any material noncompliance with any failures to comply with Board directives related to this Section.

19. The Board may delegate all obligations in § III to a Compliance Committee comprised of at least three or more Board members, of which a majority may not be employees or officers of the Defendants or any of their subsidiaries.

IV. Monetary Provisions

20. Within 10 days of the Effective Date, Defendants must reserve $6,756,025 for the purpose of providing restitution to Affected Consumers.

21. Within 90 days of the Effective Date, Defendants must submit to the Enforcement Director for review and nonobjection a comprehensive written plan for providing redress consistent with this Order ("Redress Plan"). The Enforcement Director will have the discretion to make a determination of nonobjection to the Redress Plan or direct the Defendants to revise it. If the Enforcement Director directs the Defendants to revise the Redress Plan, the Defendants must make the revisions and resubmit the Redress Plan to the Enforcement Director within 30 days. After receiving notification that the Enforcement Director has made a determination of nonobjection to the Redress Plan, the Defendants must implement and adhere to the steps, recommendations, deadlines, and timeframes outlined in the Redress Plan.

22. Redress will be paid to Affected Consumers who were billed for the Specified Protection Products and did not receive credit monitoring or credit report retrieval services because of a lack of authorization or service delivery issues. Defendants will refund the full amount of fees paid by the Affected Consumer while the Affected Consumer did not receive full credit monitoring or credit report retrieval services. Redress will not be provided to Affected Consumers if it is not possible to determine the specific cause of any temporary nonreceipt of credit monitoring or credit report retrieval services. In addition, an Affected Consumer will be deemed to have received benefits if such benefits could be accessed online or web-enabled, or if partial monitoring was received and the Affected Consumer was notified of the partial receipt.

23. After completing the Redress Plan, if the amount of redress provided to Affected Consumers is less than $6,756,025, within 90 days of the completion of the Redress Plan, Defendants must pay to the Bureau, by wire transfer to the Bureau or to the Bureau's agent, and according to the Bureau's wiring instructions, the difference between the amount of redress provided to Affected Consumers and $6,756,025.

24. Within 90 days of completing the Redress Plan, Defendants will submit to the Enforcement Director a report with an assessment of its compliance with the terms of the Redress Plan ("Redress Report"). The Redress Report will:

a. Describe the methodology used to determine the population of Affected Consumers who received redress under this Order and as described in the Redress Plan;

b. State the total number of Affected Consumers to whom Defendants provided redress;

c. State the total amounts reimbursed to Affected Consumers;

d. Describe the procedures used to issue and track redress payments to Affected Consumers; and

e. Describe the work of independent consultants that Defendants used, if any, to assist and review its execution of the Redress Plan.

25. If the Bureau determines, in its sole discretion, that further redress to consumers is wholly or partially impracticable, or if funds remain after additional redress is completed, those remaining funds will be deposited in the U.S. Treasury as disgorgement. The Defendants will have no right to challenge any actions that the Bureau or their representatives may take under this Paragraph.

26. Defendants may not condition the payment of redress to any Affected Consumer under this Order on that Affected Consumer waiving any right.

27. For any Affected Consumer that receives redress as a credit that decreases the existing balance or charged-off balance, Defendants must, as permitted by law, report the updated balance to each credit bureau to which Defendants had previously furnished balance information for the account or delete the account tradeline if the updated balance is zero dollars or less.

V. Civil Money Penalties

28. Under § 1055(c) of the CFPA, 12 U.S.C. § 5565(c), by reason of the alleged violations of law described in the Complaint, and taking into account the factors in 12 U.S.C. § 5565(c)(3), a judgment for a civil money penalty is entered in favor of the Bureau and against Defendants, jointly and severally, in the amount of $1,900,000.

29. Within 20 days of the Effective Date, Defendants must pay the civil money penalty by wire transfer to the Bureau or to the Bureau's agent in compliance with the Bureau's wiring instructions.

30. The civil money penalty paid under this Order will be deposited in the Civil Penalty Fund of the Bureau as required by § 1017(d) of the CFPA, 12 U.S.C. § 5497(d).

31. Defendants must treat the civil money penalty paid under this Order as a penalty paid to the government for all purposes. Regardless of how the Bureau ultimately uses those funds, Defendants may not:

a. Claim, assert, or apply for a tax deduction, tax credit, or any other tax benefit for any civil money penalty paid under this Order; or

b. Seek or accept, directly or indirectly, reimbursement or indemnification from any source, including but not limited to payment made under any insurance policy, with regard to any civil money penalty paid under this Order.

32. To preserve the deterrent effect of the civil money penalty in any Related Consumer Action, Defendants may not argue that Defendants are entitled to, nor may Defendants benefit by, any offset or reduction of any compensatory monetary remedies imposed in the Related Consumer Action because of the civil money penalty paid in this action ("Penalty Offset"). If the court in any Related Consumer Action grants such a Penalty Offset, Defendants must, within 90 days after entry of a final order granting the Penalty Offset, notify the Bureau, and pay the amount of the Penalty Offset to the U.S. Treasury. Such a payment will not be considered an additional civil money penalty and will not change the amount of the civil money penalty imposed in this action.

VI. Additional Monetary Provisions

33. In the event of any default on Defendants' obligation to make payment under this Order, interest, computed under 28 U.S.C. § 1961, as amended, will accrue on any outstanding amounts not paid from the date of

default to the date of payment, and will immediately become due and payable.

34. Defendants must relinquish all dominion, control, and title to the funds paid or to be paid under this Order to the fullest extent permitted by law and no part of the funds may be returned to Defendants.

35. Under 31 U.S.C. § 7701, Defendants must furnish to the Bureau their taxpayer identifying numbers, which may be used for purposes of collecting and reporting on any delinquent amount arising out of this Order.

36. Within 30 days of the entry of a final judgment, consent order, or settlement in a Related Consumer Action, Defendants must notify the Enforcement Director of the final judgment, consent order, or settlement in writing. That notification must indicate the amount of redress, if any, that Defendants paid or are required to pay to consumers and describe the consumers or classes of consumers to whom that redress has been or will be paid.

VII. Reporting Requirements

37. Defendants must notify the Bureau of any development that may affect compliance obligations arising under this Order, including but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor company; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Order; the filing of any bankruptcy or insolvency

proceeding by or against Defendants; or a change in Defendants' name or address. Defendants must provide this notice at least 30 days before the development or as soon as practicable after the learning about the development, whichever is sooner.

38. Within 30 days of the Effective Date, Defendants must:

a. Designate at least one telephone number and email, physical, and postal address as points of contact, which the Bureau may use to communicate with Defendants;

b. Identify all businesses for which any Defendant is the majority owner, or that a Defendant directly or indirectly controls, by all of their names, telephone numbers, and physical, postal, email, and Internet addresses;

c. Describe the activities of each such business, including the products and services offered, and the means of advertising, marketing, and sales.

39. Defendants must report any change in the information required to be submitted under ¶ 37 at least 30 days before the change or as soon as practicable after the learning about the change, whichever is sooner.

40. Within 120 days of the Effective Date, and again one year after the Effective Date, Defendants must submit to the Enforcement Director an

accurate written compliance progress report that has been approved by the Board, which, at a minimum:

a. Describes in detail the manner and form in which Defendants have complied with this Order; and

b. Attaches a copy of each Order Acknowledgment obtained under § VIII, unless previously submitted to the Bureau.

VIII. Order Distribution and Acknowledgment

41. Within 90 days of the Effective Date, Defendants must deliver a copy of this Order to each of its Board members and executive officers, as well as to any managers, or service providers who have responsibilities related to Protection Products. Defendants must deliver a copy of this Order or a summary of this Order, as to which the Enforcement Director has made a determination of nonobjection, to employees or other agents and representatives who have responsibilities related to Protection Products.

42. For 5 years from the Effective Date, Defendants must deliver a copy of this Order to any business entity resulting from any change in structure referred to in § VII, any future Board members and executive officers, as well as to any managers and service providers, who will have responsibilities related to Protection Products before they assume their responsibilities. Defendants must deliver a copy of this Order or a summary of this Order (as described in ¶ 41), to employees of any business entity

resulting from any change in structure referred to in § VII, or other agents and representatives of such an entity, who will have responsibilities related to Protection Products.

43. Defendants must secure a signed and dated statement acknowledging receipt of a copy or the summary of this Order described in ¶ 41, ensuring that any electronic signatures comply with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq.*, within 90 days of delivery, from all persons receiving a copy or summary of this Order under this Section.

IX. Recordkeeping

44. Defendants must maintain for at least 5 years from the Effective Date all documents and records necessary to demonstrate full compliance with each provision of this Order, including all submissions to the Bureau.

45. Defendants must retain the documents related to the compliance report described in ¶ 44 for at least 5 years.

46. Defendants must make the documents identified in ¶ 44 available to the Bureau upon the Bureau's request.

X. Notices

47. Unless otherwise directed in writing by the Bureau, Defendants must provide all submissions, requests, communications, or other documents relating to this Order in writing, with the subject line, "*In re Affinion Group Holdings, Inc.* Matter No. 2012-0110-02" and send them to:

Assistant Director for Enforcement
Consumer Financial Protection Bureau
ATTN: Office of Enforcement
1700 G Street, NW
Washington, DC 20552

Enforcement_Compliance@cfpb.gov

XI. Cooperation with the Bureau

48. Defendants must cooperate fully to help the Bureau determine the identity and location of, and the amount of injury sustained by, each Affected Consumer. Defendants must provide such information in its or its agents' possession or control within 30 days of receiving a written request from the Bureau.

49. Defendants must cooperate fully with the Bureau in this matter and in any investigation related to or associated with the conduct described in the Complaint. Defendants must provide to the Bureau truthful and complete information, evidence, and testimony. Defendants must appear for interviews, discovery, hearings, trials, and any other proceedings that the Bureau may reasonably request upon 10 days written notice, or other reasonable notice, at such places and times as the Bureau may designate, without the service of compulsory process.

XII. Compliance Monitoring

50. Within 30 days of receipt of a written request from the Bureau, Defendants must submit compliance reports or other requested

information, which must be made under penalty of perjury; provide sworn testimony; or produce documents.

51. Defendants must permit Bureau representatives to interview any employee or other person affiliated with Defendants who have agreed to such an interview regarding the subject matter or compliance of this Order. The person interviewed may have counsel present.

52. Nothing in this Order will limit the Bureau's lawful use of civil investigative demands under 12 C.F.R. § 1080.6 or other compulsory process.

XIII. Retention of Jurisdiction

53. The Court will retain jurisdiction of this matter for purposes of construction, modification, and enforcement of this Order.

54. Notwithstanding the provisions of ¶ 53, any time limits for performance fixed by this Order may be extended by mutual written agreement of the parties and without further Court approval. Additionally, details related to administration of §§ VII through XII of this Order may be modified by written agreement of the parties and without further Court approval. Any other modifications to this Order may be made only upon approval of the Court, upon motion by any party.

XIV. Release

55. The Bureau releases and discharges Defendants from all potential liability for law violations that the Bureau has or might have

asserted based on the practices alleged in the Complaint, to the extent such practices occurred before the Effective Date and the Bureau knows about them as of the Effective Date. The Bureau may use the practices alleged in the Complaint in future enforcement actions against Defendant or its affiliates to establish a pattern or practice of violations or the continuation of a pattern or practice of violations or to calculate the amount of any penalty. This release does not preclude or affect any right of the Bureau to determine and ensure compliance with this Order, or to seek penalties for any violations of this Order.

IT IS SO ORDERED.

DATED this 27th day of _October_____, 2015.

/s/ Victor A. Bolden
United States District Court Judge

UNITED STATES OF AMERICA
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
File No. 2016-CFPB-0012

In the Matter of: **SANTANDER BANK, N.A.**	**CONSENT ORDER**

The Consumer Financial Protection Bureau (Bureau) has reviewed the overdraft practices of Santander Bank, N.A. (Respondent, as defined below) and has identified the following law violations: (1) Respondent failed to obtain an affirmative "opt-in" from certain of its customers before charging them overdraft fees in connection with ATM and one-time debit card transactions, in violation of Regulation E, 12 C.F.R. § 1005.17, the implementing regulation of the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693, *et seq*. (EFTA) and (2) Respondent, through its vendor, misled consumers about (a) the fees associated with opting in to overdraft service for ATM and one-time debit card transactions, (b) the consequences of not opting in to overdraft service for ATM and one-time debit card transactions, (c) the nature of the sales calls seeking consumers' consent to opt in to overdraft services for ATM and one-time debit card transactions, and (d) the type of transactions covered by the overdraft service in violation of 12 U.S.C. §§ 5531, 5536. Under Sections 1053 and 1055 of the Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. §§ 5563, 5565, the Bureau issues this Consent Order (Consent Order).

I
Jurisdiction

1. The Bureau has jurisdiction over this matter under sections 1053 and 1055 of the CFPA, 12 U.S.C. §§ 5563 and 5565 and Section 1693*o*(a)(5) of the Electronic Fund Transfer Act, 15 U.S.C. § 1693*o*(a)(5).

II
Stipulation

2. Respondent has executed a "Stipulation and Consent to the Issuance of a Consent Order," dated July 11, 2016 (Stipulation), which is incorporated by reference and is accepted by the Bureau. By this Stipulation, Respondent has consented to the issuance of this Consent Order by the Bureau under sections 1053 and 1055 of the CFPA, 12 U.S.C. §§ 5563 and 5565, without admitting or denying any of the findings of fact or conclusions of law, except that Respondent admits the facts necessary to establish the Bureau's jurisdiction over Respondent and the subject matter of this action.

III
Definitions

3. The following definitions apply to this Consent Order:

   a. "Account" means a demand deposit (checking) or other consumer asset account established primarily for personal, family, or household purposes, as described in Regulation E, 12 C.F.R. § 1005.2(b)(1).

   b. "Board" means Respondent's duly-elected and acting Board of Directors.

   c. "Covered Overdraft Fees" refers to Overdraft Fees assessed on ATM or one-time debit card transactions during the Relevant Period.

d. "Covered Transactions" refers to ATM or one-time debit card transactions during the Relevant Period.

e. "Customer Service Representative" or "CSR" means a customer service representative employed by the Respondent's vendor to conduct consumer calls for the Opt-in Call Campaigns.

f. "Effective Date" means the date on which the Consent Order is issued.

g. "Opt-In" means the consumer's affirmative consent to be charged a fee for Overdraft Service for ATM and/or one-time debit card transactions, as described in Regulation E, 12 C.F.R. § 1005.17(b)(1)(iii).

h. "Opt-in Call Campaign" refers to any of the telemarketing campaigns conducted by a vendor on behalf of the Respondent to enroll consumers into the Sovereign (later Santander) Account Protector.

i. "Opt-In Rule" means Regulation E's prohibition against "assess[ing] a fee or charge on a consumer's account for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service [without] [o]btain[ing] the consumer's affirmative consent, or opt-in, to the institution's payment of ATM or one-time debit card transactions . . . ." 12 C.F.R. § 1005.17(b).

j. "Overdraft Fee" means a fee Respondent assessed pursuant to its Overdraft Service.

k. "Overdraft Service," with respect to an Account, shall have the same definition provided by 12 C.F.R. § 1005.17: "a service under which a financial institution assesses a fee or charge on a consumer's account held by the institution for paying a transaction (including a check or other item) when the consumer has insufficient or unavailable funds in the account."

l. "Regional Director" means the Regional Director for the Northeast Region for the Office of Supervision for the Consumer Financial Protection Bureau, or his/her delegate.

m. "Related Consumer Action" means a private action by or on behalf of one or more consumers or an enforcement action by another governmental agency brought against Respondent based on substantially the same facts as described in Section IV of this Consent Order.

n. "Relevant Period" includes the period from July 1, 2010 to the Effective Date.

o. "Respondent" means Santander Bank, N.A., previously known as Sovereign Bank, and its successors and assigns.

p. "Service Provider" or "vendor" shall have the same definition provided by 12 U.S.C. § 5481(26):"any person that provides a material service to a covered person in connection with the offering or provision by such covered person of a consumer financial product or service, including a person that: (i) participates in designing, operating, or maintaining the consumer financial product or service; or (ii) processes transactions relating to the consumer financial product or service (other than unknowingly or incidentally transmitting or processing financial data in a manner that such data is undifferentiated from other types of data of the same form as the person transmits or processes)." This term "does not include a person solely by virtue of such person offering or providing to a covered person— (i) a support service of a type provided to businesses generally or a similar ministerial service; or (ii) time or space for an advertisement for a consumer financial product or service through print, newspaper, or electronic media."

IV
Bureau Findings and Conclusions

The Bureau finds the following:

4. Respondent is a national bank with its main office in Wilmington, Delaware. As of September 30, 2015, Respondent had $89.4 billion in assets and $58.5 billion in total domestic deposits. Respondent operates a network of nearly 700 retail branch offices and more than 2300 ATMs in Connecticut, Delaware, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, and Rhode Island.

5. Respondent is an insured depository institution with assets greater than $10 billion within the meaning of 12 U.S.C. § 5515(a).

6. In 2009, Banco Santander S.A. completed its purchase of Sovereign Bank and officially rebranded the Bank as Santander in October of 2013.

7. Respondent is a "covered person" as that term is defined by 12 U.S.C. § 5481(6).

8. Respondent is also a "bank ... that directly ... holds an account belonging to a consumer" and is therefore a "financial institution" as defined by 12 C.F.R. § 1005.2(i).

The Opt-In Rule

9. Prior to the implementation of the Opt-In Rule, many financial institutions—including Respondent—provided Overdraft Service for ATM and one-time debit transactions (in addition to other transactions such as checks and recurring transfers) as a standard feature of their Accounts. Providing Overdraft Service for those transactions allowed consumers to complete one-time debit card purchases and ATM withdrawals that would likely otherwise have been declined because of insufficient or unavailable funds. However, that service came with a price: financial institutions, including Respondent, generally charged consumers a fee when the service was used.

10. The Board of Governors of the Federal Reserve System (Federal Reserve Board) found that state of affairs concerning because, among other things, many consumers lacked understanding of the service's risks, costs, and conditions. In particular, the Federal Reserve Board noted that many consumers did not understand they could be charged overdraft fees for using their debit card. As a result, "consumers may unintentionally overdraw their account based on the erroneous belief that a transaction would be paid only if the consumer has sufficient funds in the account to cover it." 74 Fed. Reg. 59033 at 59039 (Nov. 17, 2009).

11. To address this, the Federal Reserve Board amended Regulation E by adopting the Opt-In Rule, which requires financial institutions to obtain consumers' affirmative consent or opt-in to Overdraft Service for Covered Transactions before assessing overdraft fees on such transactions. Only after obtaining that consent can financial institutions charge Overdraft Fees on Covered Transactions.

12. The Rule also requires financial institutions to disclose any Overdraft Fees they will charge based on Covered Transactions. 12 C.F.R. § 1005.17(d)(2).

13. The Opt-In Rule had a mandatory compliance date of July 1, 2010 for new accounts and August 15, 2010 for existing accounts. 12 C.F.R. § 1005.17(c).

Respondent's Response to the Opt-In Rule

14. Respondent determined that the Opt-In Rule could have a significant negative impact on its fee revenues.

15. To protect its fee revenue, Respondent needed to persuade its customers to opt in.

16. Respondent renamed its Overdraft Service on Covered Transactions the Sovereign (later Santander) Account Protector ("SAP").

17. Respondent charged consumers who opted into the SAP $35 for each overdraft on a Covered Transaction and a $5 fee per consecutive day the account was overdrawn if the overdraft remained unpaid for more than five business days. Later, Respondent changed the terms to $35 for each overdraft and an additional, one-time $35 fee on the sixth business day if the account was still overdrawn.

18. Respondent's customers could opt in to SAP through a variety of channels, including at the branches, online, by mail, and over the phone.

19. To increase enrollment in SAP, Respondent launched a series of vigorous telemarketing campaigns, the Opt-in Call Campaigns.

20. Respondent hired a third-party vendor to conduct the Opt-in Call Campaigns. The vendor marketed the SAP on both outbound and inbound calls.

21. Respondent paid the vendor a base amount for each employee hour. Additionally, as an incentive to enroll more consumers, Respondent paid the vendor a variable premium of up to approximately $9 per hour if the vendor hit specified sales targets.

22. The vendor, in turn, incentivized its CSRs to make sales by establishing sales quotas and requiring a certain number of sales per hour.

23. In numerous instances, the vendor's CSRs who failed to achieve the required number of sales per hour were sent home early and were not paid for the remainder of the day.

24. The vendor also terminated certain CSRs who continued to miss its sales goals.

25. Respondent created or approved scripts to be used by the CSRs who conducted the calls for the Opt-in Call Campaigns.

26. During a pilot test in 2010, Respondent learned that CSRs were being overly aggressive, making sales without the consumer's consent, and not following the script. Respondent also received complaints from consumers who incurred unauthorized overdraft fees.

27. In response, Respondent temporarily halted the Opt-in Call Campaign for a few days and conducted further training with the CSRs. Respondent also listened to the enrollment calls that corresponded with the consumer complaints and noted that either the consumer did not opt in during the call or inaccurate fee information was provided.

28. But, as the Opt-in Call Campaigns proceeded over the next several years, CSRs continued to deviate from the script and provide consumers with incomplete, inaccurate, or misleading information to persuade the consumers to enroll in the SAP.

29. Nevertheless, Respondent continued to use this same vendor to conduct the Opt-in Call Campaigns on its behalf until 2014, while continuing to include financial incentives in the vendor's contract tied to the number of consumers the vendor enrolled in SAP, neglecting to properly monitor the vendor, and failing to detect widespread problems in the Opt-in Call Campaigns.

Findings and Conclusions as to Violations of the Opt-In Rule's Affirmative Consent Requirement

30. In numerous instances during the Opt-in Call Campaigns, CSRs enrolled consumers in the SAP without their consent.

31. In numerous instances, the CSRs did not ask the consumers if they wanted to opt-in. Instead, the CSRs gave consumers a brief description of the product and then had the consumers verify the last four digits of their social security numbers, which was the standard enrollment confirmation practice.

32. For example, the following exchange between a CSR and a consumer resulted in a consumer being enrolled:

CSR: We have noticed that you have not enrolled in Santander Account Protector service. This is a free service that allows us to apply our standard overdraft practices for ATM and debit card transactions. So generally, this means that we may pay ATM and one time debit card purchases, even if they overdraw your account, and charge you

overdraft fees. And if you are not enrolled, we typically will decline to pay these transactions for you. So, you know, basically it's a free service and, uh, we would like to send you out Account Protector package for your account ending in . . . . . Would that be OK?
Consumer: Sure.
CSR: OK, and what is your, uh, can you verify nothing but the last four digits of your social we have on file for you?

33. In other instances, the consumers explicitly stated that they did not want to enroll in the SAP at that time but requested information about the product. In response, the CSRs enrolled the consumers without their consent or knowledge and told them that they would receive information about the SAP in less than 10 business days.

34. For example, the following exchange between a CSR and a consumer resulted in a consumer being enrolled:

Consumer: OK but that this doesn't mean that I'm enrolling or anything right now, right?
CSR: Yeah, no, we're just um
Consumer: You're just going to send me the information?
CSR: Yeah, we're going to, yeah we're going to send you – um – the information and like I said you can opt out, um, you know, you know at any time by calling that 1-877-768-2265...

35. The Opt-In Rule prohibits financial institutions from assessing a "fee or charge on a consumer's account for paying an ATM or one-time debit card transaction pursuant to the institution's overdraft service unless the institution ... obtains the consumer's affirmative consent, or opt-in, to the institution's payment of ATM or onetime debit card transactions[.]" 12 C.F.R. § 1005.17(b)(1)(iii).

36. As described above, Respondent enrolled consumers into overdraft services for Covered Transactions without first obtaining their affirmative consent.

37. When Respondent charged those consumers overdraft fees on Covered Transactions, it was in violation of the Opt-In Rule, the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693, *et seq*., and § 1036(a)(1)(A) of the CFPA, 12 U.S.C § 5536(a)(1)(A).

Findings and Conclusions as to Deceptive Acts or Practices Regarding Misleading Consumers about the Fees Associated with Opting into the SAP

38. CSRs made misrepresentations regarding the fees the consumer would pay if the consumer opted into the SAP.

39. In numerous calls, CSRs stated that the SAP is a free service. Often these CSRs would later only state the fees associated with using the service in a "legal disclosure," which was generally read at the end of the call, often quickly, after the consumer consented to enrollment.

40. In numerous calls, CSRs reinforced the impression that the SAP is free by telling consumers "This is not a sales call."

41. However, the CSRs were selling Santander's overdraft service to consumers, and consumers would ultimately be charged fees for using that service. In fact, Santander's own internal documents characterize these transactions as "sales."

42. During numerous calls, CSRs failed to inform consumers that, in addition to the initial $35 fee, Respondent would charge consumers an additional $35 fee on the sixth business day of any remaining unpaid balance.

43. During numerous calls, CSRs directly stated or implied that the initial $35 fee was the only fee charged for an overdraft.

44. For example, a CSR answered a consumer's question about whether there is a cost for the SAP as follows:

> CSR: There is no monthly or annual fee and even after you do over, um, overdraw your account, and then there's – that's the only time there's a fee of $35 and even if it takes you a while to pay it up, it's only that $35 that you'll ever have to pay. There's no other fees after that.

45. During numerous calls, CSRs directly stated or implied that the only charge was a $35 fee on the sixth business day.

46. For example, a CSR responded to a consumer's statement that he or she did not want to pay $35 as follows:

> CSR: Well, you won't have to pay [the $35 fee] ma'am unless you overdraft your account and that is still not due until the sixth business day.

47. During numerous other calls, CSRs directly stated or implied that Santander would not charge any overdraft fees at all if consumers repaid the overdraft within five business days.

48. For example, a CSR made the following statement to a consumer who later agreed to opt in:

> CSR: There is no monthly or annual fee to have this service and you would only incur the fee if you ever overdraw your account. Would this be something you'd be interested in having? Basically, if you need to overdraw your account, you can. There's a $35 transaction fee on the sixth business day. If you pay it back within six business days, we don't charge you anything.

49. In reality, Respondent charged consumers $35 for each overdraft and, after five consecutive business days of unpaid balance, an additional $35.

50. In numerous instances, CSRs directly stated or implied that overdraft services provide a benefit in emergency situations and that non-emergency charges would not result in overdraft fees. In reality, consumers could incur overdraft fees regardless of whether the transaction was for an emergency or non-emergency situation.

51. As described above, in connection with offering or providing consumer financial products or services, Respondent represented, directly or indirectly, expressly or by implication, that consumers who enrolled in the SAP:

    a. would not have to pay for the service;

    b. would only be charged one $35 fee, either at the time of the overdraft or on the sixth day after the overdraft;

c. would not be charged an overdraft fee at all if the overdraft was repaid within five business days; and

d. would only be charged an overdraft fee if the consumer was in an emergency situation.

52. In truth and in fact:

a. consumers incurred fees by using Santander's overdraft service;

b. consumers could be charged two $35 fees for an overdraft, one at the time of the overdraft and a second on the sixth business day after the overdraft if the account was still overdrawn;

c. consumers were charged an overdraft fee at the time of the overdraft regardless of whether they repaid it within five business days; and

d. consumers were charged an overdraft fee regardless of whether the transaction involved an emergency situation.

53. Therefore, Respondent's representations described above are false and misleading, and constitute deceptive acts or practices in violation of the CFPA, 12 U.S.C. §§ 5531(a) and 5536(a)(1)(B).

Findings and Conclusions as to Deceptive Acts or Practices Regarding Misleading Consumers about the Consequences of Not Opting into the SAP

54. CSRs made misrepresentations about the consequences of not opting in to the SAP:

a. In numerous calls, CSRs told consumers that they would be charged overdraft fees on Covered Transactions even if they did not enroll in the SAP.

b. In numerous calls, CSRs told consumers that they would be subject to daily transaction and transfer fees in addition to the overdraft fees. CSRs further implied that these additional fees did not apply to consumers enrolled in the SAP.

55. For example, one CSR made the following statement to a consumer who later agreed to opt in:

> CSR: Now if you are not reenrolled or enrolled into the SAP what's going to happen is you're going to get hit with fees, I mean, all over the place from individually $35 overdraft fee, um, transaction and also maybe transfer fees may apply...

56. To the contrary, declining the SAP did not expose consumers to any additional fees.

57. In connection with offering or providing consumer financial products or services, Respondent represented, directly or indirectly, expressly or by implication, that consumers would be charged overdraft on Covered Transactions and certain additional fees even if they did not opt in to Santander's overdraft services.

58. In truth and in fact, consumers would not be charged overdraft fees on Covered Transactions or the additional fees if they did not opt-in to Santander's overdraft services.

59. Therefore, Respondent's representations, as set forth above, are false and misleading, and constitute deceptive acts or practices in violation of the CFPA, 12 U.S.C. §§ 5531(a) and 5536(a)(1)(B).

Findings and Conclusions as to Deceptive Acts or Practices Regarding Misleading Consumers about the Nature of the Call

60. CSRs made misrepresentations about the purpose of the call.

61. In numerous calls, CSRs told consumers "This is not a sales call."

62. However, Santander's internal documents characterize these transactions as "sales." The CSRs were selling Santander's overdraft service to consumers, and consumers would ultimately be charged fees for using that service.

63. In numerous calls, CSRs told consumers that the reason for the call was the Respondent's name change from Sovereign to Santander, leading consumers to believe

the reason they needed to opt in to the SAP was the name change. In fact, the Respondent needed to get these consumers to opt in because the new consumer protections under the Opt-In Rule mandated that it do so.

64. For example, one CSR made the following statement:

> CSR: The reason for my call today is because, um, a lot of our customers were enrolled in the account protector whenever the bank was Sovereign and now that we've switched the name to Santander we just wanted to call the customers and make sure they wanted to be enrolled before we actually enrolled them.

65. In numerous calls, CSRs told consumers that the reason for the call was to reenroll the consumers into the SAP when these consumers had not previously been enrolled in the SAP.

66. In connection with offering or providing consumer financial products or services, Respondent represented, directly or indirectly, expressly or by implication, that:

a. Santander was not trying to sell anything to consumers;

b. Santander was inquiring about consumers' opt-in status because the bank changed its name from Sovereign to Santander; and

c. Santander was attempting to reenroll the consumers in the SAP.

67. In truth and in fact:

a. Santander was selling its overdraft service, the SAP, to consumers, and consumers would be charged fees for using that service;

b. Santander was trying to market its overdraft service, the SAP, to consumers because the consumers were not currently opted in, and the fact that the bank had changed its name was irrelevant; and

c. the consumers had not previously opted in to Santander's overdraft service and thus the call was not to reenroll the consumers in the SAP.

68. Therefore, Respondent's representations, as set forth above, are false and misleading, and constitute deceptive acts or practices in violation of the CFPA, 12 U.S.C. §§ 5531(a) and 5536(a)(1)(B).

Findings and Conclusions as to Deceptive Acts or Practices Regarding Transactions Covered by the SAP

69. In numerous calls, such as in the examples below, CSRs misrepresented the type of transactions that were covered by the SAP. CSRs repeatedly told consumers that the SAP also covered checks. However, the SAP was limited to Covered Transactions.

70. For example, a CSR had the following exchange with a consumer:

> Consumer: What about, what about my checks? I write checks a lot. What about that?
> CSR: The checks are included too. Because they say, if we charge – we would charge you that overdraft fee of $35 for any transaction that is including checks. So if you would have a check that you forgot about that went through, that's another good example because if you have a check that came through, instead of sending that check back to whoever you wrote it for, we're going to go ahead and pay the check. We're going to charge you the overdraft fee but instead of sending it back to whoever you wrote that check to and you having two charges because probably the bank is going to charge you too and whoever you wrote that check to is going to charge you. So now the bank is going to pay that for you and you're just going to owe them and not two different people.

71. CSRs also told consumers that other non-Covered Transactions, such as bill pay, were covered by the SAP, as seen in the following exchange:

> Consumer: Now does that also include the bill pay, like if I have a scheduled bill pay to go through on a specific date?
> CSR: Yes sir. Any type of transaction on your account.
> Consumer: OK. Great.

72. Respondent automatically provided overdraft services for checks and bill pay and could not lawfully condition the payment of checks or bill pay overdrafts on consumers affirmatively consenting to the SAP.

73. In connection with offering or providing consumer financial products or services, Respondent represented, directly or indirectly, expressly or by implication, that overdrafts for checks and bill-pay transactions would be covered by Santander's overdraft service, the SAP.

74. In truth and in fact, the SAP only covers overdrafts from ATM and one-time debit card transactions, not from checks and bill-pay transactions.

75. Therefore, Respondent's representations as set forth above are false and misleading, and constitute deceptive acts or practices in violation of the CFPA, 12 U.S.C. §§ 5531(a) and 5536(a)(1)(B).

ORDER

V
Conduct Provisions

IT IS ORDERED, under sections 1053 and 1055 of the CFPA, that:

76. Respondent and its officers, agents, servants, employees, and attorneys who have actual notice of this Consent Order, whether acting directly or indirectly, may not violate the Opt-In Rule or sections 1031 and 1036 of the CFPA, 12 U.S.C. §§ 5531 and 5536, and must take the following affirmative actions:

    a. Respondent and its officers, agents, servants, employees, and attorneys who have actual notice of this Consent Order, whether acting directly or indirectly, must ensure that Respondent's presentation of the Opt-In election to consumers satisfies the requirements of Regulation E.

b. Respondent, and its officers, agents, servants, employees, and attorneys who have actual notice of this Consent Order, whether acting directly or indirectly, may not misrepresent, or assist others in misrepresenting, expressly or impliedly:

   i. the terms and conditions of Overdraft Service for Covered Transactions;

   ii. the categories of transactions covered by Overdraft Service;

   iii. the risks and costs associated with Opting In;

   iv. the risks and costs associated with not Opting In;

   v. the fees associated with Opting In;

   vi. the nature of any sales or enrollment call for Overdraft Service; or

   vii. any other term material to the Opt-In election.

c. Within 90 days after receipt of the non-objection described in subparagraph ii below, Respondent shall provide all consumers who, based on a full review by Respondent of its records, were enrolled in the SAP through the Opt-in Call Campaigns an opportunity to validate their opt-in decisions (Validation). In order to validate an opt-in decision, Respondent must obtain the consumers' affirmative consent to Respondent's payment of Covered Transactions. No later than 90 days after receipt of the non-objection described in subparagraph ii below, Respondent must cease charging Covered Overdraft Fees on all Accounts for which Validation is required but has not been obtained, unless the consumer affirmatively contacts Respondent to Opt-In. Validation shall be subject to the following requirements:

   i. Within 30 days of the Effective Date, Respondent must submit to the Regional Director for review and determination of non-objection a comprehensive plan for obtaining Validation from consumers (Validation Process). The plan must include the communication channels and methods the Bank proposes using to

complete the Validation Process as well as any scripts, internal guidance for communicating with consumers, letters, or direct marketing materials to be used in the Validation Process. At a minimum, the Validation Process shall include (a) a balanced presentation of the risks and benefits of Overdraft Service for Covered Transactions; and (b) an explanation of how the consumer's Overdraft Service will change in the event the consumer declines to validate his or her opt-in decision. Respondent shall not use a Service Provider to communicate with consumers as part of the Validation Process. Mailing a document that was written and approved by the Respondent shall not be considered communication with consumers under this section.

ii. The Regional Director will have the discretion to make a determination of non-objection to the Validation Process or direct the Respondent to revise it. If the Regional Director directs the Respondent to revise the Validation Process, Respondent must make the revisions and resubmit the Validation Process to the Regional Director within 15 days.

iii. After receiving notification that the Regional Director has made a determination of non-objection to the Validation Process, Respondent must implement and adhere to the steps, recommendations, deadlines, and timeframes outlined in the Validation Process.

d. Respondent, whether acting directly or indirectly, is prohibited from using a Service Provider to engage in any outbound telemarketing of Overdraft Services for Covered Transactions to consumers. Nothing in this Order shall be read as an exception to this Paragraph.

e. Respondent and its officers, agents, servants, employees, and attorneys who have actual notice of this Consent Order, whether acting directly or indirectly, may not (i) require its employees to generate a specific number of opt-ins; (ii) cause any employee to suffer adverse consequences for failing to satisfy any such requirement; or (iii) provide employees financial incentives in connection with opt-ins.

f. Within 90 days of the Effective Date, Respondent must develop a new or revised written policy governing vendor management for Service Providers engaged in telemarketing of consumer financial products or services. After receiving the Regional Director's determination of non-objection described in Section VI, the Respondent shall implement this new or revised vendor management policy according the timelines and deadlines set forth in the Compliance Plan. The policy shall require, at a minimum:

   i. An analysis to be conducted by Respondent, prior to Respondent entering into a contract with a Service Provider relating to the offering or providing of a consumer financial product or service via telemarketing, of the ability of the Service Provider to perform telemarketing of the product or service in compliance with all applicable Federal consumer financial laws and Respondent's policies and procedures.

   ii. For new and renewed contracts to perform telemarketing of consumer financial products or services, a written contract between Respondent and the Service Provider, which sets forth the responsibilities of each party, especially:

a) the Service Provider's specific performance responsibilities and duty to maintain adequate internal controls over telemarketing of the consumer financial product or service;

b) the Service Provider's responsibilities and duty to provide adequate training on applicable Federal consumer financial laws and Respondent's policies and procedures to all Service Provider employees or agents engaged in telemarketing of the consumer financial product or service;

c) granting Respondent the authority to conduct periodic onsite reviews of the Service Provider's controls, performance, and information systems as they relate to telemarketing of the consumer financial product or service; this authority must permit Respondent or a third party agent of the Respondent, who is not affiliated with the contracting Service Provider, to conduct unannounced live auditing of calls made for Santander by Service Providers performing outbound telemarketing of consumer financial products or services; and

d) Respondent's right to terminate the contract if the Service Provider materially fails to comply with the terms specified in the contract, including the terms required by this Paragraph or applicable provision of this Order.

iii. Periodic onsite reviews by Respondent or a third party agent of the Respondent, who is not affiliated with the contracting Service Provider, of the controls, performance, and information systems of any Service Provider providing outbound telemarketing of consumer financial products or services.

iv. Auditing of the Service Provider's telemarketing sales calls, including but not limited to unannounced live listening of sales calls and randomly reviewing a representative number of the recently recorded sales calls.

v. A written comprehensive assessment, to be conducted on an annual basis, of the unfair, deceptive, and abusive acts or practices ("UDAAP") risk for existing, new, and recently modified consumer financial products or services as to which Service Providers engage in telemarketing, including, but not limited to the UDAAP risk of the governance control, marketing, sales, delivery, servicing, and fulfillment of services for existing or new such consumer financial products or services, including the UDAAP risk of marketing and sales practices.

vi. The development and implementation of written policies and procedures to effectively manage, detect, and mitigate, on an ongoing basis, the risks identified in the written assessment required by the preceding subparagraph v.

vii. Comprehensive written policies and procedures for identifying and reporting any violation of Federal consumer financial laws or Respondent's policies and procedures relating to consumer financial products or services by Service Providers' employees or agents engaging in telemarketing, in a timely manner, to a specified executive risk or compliance manager at Respondent. The manager to whom such reports are made must be independent of the unit overseeing the sale and marketing of the consumer financial product or service at issue.

viii. Comprehensive written policies and procedures for the development of training materials relating to identifying and addressing violations of Federal

consumer financial laws relating to telemarketing by Service Providers of consumer financial products or services that will be incorporated into the existing annual compliance training for appropriate employees.

ix. Written policies and procedures to ensure that the appropriate employees and departments within Respondent have the requisite authority and status within Respondent so that appropriate reviews of consumer financial products or services marketed or sold by Service Providers via telemarketing may occur and deficiencies are identified and properly remedied.

g. Within 90 days of the Effective Date, Respondent must develop a new or revised written policy governing the management of consumer complaints. After receiving the Regional Director's determination of non-objection described in Section VI, the Respondent shall implement this new or revised policy governing the management of consumer complaints according the timelines and deadlines set forth in the Compliance Plan. The policy shall require Service Providers marketing Overdraft Services for Covered Transactions to provide any consumer complaints they receive to Santander, and shall require, at a minimum:

i. the maintenance of adequate records of all written, oral, or electronic complaints from consumers, formal or informal, received by Respondent and its Service Providers and the resolution of the complaints, and

ii. the designation of appropriate personnel as responsible for overseeing the consumer complaint management program, which will include: (a) writing and revising policies and procedures as necessary, (b) reviewing all consumer complaints, including those regarding Service Providers, (c) analyzing consumer complaint data to determine if there exist any patterns of complaints

caused by common policies, procedures, individuals, or Service Providers, and (d) if so, making recommendations to eliminate or reduce the number of complaints.

VI
Compliance Plan

IT IS FURTHER ORDERED that:

77. Within 90 days of the Effective Date, Respondent must submit to the Regional Director for review and determination of non-objection a comprehensive compliance plan designed to ensure that Respondent's presentation of the Opt-In election complies with all applicable Federal consumer financial laws and the terms of this Consent Order (Compliance Plan). The Compliance Plan must include, at a minimum:

a. Detailed steps for addressing each action required by Section V of this Consent Order;

b. Specific timeframes and deadlines for implementation of the steps described above.

78. The Regional Director will have the discretion to make a determination of non-objection to the Compliance Plan or direct the Respondent to revise it. If the Regional Director directs the Respondent to revise the Compliance Plan, the Respondent must make the revisions and resubmit the Compliance Plan to the Regional Director within 30 days.

79. After receiving notification that the Regional Director has made a determination of non-objection to the Compliance Plan, the Respondent must implement and adhere to the steps, recommendations, deadlines, and timeframes outlined in the Compliance Plan.

VII
Role of the Board

IT IS FURTHER ORDERED that:

80. The Board or a committee thereof must review all submissions (including plans, reports, programs, policies, and procedures) required by this Consent Order prior to submission to the Bureau.

81. Although this Consent Order requires the Respondent to submit certain documents for the review or non-objection by the Regional Director, the Board will have the ultimate responsibility for proper and sound management of Respondent and for ensuring that Respondent complies with Federal consumer financial law and this Consent Order.

82. In each instance that this Consent Order requires the Board to ensure adherence to, or perform certain obligations of Respondent, the Board or a committee thereof must:

a. Authorize whatever actions are necessary for Respondent to fully comply with the Consent Order;

b. Require timely reporting by management to the Board on the status of compliance obligations; and

c. Require timely and appropriate corrective action to remedy any material non-compliance with Board directives related to this Section.

VIII
Order to Pay Civil Money Penalties

IT IS FURTHER ORDERED that:

83. Under section 1055(c) of the CFPA, 12 U.S.C. § 5565(c), by reason of the violations of law described in Section IV of this Consent Order, and taking into account the factors in 12 U.S.C. § 5565(c)(3), Respondent must pay a civil money penalty of $10 million to the Bureau.

84. Within 10 days of the Effective Date, Respondent must pay the civil money penalty by wire transfer to the Bureau or to the Bureau's agent in compliance with the Bureau's wiring instructions.

85. The civil money penalty paid under this Consent Order will be deposited in the Civil Penalty Fund of the Bureau as required by section 1017(d) of the CFPA, 12 U.S.C. § 5497(d).

86. Respondent must treat the civil money penalty paid under this Consent Order as a penalty paid to the government for all purposes. Regardless of how the Bureau ultimately uses those funds, Respondent may not:

a. Claim, assert, or apply for a tax deduction, tax credit, or any other tax benefit for any civil money penalty paid under this Consent Order; or

b. Seek or accept, directly or indirectly, reimbursement or indemnification from any source, including but not limited to payment made under any insurance policy, with regard to any civil money penalty paid under this Consent Order.

87. To preserve the deterrent effect of the civil money penalty in any Related Consumer Action, Respondent may not argue that Respondent is entitled to, nor may Respondent benefit by, any offset or reduction of any compensatory monetary remedies imposed in the Related Consumer Action because of the civil money penalty paid in this action (Penalty Offset). If the court in any Related Consumer Action grants such a Penalty Offset, Respondent must, within 30 days after entry of a final order granting the Penalty Offset, notify the Bureau, and pay the amount of the Penalty Offset to the U.S. Treasury. Such a payment will not be considered an additional civil money penalty and will not change the amount of the civil money penalty imposed in this action.

88. In the event of any default on Respondent's obligations to make payment under this Consent Order, interest, computed under 28 U.S.C. § 1961, as amended, will accrue on any outstanding amounts not paid from the date of default to the date of payment, and will immediately become due and payable.

89. Respondent must relinquish all dominion, control, and title to the funds paid to the fullest extent permitted by law and no part of the funds may be returned to Respondent.

90. Under 31 U.S.C. § 7701, Respondent, unless it already has done so, must furnish to the Bureau its taxpayer identifying numbers, which may be used for purposes of collecting and reporting on any delinquent amount arising out of this Consent Order.

91. Within 30 days of the entry of a final judgment, consent order, or settlement in a Related Consumer Action, Respondent must notify the Regional Director of the final judgment, consent order, or settlement in writing. That notification must indicate the amount of redress, if any, that Respondent paid or is required to pay to consumers and describe the consumers or classes of consumers to whom that redress has been or will be paid.

IX
Reporting Requirements

IT IS FURTHER ORDERED that:

92. Respondent must notify the Bureau of any development that may affect compliance obligations arising under this Consent Order, including but not limited to, a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor company; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Consent Order; the filing of any bankruptcy or insolvency proceeding by or against Respondent; or a change in

Respondent's name or address. Respondent must provide this notice, if practicable, at least 30 days before the development, but in any case no later than 14 days after the development.

93. Within 90 days of the Effective Date, and again one year after the Effective Date, Respondent must submit to the Regional Director an accurate written compliance progress report (Compliance Report) that has been approved by the Board or a committee thereof, which, at a minimum:

a. Describes in detail the manner and form in which Respondent has complied with this Order; and

b. Attaches a copy of each Order Acknowledgment obtained under Section X, unless previously submitted to the Bureau.

X
Order Distribution and Acknowledgment

IT IS FURTHER ORDERED that,

94. Within 30 days of the Effective Date, Respondent must deliver a copy of this Consent Order to each of its board members and executive officers, as well as to any managers or Service Providers who have responsibilities related to the subject matter of the Consent Order and employees or agents whose responsibilities include managing, overseeing, or negotiating contracts with Service Providers engaged in telemarketing.

95. For 5 years from the Effective Date, Respondent must deliver a copy of this Consent Order to any business entity resulting from any change in structure referred to in Section IX, any future board members and executive officers, as well as to any managers, or Service Providers who will have responsibilities related to the subject matter of the Consent Order and employees or agents whose responsibilities include

managing, overseeing, or negotiating contracts with Service Providers engaged in telemarketing before they assume their responsibilities.

96. Respondent must secure a signed and dated statement acknowledging receipt of a copy of this Consent Order, ensuring that any electronic signatures comply with the requirements of the E-Sign Act, 15 U.S.C. § 7001 *et seq.*, within 30 days of delivery, from all persons receiving a copy of this Consent Order under this Section.

XI
Recordkeeping

IT IS FURTHER ORDERED that

97. Respondent must create, or if already created, must retain for at least 5 years from the Effective Date, the following business records:

    a. All documents and records necessary to demonstrate full compliance with each provision of this Consent Order, including all submissions to the Bureau.

    b. Copies of all telemarketing calls; sales scripts; training materials; advertisements; websites; and other marketing materials relating to the Opt-In Rule.

    c. All written records of consumer complaints and refund requests, and any responses to those complaints or requests, that are recorded and tracked by Respondent in accordance with Respondent's policies, whether received directly or indirectly, that relate to overdraft fees charged on Covered Transactions.

98. Respondent must make the documents identified in Paragraph 97 available to the Bureau upon the Bureau's request.

XII
Notices

IT IS FURTHER ORDERED that:

99. Unless otherwise directed in writing by the Bureau, Respondent must provide all submissions, requests, communications, or other documents relating to this Consent Order in writing, with the subject line, "*In re* Santander Bank, N.A., File No. 2016-CFPB-0012," and send them either:

a. By overnight courier (not the U.S. Postal Service), as follows:

Regional Director, CFPB Northeast Region
140 East 45th Street
New York, NY 10017; or

b. By first-class mail to the below address and contemporaneously by email to Enforcement_Compliance@cfpb.gov:

Regional Director, CFPB Northeast Region
140 East 45th Street
New York, NY 10017

XIII

Cooperation with the Bureau

IT IS FURTHER ORDERED that:

100. Respondent must cooperate fully with the Bureau in this matter and in any investigation related to or associated with the conduct described in Section IV. Respondent must provide truthful and complete information, evidence, and testimony. Respondent must cause its officers, employees, representatives, or agents to appear for interviews, discovery, hearings, trials, and any other proceedings that the Bureau may reasonably request upon 5 days' written notice, or other reasonable notice, at such places and times as the Bureau may designate, without the service of compulsory process.

XIV

Compliance Monitoring

IT IS FURTHER ORDERED that, to monitor Respondent's compliance with this Consent Order:

101. Within 14 days of receipt of a written request from the Bureau, Respondent must submit additional Compliance Reports or other requested information, which must be made under penalty of perjury; provide sworn testimony; or produce documents.

102. Respondent must permit Bureau representatives to interview any employee or other person affiliated with Respondent who has agreed to such an interview. The person interviewed may have counsel present.

103. Nothing in this Consent Order will limit the Bureau's lawful use of civil investigative demands under 12 C.F.R. § 1080.6 or other compulsory process.

XV
Modifications to Non-Material Requirements

IT IS FURTHER ORDERED that:

104. Respondent may seek a modification to non-material requirements of this Consent Order (*e.g.*, reasonable extensions of time and changes to reporting requirements) by submitting a written request to the Regional Director.

105. The Regional Director may, in his/her discretion, modify any non-material requirements of this Consent Order (*e.g.*, reasonable extensions of time and changes to reporting requirements) if he/she determines good cause justifies the modification. Any such modification by the Regional Director must be in writing.

XVI
Administrative Provisions

106. The provisions of this Consent Order do not bar, estop, or otherwise prevent the Bureau, or any other governmental agency, from taking any other action against Respondent, except as described in Paragraph 107.

107. The Bureau releases and discharges Respondent from all potential liability for law violations that the Bureau has or might have asserted based on the practices described in Section IV of this Consent Order, to the extent such practices occurred before the Effective Date and the Bureau knows about them as of the Effective Date. The Bureau may use the practices described in this Consent Order in future enforcement actions against Respondent and its affiliates, including, without limitation, to establish a pattern or practice of violations or the continuation of a pattern or practice of violations or to calculate the amount of any penalty. This release does not preclude or affect any right of the Bureau to determine and ensure compliance with the Consent Order, or to seek penalties for any violations of the Consent Order.

108. This Consent Order is intended to be, and will be construed as, a final Consent Order issued under section 1053 of the CFPA, 12 U.S.C. § 5563, and expressly does not form, and may not be construed to form, a contract binding the Bureau or the United States.

109. This Consent Order will terminate 5 years from the Effective Date or 5 years from the most recent date that the Bureau initiates an action alleging any violation of the Consent Order by Respondent. If such action is dismissed or the relevant adjudicative body rules that Respondent did not violate any provision of the Consent Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the Consent Order will terminate as though the action had never been filed. The Consent Order will remain effective and enforceable until such time, except to the extent that any provisions of this

Consent Order have been amended, suspended, waived, or terminated in writing by the Bureau or its designated agent.

110. Calculation of time limitations will run from the Effective Date and be based on calendar days, unless otherwise noted.

111. Should Respondent seek to transfer or assign all or part of its operations that are subject to this Consent Order, Respondent must, as a condition of sale, obtain the written agreement of the transferee or assignee to comply with all applicable provisions of this Consent Order.

112. The provisions of this Consent Order will be enforceable by the Bureau. For any violation of this Consent Order, the Bureau may impose the maximum amount of civil money penalties allowed under section 1055(c) of the CFPA, 12 U.S.C. § 5565(c). In connection with any attempt by the Bureau to enforce this Consent Order in federal district court, the Bureau may serve Respondent wherever Respondent may be found and Respondent may not contest that court's personal jurisdiction over Respondent.

113. This Consent Order and the accompanying Stipulation contain the complete agreement between the parties. The parties have made no promises, representations, or warranties other than what is contained in this Consent Order and the accompanying Stipulation. This Consent Order and the accompanying Stipulation supersede any prior oral or written communications, discussions, or understandings.

114. Nothing in this Consent Order or the accompanying Stipulation may be construed as allowing the Respondent, its Board, officers, or employees to violate any law, rule, or regulation.

IT IS SO ORDERED, this 13th day of July, 2016.

Richard Cordray

Richard Cordray
Director
Consumer Financial Protection Bureau

#2016-079

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

In the Matter of:	)	
	)	
Wells Fargo Bank, N.A.	)	AA-EC-2016-67
Sioux Falls, South Dakota	)	
	)	

CONSENT ORDER FOR A CIVIL MONEY PENALTY

The Comptroller of the Currency of the United States of America ("Comptroller"), through his national bank examiners, has examined the affairs of Wells Fargo Bank, N.A., Sioux Falls, South Dakota ("Wells Fargo" or "Bank"), and has identified (1) deficiencies and unsafe or unsound practices in the Bank's risk management and oversight of the Bank's sales practices, and (2) unsafe or unsound sales practices by the Bank. The Comptroller has informed the Bank of the findings resulting from the examinations.

The Bank, by and through its duly elected and acting Board of Directors ("Board"), has executed a Stipulation and Consent to the Issuance of a Consent Order, dated September 6, 2016, that is accepted by the Comptroller ("Stipulation"). By the Stipulation, which is incorporated herein by reference, the Bank has consented to the issuance of this Consent Cease and Desist Order ("Order") by the Comptroller.

ARTICLE I

COMPTROLLER'S FINDINGS

The Comptroller finds, and the Bank neither admits nor denies, the following:

(1) The Bank's business model emphasized sales of the Bank's products and services to Bank customers. As part of this model, the Bank set sales goals and established an incentive

compensation structure that emphasized sales of Bank products and services to customers by Bank employees.

(2) In the course of its ongoing supervision of the Bank, the OCC has identified the following deficiencies and unsafe or unsound practices in the Bank's risk management and oversight of the Bank's sales practices:

(a) The incentive compensation program and plans within the Community Bank Group were not aligned properly with local branch traffic, staff turnover, or customer demand, and they fostered the unsafe or unsound sales practices described in Paragraph (3) of this Article and pressured Bank employees to sell Bank products not authorized by the customer.

(b) The Bank lacked an Enterprise-Wide Sales Practices Oversight Program and thus failed to provide sufficient oversight to prevent and detect the unsafe or unsound sales practices described in Paragraph (3) of this Article and failed to mitigate the risks that resulted from such sales practices.

(c) The Bank lacked a comprehensive customer complaint monitoring process that impeded the Bank's ability to:

(1) assess customer complaint activity across the Bank;

(2) adequately monitor, manage, and report on customer complaints; and

(3) analyze and understand the potential sales practices risk.

(d) The Bank's Community Bank Group failed to adequately oversee sales practices and failed to adequately test and monitor branch employee sales practices.

(e) The Bank's audit coverage was inadequate because it failed to include in its scope an enterprise-wide view of the Bank's sales practices.

(3) In the course of its ongoing supervision, the OCC has identified the following unsafe or unsound sales practices in the Bank's Community Bank Group (referred to as "unsafe or unsound sales practices" within this Order):

(a) The selling of unwanted deposit or credit card accounts.

(b) The unauthorized opening of deposit or credit card accounts.

(c) The transfer of funds from authorized, existing accounts to unauthorized accounts ("simulated funding").

(d) Unauthorized credit inquiries for purposes of the conduct described in sub-paragraphs (a) and (b) of this paragraph.

(4) By reason of the conduct set forth in Paragraphs (2) and (3) above, the Bank engaged in reckless unsafe or unsound banking practices that were part of a pattern of misconduct.

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

ARTICLE II

ORDER FOR A CIVIL MONEY PENALTY

(1) The Bank shall make payment of a civil money penalty in the total amount of thirty-five million dollars ($35 million), which shall be paid upon the execution of this Order.

(a) If a check is the selected method of payment, the check shall be made payable to the Treasurer of the United States and shall be delivered to: Comptroller of the Currency, P.O. Box 979012, St. Louis, Missouri

63197-9000.

(b) If a wire transfer is the selected method of payment, it shall be sent in accordance with instructions provided by the Comptroller.

(c) The docket number of this case (AA-EC-2016-67) shall be entered on the payment document or wire confirmation and a photocopy of the payment document or confirmation of the wire transfer shall be sent immediately, by overnight delivery, to the Director of Enforcement and Compliance, Office of the Comptroller of the Currency, 400 7th Street, S.W., Washington, D.C. 20219.

(2) This Order shall be enforceable to the same extent and in the same manner as an effective and outstanding order that has been issued and has become final pursuant to 12 U.S.C. § 1818.

ARTICLE III

OTHER PROVISIONS

(1) This Order is intended to be, and shall be construed to be, a final order issued pursuant to 12 U.S.C. § 1818(i)(2), and expressly does not form, and may not be construed to form, a contract binding on the OCC or the United States.

(2) This Order constitutes a settlement of the civil money penalty proceeding against the Bank contemplated by the Comptroller, based on the practices described in the Comptroller's Findings set forth in Article I of this Order. The Comptroller releases and discharges the Bank from all potential liability for a civil money penalty that has been or might have been asserted by the Comptroller based on the practices described in Article I of this Order, to the extent known to

the Comptroller as of the effective date of the Order. Nothing in the Stipulation or the Order, however, shall prevent the Comptroller from:

(a) instituting enforcement actions, other than a civil money penalty, against the Bank based on the findings set forth in Article I of this Order;

(b) instituting enforcement actions against the Bank based on any other findings;

(c) instituting enforcement actions against the Bank's institution-affiliated parties based on the findings set forth in Article I of this Order, or any other findings; or

(d) utilizing the findings set forth in Article I of this Order in future enforcement actions against the Bank or its institution-affiliated parties to establish a pattern or the continuation of a pattern.

Further, nothing in the Stipulation or this Order shall affect any right of the Comptroller to determine and ensure compliance with the terms and provisions of the Stipulation or this Order.

(3) The terms of this Order, including this paragraph, are not subject to amendment or modification by any extraneous expression, prior agreements, or prior arrangements between the parties, whether oral or written.

IT IS SO ORDERED, this 6 day of September, 2016.

_//S//Greg Coleman_____

Greg Coleman
Deputy Comptroller
Large Bank Supervision

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

In the Matter of:	)	
	)	
Wells Fargo Bank, N.A. Sioux Falls, South Dakota	)	AA-EC-2016-67
	)	

STIPULATION AND CONSENT TO THE ISSUANCE OF AN ORDER FOR A CIVIL MONEY PENALTY

WHEREAS, the Office of the Comptroller of the Currency ("OCC"), based upon information derived from the exercise of its regulatory and supervisory responsibilities, intends to institute a civil money penalty proceeding against Wells Fargo Bank, N.A., Sioux Falls, South Dakota ("Bank"), pursuant to 12 U.S.C. § 1818(i), for the Bank's unsafe or unsound practices in its risk management and oversight of its sales practices, and the Bank's unsafe or unsound sales practices;

WHEREAS, in the interest of cooperation and to avoid additional costs associated with administrative and judicial proceedings with respect to the above matter, the Bank, through its duly elected and acting Board of Directors, has agreed to execute this Stipulation and Consent to the Issuance of an Order for a Civil Money Penalty ("Stipulation"), that is accepted by the OCC, through the duly authorized representative of the Comptroller of the Currency ("Comptroller");

NOW, THEREFORE, in consideration of the above premises, it is stipulated by the Bank that:

ARTICLE I

JURISDICTION

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

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

(3) The OCC is the "appropriate Federal banking agency" as that term is defined in 12 U.S.C. § 1813(q) and is therefore authorized to initiate and maintain this cease and desist action against the Bank pursuant to 12 U.S.C. § 1818(b).

ARTICLE II

CONSENT

(1) The Bank, without admitting or denying any wrongdoing, consents and agrees to issuance of the accompanying Consent Order for a Civil Money Penalty ("Consent Order") by the OCC.

(2) The terms and provisions of the Consent Order apply to the Bank and all of its subsidiaries, even though those subsidiaries are not named as parties to the Consent Order.

(3) The Bank consents and agrees that the Consent Order shall be deemed an "order issued with the consent of the depository institution" pursuant to 12 U.S.C. § 1818(h)(2), and consents and agrees that the Consent Order shall become effective upon its execution by the OCC through the Comptroller's duly authorized representative, and shall be fully enforceable by the Comptroller pursuant to 12 U.S.C. § 1818(i).

(4) Notwithstanding the absence of mutuality of obligation, or of consideration, or of a contract, the OCC may enforce any of the commitments or obligations herein undertaken by

the Bank under its supervisory powers, including 12 U.S.C. § 1818(i), and not as a matter of contract law. The Bank expressly acknowledges that neither the Bank nor the OCC has any intention to enter into a contract.

(5) The Bank declares that no separate promise or inducement of any kind has been made by the OCC, or by its officers, employees, or agents, to cause or induce the Bank to consent to the issuance of the Consent Order and/or execute this Stipulation.

(6) The Bank expressly acknowledges that no officer, employee, or agent of the OCC has statutory or other authority to bind the United States, the United States Treasury Department, the OCC, or any other federal bank regulatory agency or entity, or any officer, employee, or agent of any of those entities to a contract affecting the OCC's exercise of its supervisory responsibilities.

(7) The Consent Order constitutes a settlement of the civil money penalty proceeding against the Bank contemplated by the OCC, based on the practices described in the Comptroller's Findings set forth in Article I of the Consent Order. The OCC releases and discharges the Bank from all potential liability for a civil money penalty that has been or might have been asserted by the OCC based on the practices described in Article I of the Consent Order, to the extent known to the OCC as of the effective date of the Consent Order. Nothing in this Stipulation or the Consent Order, however, shall prevent the OCC from:

(a) Instituting enforcement actions, other than a civil money penalty, against the Bank based on the findings set forth in Article I of the Consent Order;

(b) Instituting enforcement actions against the Bank based on any other findings;

(c) Instituting enforcement actions against the Bank's institution-affiliated parties based on the findings set forth in Article I of the Consent Order, or any other findings; or

(d) Utilizing the findings set forth in Article I of the Consent Order in future enforcement actions against the Bank or its institution-affiliated parties to establish a pattern or the continuation of a pattern.

Further, nothing in this Stipulation or the Consent Order shall affect any right of the OCC to determine and ensure compliance with the terms and provisions of this Stipulation or the Consent Order.

ARTICLE III

WAIVERS

(1) The Bank, by executing this Stipulation and consenting to the Consent Order, waives:

(a) Any and all rights to the issuance of a Notice of Charges pursuant to 12 U.S.C. § 1818(i);

(b) Any and all procedural rights available in connection with the issuance of the Consent Order;

(c) Any and all rights to a hearing and a final agency decision pursuant to 12 U.S.C. § 1818(i, and 12 C.F.R. Part 19;

(d) Any and all rights to seek any type of administrative or judicial review of the Consent Order;

(e) Any and all claims for fees, costs, or expenses against the OCC, or any officer, employee, or agent of the OCC, related in any way to this

enforcement matter or the Consent Order, whether arising under common law or under the terms of any statute, including, but not limited to, the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412;

(f) Any and all rights to assert this proceeding, this Stipulation, consent to the issuance of the Consent Order, and/or the issuance of the Consent Order, as the basis for a claim of double jeopardy in any pending or future proceeding brought by the United States Department of Justice or any other governmental entity; and

(g) Any and all rights to challenge or contest the validity of the Consent Order.

ARTICLE IV

CLOSING

(1) The provisions of this Stipulation and the Consent Order shall not inhibit, estop, bar, or otherwise prevent the OCC from taking any other action affecting the Bank if, at any time, the OCC deems it appropriate to do so to fulfill the responsibilities placed upon it by the several laws of the United States of America.

(2) Nothing in this Stipulation or the Consent Order shall preclude any proceedings brought by the OCC to enforce the terms of the Consent Order, and nothing in this Stipulation or the Consent Order constitutes, nor shall the Bank contend that it constitutes, a release, discharge, compromise, settlement, dismissal, or resolution of any actions, or in any way affects any actions that may be or have been brought by any other representative of the United States or an agency thereof, including, without limitation, the United States Department of Justice.

(3) The terms of this Stipulation, including this paragraph, and of the Consent Order are not subject to amendment or modification by any extraneous expression, prior agreements or prior arrangements between the parties, whether oral or written.

IN TESTIMONY WHEREOF, the undersigned, authorized by the Comptroller as his representative, has hereunto set his hand on behalf of the Comptroller.

By: //S//Greg Coleman 9/6/16

Greg Coleman
Deputy Comptroller
Large Bank Supervision

Date

IN TESTIMONY WHEREOF, the undersigned, as the duly elected and acting Board of Directors of Wells Fargo Bank, N.A., Sioux Falls, South Dakota, have hereunto set their hands on behalf of the Bank.

//S//John G. Stumpf	Sept. 1, 2016
John G. Stumpf	Date
//S//Lloyd H. Dean	Sept. 1, 2016
Lloyd H. Dean	Date
//S//Enrique Hernandez, Jr.	Sept. 1, 2016
Enrique Hernandez, Jr.	Date
//S//Cynthia H. Milligan	Sept. 1, 2016
Cynthia H. Milligan	Date
//S//Federico F. Pena	Sept. 1, 2016
Federico F. Peña	Date
//S//James H. Quigley	Sept. 1, 2016
James H. Quigley	Date
//S//Stephen W. Sanger	Sept. 1, 2016
Stephen W. Sanger	Date

UNITED STATES OF AMERICA
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
2016-CFPB-0015

In the Matter of: **WELLS FARGO BANK, N.A.**	**CONSENT ORDER**

The Consumer Financial Protection Bureau (Bureau) has reviewed the sales practices of Wells Fargo Bank, N.A. (Respondent, as defined below) and determined that it has engaged in the following acts and practices: (1) opened unauthorized deposit accounts for existing customers and transferred funds to those accounts from their owners' other accounts, all without their customers' knowledge or consent; (2) submitted applications for credit cards in consumers' names using consumers' information without their knowledge or consent; (3) enrolled consumers in online-banking services that they did not request; and (4) ordered and activated debit cards using consumers' information without their knowledge or consent. The Bureau has concluded that such acts violate §§ 1031 and 1036(a)(1)(B) of the Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. §§ 5531 and 5536(a)(1)(B). Under §§ 1053 and 1055 of CFPA, 12 U.S.C. §§ 5563, 5565, the Bureau issues this Consent Order (Consent Order).

I
Jurisdiction

1. The Bureau has jurisdiction over this matter under §§ 1053 and 1055 of the CFPA, 12 U.S.C. §§ 5563, 5565.

II
Stipulation

2. Respondent has executed a "Stipulation and Consent to the Issuance of a Consent Order" (Stipulation), which is incorporated by reference and is accepted by the Bureau. By this Stipulation, Respondent has consented to the issuance of this Consent Order by the Bureau under §§ 1053 and 1055 of the CFPA, 12 U.S.C. §§ 5563, 5565, without admitting or denying the findings of facts and conclusions of law, except that Respondent admits the facts necessary to establish the Bureau's jurisdiction over Respondent and the subject matter of this action.

III
Definitions

3. The following definitions apply to this Consent Order:

a. "**Affected Consumers**" means any consumer subjected to any of the Improper Sales Practices.

b. "**Board**" means Respondent's duly-elected and acting Board of Directors.

c. "**California Enforcement Action**" means the lawsuit styled *People v. Wells Fargo & Co., et al.*, Los Angeles Superior Court, Case No. BC580778, filed by the Office of the Los Angeles City Attorney.

d. "**Community Bank Regional Bank Branch Network**" means the Respondent's retail-branch operations within Respondent's Regional Bank group.

e. "**Effective Date**" means the date on which this Order is issued.

f. "**Improper Sales Practices**" means any of the following in the Community Bank Regional Bank Branch Network:

(1) opening any account without the consumer's consent;

(2) transferring funds between a consumer's accounts without the consumer's consent;

(3) applying for any credit card without the consumer's consent;

(4) issuing any debit card without the consumer's consent; and

(5) enrolling any consumer in online-banking services without the consumer's consent.

g. "**Los Angeles City Attorney**" means the Office of the Los Angeles City Attorney.

h. "**Regional Director**" means the Regional Director for the West Region for the Office of Supervision for the Consumer Financial Protection Bureau, or his/her delegate.

i. "**Related Consumer Action**" means a private action by or on behalf of one or more consumers or an enforcement action by a governmental agency other than the California Enforcement Action, brought against Respondent based on substantially the same facts as described in Section IV of this Consent Order.

j. "**Relevant Period**" includes the period from January 1, 2011, to the Effective Date.

k. "**Respondent**" means Wells Fargo Bank, N.A. and its successors and assigns.

IV
Bureau Findings and Conclusions

The Bureau finds the following:

4. Respondent is a national bank headquartered in Sioux Falls, South Dakota. Respondent is an insured depository institution with assets greater than $10 billion within the meaning of 12 U.S.C. § 5515(a).

5. Respondent is a "covered person" under 12 U.S.C. § 5481(6).

6. During the Relevant Period, Respondent offered a broad array of consumer financial products and services, including mortgages, savings and checking accounts, credit cards, debit and ATM cards, and online-banking services.

7. Respondent sought to distinguish itself in the marketplace as a leader in "cross-selling" banking products and services to its existing customers.

8. Respondent set sales goals and implemented sales incentives, including an incentive-compensation program, in part to increase the number of banking products and services that its employees sold to its customers.

9. Thousands of Respondent's employees engaged in Improper Sales Practices to satisfy sales goals and earn financial rewards under Respondent's incentive-compensation program. During the Relevant Period, Respondent terminated roughly 5,300 employees for engaging in Improper Sales Practices.

10. Respondent's employees engaged in "simulated funding." To qualify for incentives that rewarded bankers for opening new accounts that were funded shortly after opening, Respondent's employees opened deposit accounts without consumers' knowledge or consent and then transferred funds from consumers' authorized accounts

to temporarily fund the unauthorized accounts in a manner sufficient for the employee to obtain credit under the incentive-compensation program.

11. Respondent's employees submitted applications for and obtained credit cards for consumers without the consumers' knowledge or consent.

12. Respondent's employees used email addresses not belonging to consumers to enroll consumers in online-banking services without their knowledge or consent.

13. Respondent's employees requested debit cards and created personal identification numbers (PINs) to activate them without the consumer's knowledge or consent.

14. During the Relevant Period, Respondent's employees opened hundreds of thousands of unauthorized deposit accounts and applied for tens of thousands of credit cards for consumers without consumers' knowledge or consent.

15. Respondent has performed an analysis to assess the scope of Improper Sales Practices that occurred between May 2011 and July 2015, including the number of potential instances of such practices.

Findings and Conclusions as to Unauthorized Deposit Accounts & Simulated Funding

16. Respondent's analysis concluded that its employees opened 1,534,280 deposit accounts that may not have been authorized and that may have been funded through simulated funding, or transferring funds from consumers' existing accounts without their knowledge or consent. That analysis determined that roughly 85,000 of those accounts incurred about $2 million in fees, which Respondent is in the process of refunding. The fees included overdraft fees on linked accounts the consumers already

had, monthly service fees imposed for failure to keep a minimum balance in the unauthorized account, and other fees.

17. Section 1036(a)(1)(B) of the CFPA prohibits "unfair" acts or practices. 12 U.S.C. § 5536(a)(1)(B). An act or practice is unfair if it causes or is likely to cause consumers substantial injury that is not reasonably avoidable and is not outweighed by countervailing benefits to consumers or to competition. 12 U.S.C. § 5531(c)(1).

18. By opening unauthorized deposit accounts and engaging in acts of simulated funding, Respondent caused and was likely to cause substantial injury to consumers that was not reasonably avoidable, because it occurred without consumers' knowledge, and was not outweighed by countervailing benefits to consumers or to competition.

19. Section 1036(a)(1)(B) of the CFPA prohibits "abusive" acts or practices. 12 U.S.C. § 5536(a)(1)(B). An act or practice is abusive if it materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service. 12 U.S.C. § 5531(d)(1). Additionally, an act or practice is abusive if it takes unreasonable advantage of the inability of the consumer to protect his or her interests in selecting or using a consumer financial product or service. 12 U.S.C. § 5531(d)(2)(B).

20. Respondent's acts of opening unauthorized deposit accounts and engaging in simulated funding materially interfered with the ability of consumers to understand a term or condition of a consumer financial product or service, as they had no or limited knowledge of those terms and conditions, including associated fees.

21. Additionally, Respondent's acts of opening unauthorized deposit accounts and engaging in simulated funding took unreasonable advantage of consumers' inability

to protect their interests in selecting or using consumer financial products or services, including interests in having an account opened only after affirmative agreement, protecting themselves from security and other risks, and avoiding associated fees.

22. Therefore, Respondent engaged in "unfair" and "abusive" acts or practices that violate §§ 1031(c)(1), (d)(1), (d)(2)(B), and 1036(a)(1)(B) of the CFPA. 12 U.S.C. §§ 5531(c)(1), (d)(1), (d)(2)(B), 5536(a)(1)(B).

Findings and Conclusions as to Unauthorized Credit Cards

23. Respondent's analysis concluded that its employees submitted applications for 565,443 credit-card accounts that may not have been authorized by using consumers' information without their knowledge or consent. That analysis determined that roughly 14,000 of those accounts incurred $403,145 in fees, which Respondent is in the process of refunding. Fees incurred by consumers on such accounts included annual fees and overdraft-protection fees, as well as associated finance or interest charges and other late fees.

24. Section 1036(a)(1)(B) of the CFPA prohibits "unfair" acts or practices. 12 U.S.C. § 5536(a)(1)(B). An act or practice is unfair if it causes or is likely to cause consumers substantial injury that is not reasonably avoidable and is not outweighed by countervailing benefits to consumers or to competition. 12 U.S.C. § 5531(c)(1).

25. By applying for and opening credit-card accounts using consumers' information without their knowledge or consent, Respondent caused and was likely to cause substantial injury that was not reasonably avoidable, because it occurred without consumers' knowledge, and was not outweighed by countervailing benefits to consumers or competition.

26. Section 1036(a)(1)(B) of the CFPA prohibits "abusive" acts or practices. 12 U.S.C. § 5536(a)(1)(B). An act or practice is abusive if it materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service. 12 U.S.C. § 5531(d)(1). Additionally, an act or practice is abusive if it takes unreasonable advantage of the consumer's inability to protect his or her interests in selecting or using a consumer financial product or service. 12 U.S.C. § 5531(d)(2)(B).

27. Respondent's acts of opening credit-card accounts using consumers' information without their knowledge or consent materially interfered with the ability of consumers to understand a term or condition of a consumer financial product or service, as they had no or limited knowledge of those terms and conditions, including associated fees.

28. Additionally, Respondent's acts of opening credit-card accounts using consumers' information without their knowledge or consent took unreasonable advantage of the consumers' inability to protect their interests in selecting or using a consumer financial product or service.

29. Therefore, Respondent engaged in "unfair" and "abusive" acts or practices that violate §§ 1031(c)(1), (d)(1), (d)(2)(B), and 1036(a)(1)(B) of the CFPA. 12 U.S.C. §§ 5531(c)(1), (d)(1), (d)(2)(B), 5536(a)(1)(B).

Findings and Conclusions as to Unauthorized Enrollment into Online-Banking Services

30. During the Relevant Period, Respondent's employees used email addresses not belonging to consumers to enroll consumers in online-banking services without their knowledge or consent.

31. Section 1036(a)(1)(B) of the CFPA prohibits "abusive" acts or practices. 12 U.S.C. § 5536(a)(1)(B). An act or practice is abusive if it takes unreasonable advantage of the consumer's inability to protect his or her interests in selecting or using a consumer financial product or service. 12 U.S.C. § 5531(d)(2)(B).

32. Respondent's acts of enrolling consumers in online-banking services without their knowledge or consent took unreasonable advantage of consumers' inability to protect their interests in selecting or using a consumer financial product or service, including interests in having these products or services activated only after affirmative agreement and protecting themselves from security and other risks.

33. Therefore, Respondent engaged in "abusive" acts or practices that violate §§ 1031(d)(2)(B) and 1036(a)(1)(B) of the CFPA. 12 U.S.C. §§ 5531(d)(2)(B), 5536(a)(1)(B).

Findings and Conclusions as to Unauthorized Debit Cards

34. During the relevant period, Respondent's employees requested debit cards and created PINs to activate them without consumers' knowledge or consent.

35. Section 1036(a)(1)(B) of the CFPA prohibits "abusive" acts or practices. 12 U.S.C. § 5536(a)(1)(B). An act or practice is abusive if it takes unreasonable advantage of the consumer's inability to protect his or her interests in selecting or using a consumer financial product or service. 12 U.S.C. § 5531(d)(2)(B).

36. Respondent's acts of issuing debit cards to consumers without their knowledge or consent took unreasonable advantage of consumers' inability to protect their interests in selecting or using a consumer financial product or service. 12 U.S.C. § 5531(d)(2)(B).

37. Therefore, Respondent engaged in "abusive" acts that violate §§ 1031(d)(2)(B) and 1036(a)(1)(B) of the CFPA. 12 U.S.C. §§ 5531(d)(2)(B), 5536(a)(1)(B).

ORDER

V
Conduct Provisions

IT IS ORDERED, under §§ 1053 and 1055 of the CFPA, that:

38. Respondent and its officers, agents, servants, employees, and attorneys who have actual notice of this Consent Order, whether acting directly or indirectly, may not violate §§ 1031 and 1036 of the CFPA, 12 U.S.C. §§ 5531, 5536, by engaging in Improper Sales Practices.

VI
Independent Consultant's Report and Compliance Plan

IT IS FURTHER ORDERED that:

39. Within 45 days of the Effective Date, Respondent must select an independent consultant with specialized experience in consumer-finance-compliance issues to conduct an independent review of Respondent's sales practices within the Community Bank Regional Bank Branch Network related to deposit accounts, credit-card accounts, unsecured lines of credit, and related products and services (Independent Consultant's Review). Respondent must submit the name of the independent consultant to the Regional Director for non-objection. Upon receipt of non-objection from the Regional Director, the Bank must retain the independent consultant. The Independent Consultant's Review must assess whether Respondent's current policies and procedures are reasonably designed to ensure that Respondent's sales practices comply with all applicable Federal consumer financial laws as defined in 12 U.S.C. § 5481(14), and that Respondent's employees do not engage in Improper Sales Practices.

40. The Independent Consultant's Review must include but will not be limited to:

a. whether Respondent's employees are required to undergo training reasonably designed to prevent Improper Sales Practices and other sales-integrity violations; whether such training is adequate, complete, and timely updated, provided when employees join Respondent, and repeated at sufficient recurring intervals during their employment to reinforce such training; whether training records are complete, accurate and adequate; and whether employees are informed of an obligation to report all sales-integrity issues internally through an "ethics hotline" or similar mechanism;

b. whether Respondent's monitoring policies and procedures ensure that Respondent monitors employees' sales practices proactively, and that Respondent devotes sufficient personnel and resources to monitor those practices appropriately;

c. whether Respondent has adequate policies and procedures for (i) receiving, retaining, and addressing consumer inquiries or complaints; (ii) receiving, retaining, and addressing employee allegations of Improper Sales Practices or any other allegations of sales-integrity violations; (iii) tracking and addressing indicators of potential Improper Sales Practices or any other sales-integrity violations; and (iv) identifying and remediating consumers for Improper Sales Practices or other sales-integrity violations identified after the Effective Date, as well as for correcting any related systemic issues identified after the Effective Date;

d. whether Respondent's policies and procedures related to sales of deposit accounts, credit cards, unsecured lines of credit, and related products and services are reasonably designed to ensure consumer consent is obtained before any such product is sold or issued to a consumer. The Independent Consultant's Review

must include, but not be limited to, whether Respondent has adequate policies and procedures for capturing and retaining consumer signatures and other evidence of consent for such products and services, for providing a grace period before assessing fees on any deposit account, and for closing accounts in which there is no customer-initiated activity during the grace period without assessing fees; and

e. whether Respondent's performance-management and sales goals for its employees are consistent with the objective of preventing Improper Sales Practices and other sales-integrity violations.

41. Within 180 days of the retention of the independent consultant, the independent consultant must prepare a written report (Independent Consultant's Report) detailing the findings of the review and provide the Independent Consultant's Report to the Board or a committee thereof.

42. Within 90 days of receiving the Independent Consultant's Report, the Board or a committee thereof must:

a. In consultation with the independent consultant, develop a plan (Compliance Plan) to: (i) correct any deficiencies identified, and (ii) implement any recommendations or explain in writing why a particular recommendation is not being implemented; and

b. submit the Independent Consultant's Report and the Compliance Plan to the Regional Director.

43. The Regional Director may, in his or her discretion, make a determination of non-objection to the Compliance Plan or direct Respondent to revise it. If the Regional Director directs Respondent to revise the Compliance Plan, the Board or a committee thereof must make the requested revisions to the Compliance Plan, have the

independent consultant review the revised Compliance Plan for adequacy, accuracy, effectiveness, and completeness, and resubmit the revised Compliance Plan and the independent consultant's review of the revised Compliance Plan to the Regional Director within 60 days of the date that the Regional Director directs the Company to revise the Compliance Plan. The Regional Director may, in his or her discretion, consult with the Los Angeles City Attorney in arriving at a determination of non-objection to the Compliance Plan or direction to Respondent to revise the Compliance Plan.

44. After receiving notification that the Regional Director has made a determination of non-objection to the Compliance Plan, Respondent must implement and adhere to the steps, recommendations, deadlines, and timeframes outlined in the Compliance Plan and have the independent consultant review and assess compliance with the Compliance Plan and validate that the Compliance Plan has been properly executed; the results of such review should be submitted to the Regional Director within 30 days after completion.

VII
Role of the Board

IT IS FURTHER ORDERED that:

45. The Board or a committee thereof must review all submissions (including plans, reports, programs, policies, and procedures) required by this Consent Order before submission to the Bureau.

46. Although this Consent Order requires Respondent to submit certain documents for the review or non-objection by the Regional Director, the Board will have the ultimate responsibility for proper and sound management of Respondent and for

ensuring that Respondent complies with Federal consumer financial law and this Consent Order.

47. In each instance that this Consent Order requires the Board or a committee thereof to ensure adherence to, or perform certain obligations of Respondent, the Board or a committee thereof must:

a. authorize whatever actions are necessary for Respondent to fully comply with the Consent Order;

b. require timely reporting by management to the Board or a committee thereof on the status of compliance obligations; and

c. require timely and appropriate corrective action to remedy any material non-compliance with any failures to comply with directives from the Board or a committee thereof related to this Section.

VIII
Order to Pay Redress

IT IS FURTHER ORDERED that:

48. Respondent has retained the services of an independent third-party consulting firm (which is not the independent consultant referred to in Section VI) to identify consumers who have incurred fees or other charges as a result of Improper Sales Practices.

49. Within 10 days of the Effective Date, Respondent must reserve or deposit into a segregated deposit account an amount not less than $5 million, for the purpose of providing redress to Affected Consumers as required by this Section.

50. Within 90 days of the Effective Date, Respondent must submit to the Regional Director for review and non-objection the comprehensive written plan for

providing redress consistent with this Consent Order (Redress Plan). The Regional Director may, in his or her discretion, make a determination of non-objection to the Redress Plan or direct Respondent to revise it. If the Regional Director directs Respondent to revise the Redress Plan, Respondent must make the revisions and resubmit the Redress Plan to the Regional Director within 45 days. After receiving notification that the Regional Director has made a determination of non-objection to the Redress Plan, Respondent must implement and adhere to the steps, recommendations, deadlines, and timeframes outlined in the Redress Plan.

51. The Redress Plan must:

a. identify all Affected Consumers, except insofar as it is impracticable to do so, as well as the types and amounts of any fees or charges incurred by Affected Consumers as a result of the Improper Sales Practices, and state the means by which Affected Consumers have been identified and by which the fees or charges they incurred have been calculated;

b. describe procedures by which Respondent will notify Affected Consumers who were subject to any of the Improper Sales Practices described in paragraph 3.f of this Order, including the form of the notification such consumers will receive;

c. describe the process for providing redress to Affected Consumers and identify the dollar amount of redress for each category of Affected Consumers;

d. detail how Respondent will locate Affected Consumers for payment of redress, and the steps Respondent will take with respect to consumers whose redress payments are returned as undeliverable or not cashed within a prescribed time period;

e. state the manner in which redress will be provided to each such Affected Consumer, and the form of redress; and

f. provide the form of the letter or notice that will be sent to such Affected Consumers notifying them of the redress.

52. Within 120 days after completing the Redress Plan, Respondent's Internal Audit department must review and assess compliance with the terms of the Redress Plan (Redress Plan Review) and validate that the Redress Plan has been properly executed.

53. Within 30 days after completion of the Redress Plan Review, Respondent must prepare and submit to the Regional Director a report summarizing the results of the Redress Plan Review.

54. After completing the Redress Plan, if the amount of redress provided to Affected Consumers is less than $5 million, Respondent may recoup any remaining funds up to the amount Respondent paid to Affected Consumers before the submission of the Redress Plan as redress for fees or charges those Affected Consumers incurred as a result of the Improper Sales Practices. Respondent must, within 30 days of the completion of the Redress Plan, pay to the Bureau, by wire transfer to the Bureau or to the Bureau's agent and according to the Bureau's wiring instructions, any remaining funds not recouped by Respondent under this paragraph.

55. The Bureau may use these remaining funds to pay additional redress to Affected Consumers. Upon receiving a written request from Respondent, the Bureau may provide Respondent with information concerning additional redress. If the Bureau determines, in its sole discretion, that additional redress is wholly or partially impracticable or otherwise inappropriate, or if funds remain after the additional redress

is completed, the Bureau will deposit any remaining funds in the U.S. Treasury as disgorgement. Respondent will have no right to challenge any actions that the Bureau or its representatives may take under this Section.

56. Respondent may not condition the payment of any redress to any Affected Consumer under this Order on that Affected Consumer waiving any right.

IX
Order to Pay Civil Money Penalties

IT IS FURTHER ORDERED that:

57. Under § 1055(c) of the CFPA, 12 U.S.C. § 5565(c), by reason of the violations of law described in Section IV of this Consent Order, and taking into account the factors in 12 U.S.C. § 5565(c)(3), Respondent must pay a civil money penalty of $100 million to the Bureau.

58. Within 10 days of the Effective Date, Respondent must pay the civil money penalty by wire transfer to the Bureau or to the Bureau's agent in compliance with the Bureau's wiring instructions.

59. The civil money penalty paid under this Consent Order will be deposited in the Civil Penalty Fund of the Bureau as required by § 1017(d) of the CFPA, 12 U.S.C. § 5497(d).

60. Respondent must treat the civil money penalty paid under this Consent Order as a penalty paid to the government for all purposes. Regardless of how the Bureau ultimately uses those funds, Respondent may not:

a. claim, assert, or apply for a tax deduction, tax credit, or any other tax benefit for any civil money penalty paid under this Consent Order; or

b. seek or accept, directly or indirectly, reimbursement or indemnification from any source, including but not limited to payment made under any insurance policy, with regard to any civil money penalty paid under this Consent Order.

61. To preserve the deterrent effect of any civil money penalty in the California Enforcement Action or any Related Consumer Action, Respondent may not argue that Respondent is entitled to, nor may Respondent benefit by, any offset or reduction of any compensatory monetary remedies imposed in the California Enforcement Action or any Related Consumer Action because of the civil money penalty paid in this action (Penalty Offset). If the court in the California Enforcement Action or any Related Consumer Action grants such a Penalty Offset, Respondent must, within 30 days after entry of a final order granting the Penalty Offset, notify the Bureau, and pay the amount of the Penalty Offset to the U.S. Treasury. Such a payment will not be considered an additional civil money penalty and will not change the amount of the civil money penalty imposed in this action.

X
Additional Monetary Provisions

IT IS FURTHER ORDERED that**:**

62. In the event of any default on Respondent's obligations to make payment under this Consent Order, interest, computed under 28 U.S.C. § 1961, as amended, will accrue on any outstanding amounts not paid from the date of default to the date of payment, and will immediately become due and payable.

63. Respondent must relinquish all dominion, control, and title to the funds paid to the fullest extent permitted by law and no part of the funds may be returned to Respondent.

64. Under 31 U.S.C. § 7701, Respondent, unless it already has done so, must furnish to the Bureau its taxpayer identifying numbers, which may be used for purposes of collecting and reporting on any delinquent amount arising out of this Consent Order.

65. Within 30 days of the entry of a final judgment, consent order, or settlement in the California Enforcement Action or any Related Consumer Action, Respondent must notify the Regional Director of the final judgment, consent order, or settlement in writing. That notification must indicate the amount of redress, if any, that Respondent paid or is required to pay to consumers and describe the consumers or classes of consumers to whom that redress has been or will be paid.

XI
Reporting Requirements

IT IS FURTHER ORDERED that:

66. Respondent must notify the Bureau of any development that may affect compliance obligations arising under this Consent Order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor company; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Consent Order; the filing of any bankruptcy or insolvency proceeding by or against Respondent; or a change in Respondent's name or address. Respondent must provide this notice, if practicable, at least 30 days before the development, but in any case no later than 14 days after the development.

67. Within 7 days of the Effective Date, Respondent must designate at least one telephone number and email, physical, and postal address as points of contact, which the Bureau may use to communicate with Respondent.

68. Respondent must report any change in the information required to be submitted under Paragraph 67 at least 30 days before the change or as soon as practicable after the learning about the change, whichever is sooner.

69. Within 90 days of the Effective Date, and again at least semi-annually until the actions under this Consent Order have been completed, Respondent must submit to the Regional Director an accurate written compliance progress report (Compliance Report) that has been approved by the Board or a committee thereof, which, at a minimum:

a. describes in detail the manner and form in which Respondent has complied with this Order;

b. separately lists each corrective action required by this Consent Order, the Compliance Plan, and the Redress Plan;

c. Describes the current status of each corrective action taken and the required, actual, and anticipated completion date for each corrective action; and

d. attaches a copy of each Order Acknowledgment obtained under Section XII, unless previously submitted to the Bureau.

XII
Order Distribution and Acknowledgment

IT IS FURTHER ORDERED that,

70. Within 30 days of the Effective Date, Respondent must deliver a copy of this Consent Order to each of its board members and executive officers, as well as to any managers, employees, or other agents and representatives who have responsibilities related to the subject matter of the Consent Order.

71. For 5 years from the Effective Date, Respondent must deliver a copy of this Consent Order to any business entity resulting from any change in structure referred to in Section XI, any future board members and executive officers, as well as to any managers, employees, or other agents and representatives who will have responsibilities related to the subject matter of this Consent Order before they assume their responsibilities.

72. Respondent must secure a signed and dated statement acknowledging receipt of a copy of this Consent Order, ensuring that any electronic signatures comply with the requirements of the E-Sign Act, 15 U.S.C. § 7001 et seq., within 30 days of delivery, from all persons receiving a copy of this Consent Order under this Section.

XIII
Recordkeeping

IT IS FURTHER ORDERED that

73. Respondent must create or, if already created, retain for at least 5 years from the Effective Date the following business records:

a. all documents and records necessary to demonstrate full compliance with each provision of this Consent Order, including all submissions to the Bureau.

b. all documents and records pertaining to the Redress Plan, described in Section VIII above.

74. Respondent must retain the documents identified in Paragraph 73 for the duration of the Consent Order.

75. Respondent must make the documents identified in Paragraph 73 available to the Bureau upon the Bureau's request.

XIV
Notices

IT IS FURTHER ORDERED that:

76. Unless otherwise directed in writing by the Bureau, Respondent must provide all submissions, requests, communications, or other documents relating to this Consent Order in writing, with the subject line, "In re Wells Fargo Bank, N.A., File No. 2016-CFPB-0015," and send them as follows:

a. via email to WestRegion@cfpb.gov; and

b. via overnight courier (not the U.S. Postal Service) as follows: Regional Director, CFPB West Region, 301 Howard Street, 12th Floor, San Francisco, CA 94105.

XV
Cooperation with the Bureau

IT IS FURTHER ORDERED that:

77. Respondent must cooperate fully to help the Bureau determine the identity and location of, and the amount of injury sustained by, each Affected Consumer. Respondent must provide such information in its or its agents' possession or control within 14 days of receiving a written request from the Bureau.

78. Respondent must cooperate fully with the Bureau in this matter and in any investigation related to or associated with the conduct described in Section IV. Respondent must provide truthful and complete information, evidence, and testimony and Respondent must cause Respondent's officers, employees, representatives, or agents to appear for interviews, discovery, hearings, trials, and any other proceedings that the Bureau may reasonably request upon 5 days written notice, or other reasonable

notice, at such places and times as the Bureau may designate, without the service of compulsory process.

XVI
Compliance Monitoring

IT IS FURTHER ORDERED that, to monitor Respondent's compliance with this Consent Order:

79. Within 30 days of receipt of a written request from the Bureau, Respondent must submit additional Compliance Reports or other requested information, which must be made under penalty of perjury; provide sworn testimony; or produce documents.

80. Respondent must permit Bureau representatives to interview any employee or other person affiliated with Respondent who has agreed to such an interview. The person interviewed may have counsel present.

81. Nothing in this Consent Order will limit the Bureau's lawful use of civil investigative demands under 12 C.F.R. § 1080.6 or other compulsory process.

XVII
Modifications to Non-Material Requirements

IT IS FURTHER ORDERED that:

82. Respondent may seek a modification to non-material requirements of this Consent Order (e.g., reasonable extensions of time and changes to reporting requirements) by submitting a written request to the Regional Director.

83. The Regional Director may, in his or her discretion, modify any non-material requirements of this Consent Order (e.g., reasonable extensions of time and changes to reporting requirements) if he or she determines that good cause justifies the modification. Any such modification by the Regional Director must be in writing.

XVIII
Administrative Provisions

84. The provisions of this Consent Order do not bar, estop, or otherwise prevent the Bureau, or any other governmental agency, from taking any other action against Respondent, except as described in Paragraph 85.

85. The Bureau releases and discharges Respondent from all potential liability for law violations that the Bureau has or might have asserted based on the practices described in Section IV of this Consent Order, to the extent such practices occurred before the Effective Date and the Bureau knows about them as of the Effective Date. The Bureau may use the practices described in this Consent Order in future enforcement actions against Respondent and its affiliates, including, without limitation, to establish a pattern or practice of violations or the continuation of a pattern or practice of violations or to calculate the amount of any penalty. This release does not preclude or affect any right of the Bureau to determine and ensure compliance with the Consent Order, or to seek penalties for any violations of the Consent Order.

86. This Consent Order is intended to be, and will be construed as, a final Consent Order issued under § 1053 of the CFPA, 12 U.S.C. § 5563, and expressly does not form, and may not be construed to form, a contract binding the Bureau or the United States.

87. This Consent Order will terminate 5 years from the Effective Date or 5 years from the most recent date that the Bureau initiates an action alleging any violation of the Consent Order by Respondent. If such action is dismissed or the relevant adjudicative body rules that Respondent did not violate any provision of the Consent Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the

Consent Order will terminate as though the action had never been filed. The Consent Order will remain effective and enforceable until such time, except to the extent that any provisions of this Consent Order have been amended, suspended, waived, or terminated in writing by the Bureau or its designated agent.

88. Calculation of time limitations will run from the Effective Date and be based on calendar days, unless otherwise noted.

89. Should Respondent seek to transfer or assign all or part of its operations that are subject to this Consent Order, Respondent must, as a condition of sale, obtain the written agreement of the transferee or assignee to comply with all applicable provisions of this Consent Order.

90. The provisions of this Consent Order will be enforceable by the Bureau. For any violation of this Consent Order, the Bureau may seek to impose the maximum amount of civil money penalties allowed under § 1055(c) of the CFPA, 12 U.S.C. § 5565(c). In connection with any attempt by the Bureau to enforce this Consent Order in federal district court, the Bureau may serve Respondent wherever Respondent may be found and Respondent may not contest that court's personal jurisdiction over Respondent.

91. This Consent Order and the accompanying Stipulation contain the complete agreement between the parties. The parties have made no promises, representations, or warranties other than what is contained in this Consent Order and the accompanying Stipulation. This Consent Order and the accompanying Stipulation supersede any prior oral or written communications, discussions, or understandings.

92. Nothing in this Consent Order or the accompanying Stipulation may be construed as allowing Respondent, its Board, officers, or employees to violate any law, rule, or regulation.

IT IS SO ORDERED, this 4th day of September, 2016.

Richard Cordray

Richard Cordray
Director
Consumer Financial Protection Bureau

Andrew M. Cuomo
Governor

Maria T. Vullo
Superintendent

TO: Chief Executive Officers of NYS Chartered Banking Institutions; Managers of NYS Licensed Branches & Agencies of Foreign Banking Organizations

FROM: Maria T. Vullo, Superintendent of Financial Services

RE: Guidance on Incentive Compensation Arrangements

DATE: October 11, 2016

In light of the recent joint enforcement action by the Office of the Comptroller of the Currency, the Consumer Financial Protection Bureau, and the Los Angeles City Attorney's Office against Wells Fargo Bank, the New York State Department of Financial Services (the "Department") is issuing this guidance to its regulated banking institutions to emphasize that incentive compensation arrangements must be devised, if at all, so that employees are not provided incentives to engage in unacceptable practices or conduct.

The Wells Fargo action highlights the fact that misaligned incentive compensation arrangements, inappropriate sales practices, lack of formalized governance and effective oversight of sales practices, and the failure of internal control functions to identify risks and shortcomings at a bank may lead to disastrous outcomes for consumers, and for the bank from a safety and soundness and reputational risk perspective.

When broad organizational strategies and goals at a bank, such as maximizing profits by increasing the number of product relationships per customer, factor into individual performance through key performance indicators, coupled with incentive compensation arrangements tied to such performance indicators, without effective risk management, oversight governance and control, employees are tempted to resort to gaming these key performance indicators for personal advantage to the detriment of consumers.

Inappropriate sales practices, driven by misaligned incentive compensation arrangements, and enabled by weak risk management and controls, undermine the basic trust that underlie the relationship between a bank and its customers, adversely impact safety and soundness, and harm consumers. In fact, flawed compensation practices in the financial industry were one of the factors that contributed to the financial crisis that began in 2007.

Incentive compensation arrangements that encourage or foster inappropriate corporate practices or bad behavior should have no place in our banking system.

Accordingly, the Department advises all regulated banking institutions that no incentive compensation may be tied to employee performance indicators, such as the number of accounts opened, or the number of products sold per customer, without effective risk management, oversight and control.

In addition, incentive compensation arrangements at our banking institutions must, at a minimum, meet the following principles[1]:

- **Balance Between Risks and Rewards:** Appropriately balance risk and financial results in a manner that does not encourage employees to expose their organizations to imprudent risks;
- **Effective Controls and Risk Management:** A banking institution's risk management processes and internal controls must reinforce and support the development and maintenance of any incentive compensation arrangements: and
- **Effective Corporate Governance:** Incentive compensation arrangements must be supported by strong corporate governance, including active and effective oversight by the organization's board of directors.

Particular attention should be given to controls around cross selling or referral bonus arrangements as such arrangements have inherent risks, including the possibility of conflicts of interest and inexperienced or unlicensed personnel selling, or supervising the sale of, affiliates' products.

Misaligned incentive compensation arrangements and unacceptable corporate or individual conduct that result in consumer harm or other unsafe and unsound practices will be acted upon by the Department. The Department will conduct supervisory review of incentive compensation arrangements during the Department's regular risk focused examination process, including the review of processes in place in identifying and deterring misconduct, participation of frontline business units, effective risk management and internal audit, and effective oversight of the board of directors. Banking institutions are expected to maintain records that document the structure and approval process of their incentive compensation arrangements, as well as the related risk management and oversight of such arrangements, for the Department's examination.

For further information, please contact your relationship manager or point of contact at the Department.

[1] Based on the Interagency Guidance on Sound Incentive Compensation Policies issued in 2010 jointly by the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, and the Office of Thrift Supervision.

CFPB ISSUES CONSENT ORDER TO NATIONAL BANK OVER ACCOUNT OPERATIONS

Posted on September 9th, 2016 in Banking, Federal Issues By BuckleySandler

On September 8, the CFPB issued a consent order to a national bank to resolve allegations that its employees opened deposit and credit card accounts for consumers without obtaining consent to do so. According to the CFPB's consent order, the respondent implemented an incentive compensation program under which employees "engaged in Improper Sales Practices to satisfy goals and earn financial rewards." The CFPB alleges that the bank's employees' Improper Sales Practices were unfair and abusive. Specifically, the consent order alleges that the employees, possibly without consumers' knowledge or without their consent, (i) opened more than 1.5 million deposit accounts and subsequently transferred money from consumers' existing accounts to fund the newly opened accounts; (ii) submitted approximately 565,000 credit card account applications on behalf of consumers, with consumers consequently incurring late, annual, and over-draft fees on such accounts; (iii) issued debit cards and created personal identification numbers to activate the cards; and (iv) enrolled consumers in online-banking services. Pursuant to the consent order, the bank, among other things, must pay a civil penalty of $100 million and an expected $2.5 million in consumer redress.

NYDFS ISSUES NEW GUIDANCE ON BANKS' INCENTIVE COMPENSATION ARRANGEMENTS

Posted on October 14th, 2016 in Banking, State Issues By BuckleySandler

On October 11, the New York Department of Financial Services (NYDFS) issued new guidance regarding incentive compensation arrangements, advising "all regulated banking institutions that no incentive compensation may be tied to employee performance indicators, such as the number of accounts opened, or the number of products sold per customer, without effective risk management, oversight and control." At a minimum, the guidance requires that a bank's incentive compensation arrangement address the following principles: (i) balance between risks and rewards; (ii) effective controls and risk management; and (iii) effective corporate governance. NYDFS stated that a bank's lack of compliance with the guidance will be reflected in its regulatory examination rating and may result in additional regulatory action.

The NYDFS's recently released guidance comes in the wake of a September action taken jointly by the OCC and the CFPB over a bank's alleged sales practices under which, in an effort to meet sales goals and earn financial rewards under the bank's incentive compensation program, employees purportedly opened deposit and credit card accounts for consumers without obtaining those consumers' consent.

Consumer Financial Protection Bureau

1700 G Street NW, Washington, DC 20552

CFPB Compliance Bulletin 2016-03

Date: November 28, 2016
Subject: Detecting and Preventing Consumer Harm from Production Incentives

Financial services companies, including entities supervised by the Consumer Financial Protection Bureau (CFPB or Bureau), may accomplish business objectives through programs that tie outcomes to certain benchmarks, both required and optional. Companies may apply these production incentives, including sales and other incentives, ("incentives") to employees or service providers or both. The risks these incentives may pose to consumers are significant and both the intended and unintended effects of incentives can be complex, which makes this subject worthy of more careful attention by institutional leadership, compliance officers, and regulators alike. We thus will continue to invite further dialogue and discussion around the issues addressed in this Bulletin.

The Bureau acknowledges that incentives have been common across many economic sectors, including the market for consumer financial products and services. When properly implemented and monitored, reasonable incentives can benefit all stakeholders and the financial marketplace as a whole. For instance, companies may be able to attract and retain high-performing employees to enhance their overall competitive performance. Consumers may also benefit if these programs lead to improved customer service or introduce them to products or services that are beneficial to their financial interests.

Such incentives can affect a wide range of outcomes for employees or service providers, from their compensation levels to whether they will continue to be employed or retained at all. Incentives are found in many markets for consumer financial products and services, and span the life cycle from marketing to sales, servicing, and collection. Common examples include sales or referrals of new products or services to existing consumers ("cross-selling"), sales of products or services to new customers, sales at higher prices where pricing discretion exists, quotas for customer calls completed, and collections benchmarks.

This Bulletin compiles guidance the CFPB has already given in other contexts and highlights examples from the CFPB's supervisory and enforcement experience in which incentives contributed to substantial consumer harm. It also describes compliance management steps that supervised entities should take to mitigate risks posed by incentives.

A. Risks to Consumers from Incentives

Despite their potential benefits, incentive programs can pose risks to consumers, especially when they create an unrealistic culture of high-pressure targets. When such programs are not carefully and properly implemented and monitored, they may create incentives for employees or service providers to pursue overly aggressive marketing, sales, servicing, or collections tactics. Through its supervisory and enforcement programs, the CFPB has taken action where employees have opened accounts or enrolled consumers in services without consent or where

employees or service providers have misled consumers into purchasing products the consumers did not want, were unaware would harm them financially, or came with an unexpected ongoing periodic fee.

Depending on the facts and circumstances, such incentives may lead to outright violations of Federal consumer financial law[1] and other risks to the institution, such as public enforcement, supervisory actions, private litigation, reputational harm, and potential alienation of existing and future customers. Specific examples of problems include:

- Sales goals may encourage employees, either directly or indirectly, to open accounts or enroll consumers in services without their knowledge or consent. Depending on the type of account, this may further result in, for example:
    - Improperly incurred fees;
    - Improper collections activities; and/or
    - Negative effects on consumer credit scores.
- Sales benchmarks may encourage employees or service providers to market a product deceptively to consumers who may not benefit from or even qualify for it;
- Paying compensation based on the terms or conditions of transactions (such as interest rate) may encourage employees or service providers to overcharge consumers, to place them in less favorable products than they qualify for, or to sell them more credit or services than they had requested or needed;
- Paying more compensation for some types of transactions than for others that were or could have been offered to meet consumer needs, which could lead employees or service providers to steer consumers to transactions not in their interests; and
- Unrealistic quotas to sign consumers up for financial services may incentivize employees to achieve this result without actual consent or by means of deception.

Whether conduct like that described in this Bulletin violates Federal consumer financial law will depend on all relevant facts related to the practices encouraged by the incentives. Further detail on some of the Bureau's work and findings in these areas is recapped below:

Credit Card Add-On Matters

To date, the CFPB has resolved 12 different cases involving improper practices to market credit card add-on products or to retain consumers once enrolled in these products.[2] The Bureau notes that incentives frequently enhanced the risk that banks would engage in such improper practices. In some cases, employees or service providers received incentives, and a lack of proper controls allowed deceptive marketing practices to continue unchecked for many years. Tapes of sales calls showed that employees and service providers deviated from the prepared call scripts in order to market the add-on products more aggressively, and often deceptively, to sign up more consumers. In all these matters, the companies' compliance monitoring, vendor

[1] Selected examples of these violations previously identified by the Bureau include the Dodd-Frank Act's prohibition of unfair, deceptive, and/or abusive acts or practices (UDAAPs) (Dodd-Frank Act, §§ 1031 & 1036(a), codified at 12 USC §§ 5531 & 5536(a); the Electronic Fund Transfer Act (EFTA), as implemented by Regulation E (15 USC § 1693 *et seq*.; 12 CFR Part 1005); the Fair Credit Reporting Act, as implemented by Regulation V (15 USC § 1681-1681x; 12 CFR Part 1022); the Truth in Lending Act (TILA), as implemented by Regulation Z (15 USC § 1601 *et seq*.; 12 CFR Part 1026); and the Fair Debt Collection Practices Act (15 USC § 1692-1692p).

[2] For more information on all of the matters noted in this Bulletin, please refer to the Bureau's website at http://www.consumerfinance.gov/policy-compliance/enforcement/actions/.

management, and quality assurance programs failed to prevent, identify, or correct these practices in a timely manner.

Overdraft Opt-in Matters

Incentives played a role in at least one matter where consumers were deceived into opting in to overdraft services. The Bureau found that, as a result of incentives for hitting specific targets, a bank's telemarketing service provider had deceptively marketed overdraft services and enrolled certain bank consumers in those services without their consent.

Unfair and Abusive Sales Practices

In another public enforcement action, a Bureau investigation revealed that thousands of bank employees had opened unauthorized deposit and credit card accounts to satisfy sales goals and earn financial rewards under the bank's incentives. Specifically, the Bureau found that employees engaged in "simulated funding" by opening hundreds of thousands of deposit accounts without consumers' knowledge or consent, which caused consumers to incur improper fees. The Bureau also found that employees issued tens of thousands of unauthorized credit cards that incurred improper fees, opened debit cards and created PINs to activate them without consumers' knowledge or consent, and enrolled consumers in online banking services using false email addresses.

B. The CFPB's Expectations

The CFPB expects supervised entities that choose to utilize incentives to institute effective controls for the risks these programs may pose to consumers, including oversight of both employees and service providers involved in these programs. As the CFPB has emphasized repeatedly, a robust compliance management system (CMS) is necessary to detect and prevent violations of Federal consumer financial law.[3] An entity's CMS should reflect the risk, nature, and significance of the incentive programs to which they apply. Accordingly, the strictest controls will be necessary where incentives concern products or services less likely to benefit consumers or that have a higher potential to lead to consumer harm, reward outcomes that do not necessarily align with consumer interests, or implicate a significant proportion of employee compensation. While the CFPB does not mandate any particular CMS structure and recognizes that CMS structures may appropriately vary based on the size and complexity of an organization, the Bureau's supervisory experience has found that an effective CMS commonly has the following components:

- Board of directors and management oversight;
- Compliance program, which includes:
    - Policies and procedures;
    - Training; and
    - Monitoring and corrective action;
- Consumer complaint management program; and
- Independent compliance audit.

[3] Supervision and Examination Manual: Compliance Management Review, *available at* http://www.consumerfinance.gov/policy-compliance/guidance/supervision-examinations/; Supervisory Highlights, multiple editions, *available at* http://www.consumerfinance.gov/policy-compliance/guidance/supervisory-highlights/.

To limit incentives from leading to violations of law, supervised entities should take steps to ensure their CMS is effective. These steps may include, but are not limited to:

- Board of directors and management oversight: Fostering a culture of strong customer service related to incentives. In product sales, for example, ensuring that consumers are only offered products likely to benefit their interests;
    - Board members and senior management should consider not only the outcomes these programs seek to achieve, but also how they may incidentally incentivize outcomes that harm consumers. They should authorize compliance personnel to design and implement CMS elements that address both intended and unintended outcomes, and provide adequate resources to do so.
    - The "tone from the top" should empower all employees to report suspected incidents of improper behavior without fear of retaliation, providing easily accessible means to do so.
- Policies and procedures: Ensuring that the policies and procedures for incentives contain:
    - Employee sales/collections quotas that, if a part of an entity's incentive program, are transparent to employees and reasonably attainable;
    - Clear controls for managing the risk inherent in each stage of the product life cycle (as applicable): marketing, sales (including account opening), servicing, and collections;
    - Mechanisms to identify potential conflicts of interest posed for supervisory personnel who are covered by incentives but also are responsible for monitoring the quality of customer treatment and customer satisfaction; and
    - Fair and independent processes for investigating reported issues of suspected improper behavior.
- Training: Implementing comprehensive training that addresses:
    - Expectations for incentives, including standards of ethical behavior;
    - Common risky behaviors for employees and service providers to foster greater awareness of primary risk areas;
    - Terms and conditions of the institution's products and services so that they can be effectively described to consumers; and
    - Regulatory and business requirements for obtaining and maintaining evidence of consumer consent.
- Monitoring: Designing overall compliance monitoring programs that track key metrics – and outliers – that may indicate incentives are leading to improper behavior by employees or service providers. Examples of possible monitoring metrics include, but are not limited to:
    - Overall product penetration rates by consumer and household;
    - Specific penetration rates for products and services (such as overdraft, add-on products, and online banking), as well as penetration rates by consumer segment;
    - Employee turnover and employee satisfaction or complaint rates;
    - Spikes and trends in sales (both completed and failed sales) by specific individuals and by units;
    - Financial incentive payouts; and
    - Account opening/product enrollment and account closure/product cancellation statistics, including by specific individuals and by units, taking into account the terms of the incentive programs (i.e., requirements that accounts be open for a period of time or funded in order for employees to obtain credit under the program).

- Corrective Action: Promptly implementing corrective actions to address any incentive issues identified by monitoring reviews as areas of weakness:
    - Corrective actions should include the termination of employees, service providers, and managers, as necessary, and these termination statistics should be analyzed for trends and root cause(s);
    - Corrective actions should include changes to the structure of incentives, training on these programs, and return of funds to all affected consumers as appropriate in light of failed sales or heightened levels of customer dissatisfaction;
    - All corrective actions should ensure that the root causes of deficiencies are identified and resolved; and
    - Findings should be escalated to management and the board, particularly where they appear to pose significant risks to consumers.
- Consumer complaint management program: Collecting and analyzing consumer complaints for indications that incentives are leading to violations of law or harm to consumers in order to identify and resolve the root causes of any such issues; and
- Independent compliance audit: Scheduling audits to address incentives and consumer outcomes across all products or services to which they apply, ensuring audits are conducted independently of both the compliance program and the business functions, and ensuring that all necessary corrective actions are promptly implemented.

For more information pertaining to the oversight of incentive programs, please review the CFPB's *Supervision and Examination Manual*.[4] Specific modules referencing these programs include: *Compliance Management Review*, *Unfair, Deceptive, and Abusive Acts or Practices*, *Debt Collection*, *Credit Card Account Management*, *Consumer Reporting*, *Mortgage Origination*, *Short-Term Small Dollar Lending*, and the *Equal Credit Opportunity Act*. Other relevant Bureau guidance includes: CFPB Bulletin 2012-06 (Marketing of Credit Card Add-on Products),[5] and CFPB Bulletin 2016-02 (Service Providers, amending and reissuing CFPB Bulletin 2012-03).[6]

C. Regulatory Requirements

This Compliance Bulletin is a non-binding general statement of policy articulating considerations relevant to the Bureau's exercise of its supervisory and enforcement authority. It is therefore exempt from notice and comment rulemaking requirements under the Administrative Procedure Act pursuant to 5 USC 553(b). Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis. 5 USC 603(a), 604(a). The Bureau has determined that this Compliance Bulletin does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring OMB approval under the Paperwork Reduction Act, 44 USC 3501, *et seq*.

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[4] CFPB Supervision and Examination Manual, *available at* http://files.consumerfinance.gov/f/201210_cfpb_supervision-and-examination-manual-v2.pdf.
[5] CFPB Bulletin 2012-06, *available at* http://files.consumerfinance.gov/f/201207_cfpb_marketing_of_credit_card_addon_products.pdf.
[6] CFPB Bulletin 2016-02, *available at* http://www.consumerfinance.gov/documents/1385/102016_cfpb_OfficialGuidanceServiceProviderBulletin.pdf.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

CONSUMER FINANCIAL PROTECTION BUREAU, Plaintiff, v. TCF NATIONAL BANK, Defendant.	Case No. _____

COMPLAINT

The Consumer Financial Protection Bureau (Bureau or Plaintiff) brings this action against TCF National Bank ("TCF" or "the Bank") under Sections 1031(a), 1036(a)(1), 1054, and 1055 of the Consumer Financial Protection Act of 2010 ("CFPA") (codified at 12 U.S.C. §§ 5531(a), 5536(a)(1), 5564, and 5565); the Electronic Funds Transfer Act ("EFTA") (codified at 15 U.S.C. § 1693 *et seq.*) and its implementing Regulation E (codified at 12 C.F.R. Part 1005); and alleges:

1. In late 2009, the Federal Reserve Board (the "Board") amended Regulation E, 12 C.F.R., § 1005.17, to establish new overdraft protections for consumers. The new rule focused on overdraft fees arising from debit card and ATM transactions, as those fees had proven particularly painful for consumers. Under the Board's new rule ("the Opt-In Rule"), consumers could not be charged overdraft fees on those

transactions unless they first affirmatively opted in to the Bank's overdraft service.

2. The Opt-In Rule posed a serious threat to TCF, which depends on overdraft revenue to a greater degree than its competitors. Over $180 million in revenue was at stake.

3. To protect that revenue, TCF devised and then executed a strategy to persuade its customers to opt in. The strategy had a number of elements, including: (a) incentivizing branch employees to sell Opt-In aggressively; (b) using an uninformative script that failed to mention fees; (c) structuring the Opt-In discussion in a way that interfered with consumers' ability to consider disclosures that would inform their decision; and (d) directing branch employees not to provide consumers with information that might discourage them from opting in.

4. TCF's strategy worked. From the Opt-In Rule's effective date through April 2014, the Bank persuaded approximately 66% of its customers to opt in to overdraft service for debit card and ATM transactions, and collected overdraft fees from hundreds of thousands of its customers.

5. This Opt-In rate was more than triple the average Opt-In rate at other banks.

6. As explained in more detail below, TCF's approach to selling the overdraft service was both abusive and deceptive in violation of §§ 1031(c) and 1036(a)(1)(B); it also violated Regulation E, 12 C.F.R. § 1005.17, the implementing regulation of EFTA.

JURISDICTION AND VENUE

7. The Court has subject-matter jurisdiction over this action because it is brought under Federal consumer financial law (12 U.S.C. § 5565(a)(1)), presents a federal question (28 U.S.C. § 1331), and is brought by an agency of the United States (28 U.S.C. § 1345).

8. Venue is proper in this district under 28 U.S.C. §§ 1391(b) and (c), and 12 U.S.C. § 5564(f). The Bank maintains its principal place of business in this district, does business in this district, and part of the events giving rise to the claims took place in this district.

PLAINTIFF

9. The Bureau is an independent agency of the United States created by the CFPA. 12 U.S.C. § 5491(a). The Bureau is charged with enforcing Federal consumer financial laws. 12 U.S.C. §§ 5563, 5564.

10. The CFPA is a Federal consumer financial law. 12 U.S.C. § 5481(14). Under Sections 1031 and 1036 of the CFPA, it is unlawful for any covered person to offer or provide to a consumer any financial product

or service not in conformity with Federal consumer financial law, or to otherwise commit any act or omission in violation of a Federal consumer financial law. 12 U.S.C. §§ 5531(a), 5536(a)(1)(A). It is also unlawful for any covered person to commit or engage in any unfair, deceptive or abusive acts or practices. 12 U.S.C. §§ 5531(a), 5536(a)(1)(B).

11. The Bureau is authorized to commence civil actions in federal district court, in its own name, to address violations of Federal consumer financial laws, including violations of the CFPA. 12 U.S.C. § 5564(b).

DEFENDANT

12. TCF is an insured depository institution with $21.1 billion in assets as of September 30, 2016. Therefore, TCF is an insured depository institution with assets greater than $10 billion within the meaning of 12 U.S.C. § 5515(a).

13. "Deposit-taking activities" are a "financial product or service" within the meaning of 12 U.S.C. § 5481(15)(a)(iv).

14. When a "financial product or service" is "offered or provided for use by consumers primarily for personal, family, or household purposes, it is a "consumer financial product or service" within the meaning of 12 U.S.C. § 5481(5)(A).

15. TCF engages in deposit-taking activities for use by consumers primarily for personal, family, or household purposes. Therefore, TCF is a "covered" person as that term is defined by 12 U.S.C. § 5481(6).

16. TCF operates a network of approximately 360 retail branch offices in Minnesota, Wisconsin, Illinois, Michigan, Colorado, Arizona, and South Dakota.

THE OPT-IN RULE

17. As described above, the Opt-In Rule prohibits banks from charging overdraft fees on ATM and one-time debit card transactions ("Covered Transactions") unless the account-holder has previously opted in or consented to overdraft coverage for those transactions.

18. The Opt-In Rule is a Federal consumer financial law. 12 U.S.C. § 5481(14). Under Section 1036 of the CFPA, it is unlawful for any covered person "to offer or provide to a consumer any financial product or service not in conformity with Federal consumer financial law, or otherwise commit any act or omission in violation of a Federal consumer financial law." 12 U.S.C § 5536(a)(1)(A). A violation of the Opt-In Rule is therefore a violation of Section 1036 of the CFPA.

19. Before the Opt-In Rule was in place, most banks had provided overdraft coverage for Covered Transactions as a standard feature on

checking accounts. Consumers did not have the option to choose whether to subscribe to the service.

20. The Board found that state of affairs concerning, because, among other things, many consumers lack understanding of the product's risks, costs, and conditions:

> [M]any consumers may not be aware that they are able to overdraft at an ATM or POS [Point of Sale]. Debit cards have been promoted as budgeting tools, and a means for consumers to pay for goods and services without incurring additional debt. Additionally, the ability to overdraft at an ATM or POS is a relatively recent development. Consequently, consumers may unintentionally overdraw their account based on the erroneous belief that a transaction would be paid only if the consumer has sufficient funds in the account to cover it.

74 Fed. Reg. 220 at 59038 (Nov. 17, 2009).

21. Another risk the Board flagged was that the amount of the fee often far exceeded the transaction amount, such as, for example, where the consumer makes a $2 debit card purchase that overdraws the consumer's account and incurs a $35 fee.

22. In short, banks were providing a service that posed substantial risks to consumers, without affording consumers the opportunity to decline it.

23. To address this situation, the Opt-In Rule required banks to obtain consumers' affirmative consent or opt-in to overdraft coverage for

ATM and one-time debit card transactions ("Opt-In"). Only after obtaining that consent could banks charge fees for the overdraft service.

24. The Opt-In Rule became effective on July 1, 2010.

TCF'S RELIANCE ON OVERDRAFT REVENUE

25. Overdraft fees are an important source of revenue for many banks; but at TCF, they are central to the Bank's business model.

26. TCF's reliance on overdraft fees owes in large part to the Bank's limited portfolio of consumer banking products. Unlike many other banks its size, TCF does not generate substantial revenue from credit cards and home mortgage loans. Instead, TCF relies largely on the revenue it generates from its deposit base; and a substantial share of that revenue comes from fees.

27. TCF's CEO at the time the Opt-In Rule went into effect was particularly attuned to how important overdraft fees are to TCF's success. He even named his boat the *Overdraft*.

TCF'S OPT-IN RATE

28. Given TCF's dependence on overdraft fee revenue, the Opt-In Rule posed a serious threat to its business model.

29. In late 2009, the Bank estimated that $182 million in annual fee revenue was "at risk due to Regulation E."

30. To protect that revenue, TCF needed to get its customers to Opt In.

31. In that, the Bank proved effective. As of mid-2014, approximately 66% of all TCF checking account customers had opted in, and hundreds of thousands of TCF customers had paid overdraft fees. This Opt-In rate was more than triple the average Opt-In rate at other banks.

32. TCF's success relative to its peers in persuading its customers to Opt In appears to have been a matter of pride for the Bank. In the words of TCF's then-CEO William Cooper:

> Since implementation, we have seen a decline in overall fees and service charges, but this decline has been less significant than that of most of our competitors. Our success with Opt-In, as well as our implementation of new account maintenance fees, demonstrates our willingness and ability to meet regulatory challenges head-on.

33. In 2010, the Bank held several Opt-In celebrations to commemorate its success – one to celebrate 300,000 Opt-Ins, and a second to celebrate 500,000 Opt-Ins. Senior executives attended both celebrations.

TCF'S APPROACH TO SELLING OPT-IN

34. TCF's high Opt-In rate was the result of a carefully orchestrated campaign to get its customers to Opt In. The key elements of that campaign are described below.

Motivating Branch Employees

35. TCF relied largely on its branch employees to solicit Opt-Ins. Thus, it was the tellers and branch supervisors who served as front line troops in the Opt-In campaign.

36. To make sure those troops were motivated to make the sale, TCF offered them substantial financial incentives in 2010.

37. Under TCF's incentive formula, branch managers could earn up to $7,000 depending on the number of Opt-Ins their branch achieved and branch size. Frontline employees were offered similar but smaller incentives.

38. According to a TCF Director, the incentives were meant to "achieve as high an Opt-In [rate] as possible."

39. Beginning in early 2011, TCF phased out direct incentives.

40. However, at approximately that time, at least some of TCF's region managers began requiring their employees to meet Opt-In specific performance goals.

41. Under these goals, branch employees were generally required to maintain an Opt-In rate of 80% or higher for all new accounts they opened. Branch managers, in turn, were required to meet the requirement for all accounts opened at their branch.

42. TCF's corporate policy was that there should not be any adverse employment consequences associated with failing to attain any particular Opt-In rate.

43. Nevertheless, many employees were led to believe they could lose their job if they did not meet sales goals, of which Opt-In goals were one component.

44. Sales goals were taken very seriously at TCF, and they were often a source of great anxiety for employees. Consequences for failing to meet sales goals (of which Opt-In goals were one component) varied from state to state, but many employees generally understood they could be written up for falling short and that continued failure to meet a goal could ultimately result in termination.

45. At monthly meetings, it was common for region managers to single out any branch manager who was struggling to meet the Opt-In goals, which, according to some branch managers, often felt like an act of public shaming. Typically, the region manager would then lead a discussion of strategies that branch manager could use to improve his or her performance.

46. When a customer opening a new account declined to Opt In, the responsible branch manager often received a call from his or her region

manager asking what the problem was.

47. Another former employee testified that TCF placed her on "probation" soon after she started because she was only getting approximately 50% of the customers for whom she opened accounts to Opt In.

48. Opt-In goals were in effect in multiple branches in at least five of the states that TCF operated in (Minnesota, Michigan, Wisconsin, Colorado, and Illinois). In at least some of those states, the manager who had responsibility for overseeing all branches in the state participated personally in the effort to meet those goals.

Crafting the Opt-In Pitch

49. Beginning in the third quarter of 2009, TCF began to develop its communications strategy for Opt-In. The goal was to develop a sales pitch that would maximize the number of TCF customers that opted in.

50. To that end, the Bank conducted several sessions of consumer testing, which the Bank referred to as the "Pilot Program."

51. A 2009 memorandum summarizing the Pilot Program's findings included the following "Lessons Learned":

- "The Opt In Pilot was successful when we didn't over-explain it. Worked with the Operations Manager as there was a tendency to provide too much detail."

- "Keep it simple! When we used a basic, one sentence reference/explanation for Opt In, we were 99% successful...."

52. As explained below, these two "lessons learned" ultimately shaped TCF's communications with its customers.

53. The Pilot Program also experimented with various approaches for integrating the Opt-In decision into the Bank's account-opening process.

54. The Opt-In Rule requires depository institutions to provide consumers with a notice describing the institution's overdraft service, including, among other things, an explanation of the consumer's Opt-In right and instructions for how to Opt In ("Notice"). 12 C.F.R. § 1005.17(b)(1).

55. Based on consumer testing, the Bank learned that Opt-In rates varied dramatically depending on the proximity between the time consumers receive the notice and their opportunity to make the Opt-In election.

56. When customers could decide whether to Opt In while looking at the Notice, the "take rate" was 33%. But if the Bank had customers make their Opt-In election at another point in the process – when they were being asked to agree to other terms and conditions of the account – the "take rate" rose to 77%.

57. As described below, the Bank chose to implement the latter strategy.

TCF's Opt-In Pitch to New Customers

58. Based in large part on the findings of the Pilot Program, TCF devised the pitch that its employees would use to present the Opt-In decision to customers who were opening a new account ("New Customers").

59. The first step in the presentation was to provide the New Customer with a copy of TCF's version of the Notice. The employee opening the account generally did not summarize or explain the Notice. Nor did the employee direct the customer to read the Notice. Instead, the employee simply said in substance: "This is the federally-prescribed notice describing our overdraft service."

60. The New Customer was not given the opportunity to make the Opt-In election at the time he or she received TCF's Notice.

61. According to the testimony of former TCF employees, the vast majority of customers never looked at the Notice. Typically, the bank employee opening the account put the Notice into a folder with other documents and immediately moved on to the next step in the account-opening process (which had nothing to do with overdraft service), and the

document never came to the consumer's attention again.

62. One former branch manager described it this way:

> It was very quick.... There wasn't a big focus on it. It was this is one more a piece of paper I'm handing to you. If a customer did look, you'd be, oh, boy, they're probably going to opt out after they have started reading. Most of the time, it was just one more piece of paper. You would lead into that quickly before the customer had an opportunity to read through it. It would just end up in their new account packet. I don't think anybody looks at those once they get home.

63. After the Notice was set aside, the employee printed out a New Account Agreement and placed it in front of the consumer.

64. The New Account Agreement contained a series of items the branch employee needed to review with the customer, and which the customer needed to initial.

65. The first four items – Arbitration Agreement Acknowledgement; Fair Credit Reporting Act and Sharing of Information Acknowledgement; Certification of Taxpayer Identification Number; and Overdraft Fee Acknowledgement – were mandatory in the sense that the consumer opening the account was required to initial them. If the consumer refused to initial, the TCF employee would not let the consumer open the account.

66. TCF did not provide scripts for the employee to use while going over these first four items. Rather, at each section, the employee

would typically direct the consumer to initial in order to acknowledge TCF's policy.

67. The Opt-In section of the New Account Agreement came immediately after the four mandatory sections.

68. Unlike the previous sections, TCF did provide a script for Opt-In ("New Account Script"). According to the New Account Script, employees were directed to present the Opt-In decision as follows:

> This next section covers the Opt-In/Not Opt-In Election. By initialing here, you are allowing TCF to authorize and pay overdrafts on your ATM and everyday debit card transactions for this account. Please note that your decision does NOT affect any other transactions such as checks, ACH, or recurring debit card transactions.

69. This was the "basic, one sentence reference/explanation for Opt In" that was, according to the Pilot Program, the key to being "99% successful" in obtaining Opt-Ins.

70. The script's brevity was one reason it was so effective: the explanation was so short that consumers tended not to pay attention to the decision. One former branch manager explained this dynamic as follows:

> You know, one of the things that kind of was said I know sometimes from regional management and above, was the concept of just not making a big deal about anything when you're having the conversation, kind of try to stick to a very basic script, try not to get into explaining or talking too much because that would then scare the customer off. So basically, it was the concept of saying as little as possible and trying to get them to opt in. So I can see where that would definitely lead to people being a little unsure as to what they

are agreeing to.

71. The script was also effective because it left consumers with the impression that opting in was mandatory. Former employees testified that the script fit smoothly into the style and rhythm of the preceding sections of the new account process; and that as a result, many consumers assumed that Opt-In was yet another item they had to agree to in order to open their account. One former branch manager described this effect as follows:

> Most of the Account Agreement is things they need to sign to continue the account opening process. We created an environment for them in which they trusted us and that we were friendly enough and that we were already pointing and initial or signing. At this point it is a different part of the Account Agreement process in which they don't have to sign for this account to stay open for them. I think because I was reading a script to them and they had a trust in me they would just assume that if I wanted them to initial, it was something they had to.

72. Another former branch manager described the dynamic in this way:

> When you're opening an account, you know, you initial here, the customer's so comfortable with you, things are flowing. You read that and the customer initials and there you go, it's opted in. You know, there were your few and far between, you know, where customers understood that there had been a change in banking and that they had a choice. We didn't reiterate a choice.

73. TCF's strategy documents make clear that it was precisely this effect the Bank was hoping to achieve. The memorandum summarizing the Pilot Program findings put it this way: the objective was to "develop

scripting for Opt In *similar* to [the other terms New Customers had to initial] and *create a more fluid conversation* (vs. what occurs today)/basic, one sentence." (emphasis added)

74. The New Account Script was also effective because of what it did not say. It characterizes opting in as a choice to allow the Bank to provide a benefit – paying the consumer's overdrafts. But it is silent as to the attendant risks and costs. Among other things, it fails to mention that by initialing the Opt-In section, consumers would be giving the Bank permission to charge them overdraft fees from which they would otherwise be protected. In fact, the script did not even mention the word fees.

75. The TCF executive heading up TCF's Opt-In initiative confirmed in testimony that the TCF script focused on the benefits of opting in while omitting any mention of the risks in order to maximize the number of Opt-Ins.

76. Although the Opt-In section of the New Account Agreement included a written disclosure, consumers rarely read these disclosures because they came at the end of the account-opening process, by which point (as the Pilot Program anticipated) consumers had already fallen into a rhythm of initialing the terms of the agreement and moving on.

77. Former branch employees testified that they and their colleagues rarely if ever tried to supply consumers with additional information.

78. Providing information beyond what was in the script was known internally as "over-explaining." There was a general recognition that "over-explaining" would lead to lower Opt-In rates, and thereby jeopardize Opt-In goals and incentives.

79. The Pilot Program specifically identified "over-explaining" as an obstacle to meeting TCF's Opt-In goals.

80. As a result, many employees avoided explanations to clarify the script, even when consumers appeared not to understand that (a) by initialing the Opt-In section, consumers were agreeing to be charged fees; or (b) consumers were not required to initial the Opt-In section in order to open an account.

81. The Director of all TCF branches in Michigan used the following language to explain how he was dealing with two branch managers who were not meeting their Opt-In numbers:

> I have reviewed the Opt-In new reports and had LONG conversations with [two branch managers] regarding their Opt-In percentage and the way they present this to customers. In an effort to disclose everything, I believe both of them have been overexplaining this election. When I asked them what they say, it appears that Opt-In takes most of their account opening time. I spoke to them about answering customers'

> questions, but mainly sticking to the script with the account agreement. With the state averaging 78% and their branches (and themselves) at 58% or so, this is a big problem.

82. According to former employees, the majority of New Customers (several former employees estimated the number to be 80%) simply initialed the form after hearing the script without asking further questions. That meant they were opted in and therefore fair game for TCF's overdraft fees.

83. Many former employees believed that thanks to TCF's sales tactics, consumers often did not understand the decision they had made. One former branch manager, for example, testified that "I don't think [New Customers] understood that they -- that they were exposing [them]selves to additional fees or that they had the option to stop the additional fees."

84. While most New Customers simply opted in after hearing the script, there were some who asked questions or indicated they were disinclined to Opt In. In those circumstances, TCF instructed branch employees to try to persuade the customers to Opt In. In TCF parlance, this was referred to as "overcoming objections."

85. The most important tool for overcoming objections was hypotheticals. Typically, the hypotheticals described a situation where the customer would need to pay for something, but the transaction would be

declined unless the customer had opted in. Branch employees were encouraged to tailor the hypothetical for maximum emotional resonance. One former employee described the use of hypotheticals as follows:

> The major strategy would be to present an example of how it benefited the customer. It tugged at your heart strings. It usually was related to an emergency situation in which you needed funds. Some of the examples I would use is, "We live in Minnesota too. It is cold outside. You are on the side of the road. You know your account has $50 in it. You know to get a service call it is going to cost you $80. You have to get it fixed. So you make that call. If you are opted in, we will pay it. You get an overdraft fee. If you don't Opt-In, it declines you. You might get stuck on the side of the road," kind of like scare tactics. You do the same thing with the grocery store. You have to get milk. It is an emergency situation. It was scare [tactics].

86. Former branch employees testified that employees never used hypotheticals that highlighted the risks of opting in. As a result, TCF customers never heard hypotheticals about being charged a $37 fee for a $4 purchase. Such hypotheticals fell into the category of "over-explaining," and were discouraged.

TCF's Pitch to Existing Customers

87. TCF also had to devise strategies for presenting the Opt-In decision to customers who already had an account when the Opt-In Rule became effective, but who, because of the law change, could not be charged fees unless TCF obtained affirmative consent ("Existing Customers").

88. One of TCF's most important means of obtaining Opt-Ins from Existing Customers was a telephone call campaign. TCF provided branch employees scripts to use on those calls, which varied in minor ways depending on the customer's circumstances, but shared a basic structure.

89. In a typical call, the employees would begin by introducing herself. She would then say something like the following: "I am calling today regarding your TCF check card and some upcoming changes that would limit the usage of your card. Would you like your TCF Check Card to continue to work as it does today?"

90. Former employees testified that the majority of consumers answered "yes" to that question. TCF considered that "yes" as an indication that the customer wanted to Opt In.

91. When customers did not answer "yes," TCF employees were trained to use the same "overcoming objections" strategies discussed above, including the hypotheticals.

92. Some of the call scripts included additional strategies as well. One script directed the TCF caller to tell the customer that not opting in "could cause you a real problem. In order for TCF to continue authorizing your transactions, you must consent or Opt-In to this service. We would definitely suggest you Opt In, to allow TCF the flexibility to approve your

card transactions."

93. Another script was to be used for customers who indicated they were not interested in Opting In:

> I understand your concern, but typically we find that customers whose check card transactions are authorized when they [do] not have enough available funds do have sufficient funds when the transaction posts to the account.

94. If customers indicated they wanted their "account to continue to work as it does today," the scripts called for the TCF caller to recite a short disclosure:

> You will pay nothing extra for TCF's Overdraft Service. However, you will be charged an overdraft fee – currently $35 per item – if you overdraft your account. This includes overdrafts by check teller withdrawals, ATM and card transactions, ACH and other electronic transactions.

95. That disclosure describes TCF's Overdraft Service as a whole, including how the service applies to checks and ACH transactions, even though such transactions were outside the scope of the Opt-In decision.

96. After reading the disclosures, the TCF employee would ask the consumer to confirm his or her decision to Opt In.

97. In all cases, consumers did not hear the disclosures until after they had already expressed their preference to have their card continue to work as it did at the time (which TCF chose to interpret as a decision to Opt In).

98. On some scripts, the TCF employee only read the disclosure if the customer expressed interest in hearing it.

99. It was no accident that TCF presented the Opt-In choice in terms of whether the consumer wanted the account "to continue to work as it does today." TCF understood that consumers generally prefer to avoid making changes to their accounts, since changes typically come with new risks or costs. As a result, consumers are generally inclined to keep their accounts *as is*.

100. The TCF executive in charge of developing a strategy for presenting Opt-In to Existing Customers explained it this way:

> We felt that the majority of customers would probably choose to opt in based on the fact it would not change the fundamental way that their account worked today. And that, any change that we've ever introduced to a customer on their account has typically been viewed negative. I'm not just talking about opt-in, I'm talking about anything. They want to know what it is, why it is, how is this going to impact me. So, when you use the word "change" it's typically not something they snuggle up with, shall I say.

101. In fact, because of the Opt-In Rule, it was the consumers who chose to have their account "continue to work as it does today" who were taking on the new risk.

102. Former employees testified that Existing Customers experienced confusion similar to that of New Customers – namely, they did not understand that TCF could not charge them overdraft fees unless they

gave permission or that by opting in they were giving that permission. One former branch manager explained Existing Customers' lack of understanding this way:

> They figured the way they had been using their check card had been working for them in the past however long they had been using it. They did not know that they had the choice to opt out and that their card could be denied if they didn't have the funds available.... [T]hey didn't know what the alternative was. They didn't know that really they had a choice. Many customers were like, yes, I'm fine with the way my card is working right now. Very few customers in response would say, "What other choice do I have?" That just wasn't a topic that came up.

103. TCF pitched Opt-In to Existing Customers through a number of other communications channels as well. When, for example, Existing Customers came into the branch on other business, such as to make a deposit or get a bank check, tellers were instructed to bring up Opt-In. TCF's communication strategy for those other channels more or less tracked the approach the Bank used in the call campaign.

104. TCF has charged overdraft fees to Existing Customers.

VIOLATIONS OF THE CONSUMER FINANCIAL PROTECTION ACT

Count I
Abusive Acts or Practices

105. The Bureau incorporates the allegations in Paragraphs 1 through 104 by reference.

106. Section 1036(a)(1)(B) of the CFPA prohibits "unfair, deceptive, or abusive" acts or practices." 12 U.S.C. § 5536(a)(1)(B).

107. An act or practice is abusive if, among other things, it "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service." 12 U.S.C. § 5531(d)(1).

108. Overdraft Service for ATM and one-time debit card transactions is a "consumer financial product or service" as that term is defined in § 1002(5) of the CFPA, 12 U.S.C. § 5481(5).

109. Overdraft Service for Covered Transactions is subject to, inter alia, the following terms and conditions:

a. Financial institutions cannot charge Overdraft Fees for Covered Transactions unless the consumer gives affirmative consent;

b. TCF considered the customer's act of initialing the Opt-In section of the New Account Agreement to be "affirmative consent."

c. When the consumer has Opted In, TCF pays Covered Transactions even when the consumer lacks sufficient available funds to cover them, and then charges an

Overdraft Fee.

d. TCF applied its standard Overdraft Fee to Covered Transactions, even when the amount of the purchase was far lower than the fee charged.

110. TCF materially interfered with its New Customers' ability to understand those terms and conditions by:

a. Using an account-opening process that interfered with customers' ability to read the Notice;

b. Using an account-opening process that interfered with customers' ability to consider the contents of the Notice when they made their Opt-In decision;

c. Using an account opening process that effectively replaced the disclosures contained in the Notice with a script that characterized Opt-In as a benefit without adequately disclosing other relevant terms and conditions, including fees;

d. Presenting the Opt-In decision with a short, cursory explanation and as if it were one in a series of acknowledgements that consumers were required to make to open their account, which in numerous instances

led consumers to believe that opting in was mandatory;

e. Directing branch employees not to provide consumers with information that would correct their lack of understanding;

f. Incentivizing branch employees, through both positive and negative incentives, to reach unreasonably aggressive sales targets; and

g. Training branch employees that, while they should not answer consumer questions or provide consumers with clarifying information, employees could emphasize the benefits of opting in with one-sided hypotheticals.

111. Therefore, TCF's acts or practices, as described in Paragraph 109, constitute abusive acts or practices in violation of the CFPA, 12 U.S.C. §§ 5531(a) & (d)(1), and 5536(a)(1)(B).

Count II

Deceptive Acts or Practices as to New Customers

112. The Bureau incorporates the allegations in Paragraphs 1 through 104 by reference.

113. As described in paragraphs 58 through 86 above, TCF:

a. Used an account-opening process that discouraged

consumers from reading the Notice;

b. Used an account-opening process that discouraged consumers from looking at or thinking about the Notice when they made their Opt-In decision;

c. Used an account-opening process that effectively replaced the disclosures contained in the Notice with a script that characterized Opt-In as a benefit and did not adequately disclose other relevant terms and conditions, including fees; and

d. Presented the Opt-In decision with a short, cursory explanation and as one in a series of acknowledgements that consumers had to make to open their account.

114. As a result, the net impression left by TCF's process was that there was no cost to opting in.

115. In truth and in fact, by opting in consumers were exposing themselves to overdraft fees from which they would otherwise have been protected.

116. TCF's process also created the net impression that initialing the Opt-In section of the New Account Agreement was mandatory.

117. In truth and in fact, opting in was optional.

118. Therefore, TCF's representations and omissions as set forth in Paragraphs 112 through 116 are false and misleading, and constitute deceptive acts or practices in violation of the CFPA, 12 U.S.C. §§ 5531(a) and 5536(a)(1)(B).

Count III

Violation of Regulation E as to Existing Customers

119. The Bureau incorporates the allegations in Paragraphs 1 through 104 by reference.

120. Under the Opt-In Rule, a financial institution may not charge overdraft fees on ATM and one-time debit card transactions unless it first provides a "reasonable opportunity" for consumers to affirmatively consent and "[o]btains the consumer's affirmative consent, or Opt-In, to the institution's payment of ATM or one-time debit card transactions[.]" 12 C.F.R. § 1005.17(b)(ii) and (iii).

121. As described in paragraphs 87 through 104 above, TCF pitched overdraft service for Covered Transactions to Existing Customers by asking whether they wanted their account to "continue working as it does today."

122. That framing of the decision turned Overdraft Service for Covered Transactions into the default position. To avoid that default, consumers had to choose to change the way their accounts worked. In

effect, TCF changed the election from an Opt-In to an Opt-Out.

123. As a result, Existing Customers did not have a reasonable opportunity to consent nor did they affirmatively consent to the payment of their ATM and one-time debit card transactions in exchange for a fee.

124. When TCF charged those consumers overdraft fees on Covered Transactions, it was therefore without their affirmative consent, in violation of the Opt-In Rule, the EFTA, 15 U.S.C. §§ 1693, et seq., and § 1036(a)(1)(A) of the CFPA, 12 U.S.C § 5536(a)(1)(A).

PRAYER FOR RELIEF

Wherefore, the Bureau requests that the Court:

a. Permanently enjoin TCF from committing future violations of the CFPA and Regulation E;

b. Award such relief as the Court finds necessary to redress injury to consumers resulting from TCF's violations of the CFPA and Regulation E, including, but not limited to, rescission or reformation of contracts, the refund of moneys paid, restitution, disgorgement or compensation for unjust enrichment, and payment of damages;

c. Impose civil money penalties against TCF;

d. Award Plaintiff its costs in connection with prosecuting this

action; and

e. Award other and additional relief as the Court may determine to be just and proper.

Dated: January 19, 2017

Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Consumer Financial Protection Bureau,

Plaintiff,

vs.

TCF National Bank,

Defendant.

Case No. 17-cv-0166-RHK-KMM

DEFENDANT TCF NATIONAL BANK'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

Defendant TCF National Bank, by and through undersigned counsel, hereby moves to dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). This motion is supported by Defendant's Memorandum of Law, supporting declaration and exhibits thereto, arguments of counsel at the time of any hearing, and all files, records, and proceedings in this matter.

Dated: February 17, 2017

Respectfully submitted,

/s/ Timothy D. Kelly

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Consumer Financial Protection Bureau,

Plaintiff,

vs.

TCF National Bank,

Defendant.

Case No. 17-cv-0166-RHK-KMM

MEMORANDUM IN OF LAW SUPPORT OF DEFENDANT'S MOTION TO DISMISS

TCF National Bank ("TCF") offers its customers an overdraft service that allows customers to withdraw funds or complete purchases—instead of having these transactions declined—if their account balance drops below zero. Enrolling is free and optional, but TCF charges a fee each time it extends this short-term, unsecured credit to customers. As one might expect in a heavily regulated industry, the Federal Reserve issued a regulation governing overdraft fees in 2009, called "Regulation E." This regulation prohibits banks from charging overdraft fees for ATM and non-recurring *debit card transactions* unless the customer has consented to the service.

The regulation focuses on obtaining customer consent after providing written disclosures. TCF met each condition established by the regulation. It provided all required written disclosures to its customers, including (1) a separate notice called "*What You Need to Know About Overdrafts and Overdraft Fees*"

("Notice"), and (2) a New Account Agreement ("Agreement") that described TCF's overdraft service and associated fees. These disclosures explained the voluntary nature of TCF's overdraft service and the amount of the overdraft fee. TCF did not enroll any customers who did not affirmatively communicate to TCF their consent to enroll in overdraft service.

Plaintiff Consumer Financial Protection Bureau ("CFPB" or "Bureau") acknowledges in its complaint that TCF provided these disclosures, but filed suit nonetheless, claiming that TCF used unlawful *methods* to obtain customers' consent:

- For New Customers (defined by Regulation E as customers who opened accounts after July 1, 2010), the Bureau alleges that TCF engaged in deceptive and abusive conduct by sequencing the account opening process to separate the Notice from the enrollment decision and by giving "cursory," "uninformative," and "one-sided" oral explanations. Compl. ¶¶ 3, 105–18.
- For Existing Customers (defined as customers who already had TCF accounts before Regulation E's effective date), the Bureau alleges that TCF violated Regulation E by asking an ice-breaker question that allegedly framed the decision in a way that turned overdraft service "into the default position." Compl. ¶¶ 121–23.

These allegations are insufficient to state a claim. Failing to orally summarize terms and conditions already provided in unambiguous written disclosures is not deceptive or abusive conduct. Written disclosures are integral to consumer financial regulation. Consumers are presumed to read and understand documents provided by sellers as part of consumer transactions—particularly where, as here, there are no allegations that the documents themselves were confusing or misleading. This notion lies at the heart of the Federal Reserve's approach to Regulation E, which focuses exclusively upon the adequacy of written disclosures and makes no mention of the substance or cadence of any oral description.

The CFPB attempts to sidestep this bedrock principle of consumer financial regulation by pleading only oral misconduct while ignoring the clear written disclosures that customers reviewed or signed, and asserting its belief that "consumers rarely read these disclosures." *Id.* ¶ 76. But, this principle cannot be so easily dismissed. If the Bureau had sued a rental car company challenging its oral presentations at the rental counter, but downplayed the rental agreements in its complaint, this Court would not countenance the effort to leave out this crucial aspect of the story. Yet that is exactly what the Bureau seeks to do here.

The Bureau, moreover, does not claim TCF's documentation can be ignored because TCF contradicted a writing with misleading oral statements. Instead, the

CFPB alleges that it has located a handful of former employees—out of thousands who worked at TCF over the years—who allegedly *perceived* pressure on employees to enroll customers and give cursory or "uninformative" answers to customer questions. Compl. ¶¶ 44, 70. But none of those employees claims to have engaged in misconduct, such as misrepresenting overdraft service or enrolling customers without their consent. Even if oral explanations were abbreviated or incomplete, no reasonable customer who read TCF's disclosures could have failed to understand that they were making a voluntary decision to enroll in an overdraft service that authorized TCF to charge a fee if the customer overdrafted.

This enforcement action is an attempt to impose upon TCF a series of oral disclosure and sequencing requirements that are found nowhere in Regulation E. If the CFPB has regulatory concerns about the manner in which customers and bank employees orally interact, then it should give financial institutions advance notice and address those concerns through *prospective* rule-making, not by concocting novel interpretations and then applying them *retroactively* to conduct that occurred many years ago. It is not fair to change the rules after the game, and then penalize TCF for allegedly falling short of those new rules. *PHH Corp. v. Consumer Fin. Prot. Bureau*, 839 F.3d 1, 49 (D.C. Cir. 2016), *pet. for reh'g en banc granted* (Feb. 16, 2017) (No. 15-1177). While the judgment of the *PHH* panel was vacated upon grant of *en banc* review, and therefore has no legal effect, this Court can still look

to the panel opinion for its highly persuasive reasoning.[1] There are also a number of timeliness and retroactivity barriers to applying these new interpretations to conduct reaching back to 2010.

It is unfortunate that, in its effort to generate publicity (including a gratuitous reference to a boat owned by a now-deceased corporate officer), the CFPB brought this meritless lawsuit—as part of a fusillade of suits filed days before the change in administration[2]—against a consumer-oriented bank serving this community for nearly 100 years. Dismissal is required.

BACKGROUND

I. TCF's Business Model Prioritizes Consumer Convenience and No-Minimum-Balance Checking.

TCF has a substantial retail presence—over 360 branches across seven states. Compl. ¶ 16. "Unlike many other banks its size, TCF does not generate substantial revenue from credit cards and home mortgage loans." *Id.* ¶ 26. Instead, TCF has a business model focused on a "limited portfolio of consumer banking products," *id.* ¶ 26, such as no-minimum-balance checking. Its consumer-

[1] Per the rules of the D.C. Circuit, "[i]f rehearing *en banc* is granted, the panel's judgment, but ordinarily not its opinion, will be vacated." D.C. Cir. R. 35(d). The order granting rehearing *en banc* did exactly that, ordering that the "judgment . . . be vacated," but remaining silent on the panel's opinion.

[2] *See* Press Release, Navient, *Navient Rejects CFPB Ultimatum To Settle by Inauguration Day or Be Sued* (Jan. 18, 2017), *http://news.navient.com/releasedetail.cfm?ReleaseID=1008347*.

oriented business model—geared "primarily for personal, family, or household purposes," *id.* ¶ 15—is focused on customer convenience.

Part of this convenience is giving customers the ability to complete their debit card purchases even when they do not have sufficient funds. Not all transactions that involve negative balances when they are approved result in a fee, though some do. Sometimes an account has sufficient funds when the transaction settles because of an intervening deposit. When this happens, TCF does not charge a fee. Many customers have never incurred an overdraft fee but nevertheless have enjoyed the benefit of this "swipe negative/settle positive" policy, which would only be available after the rule change if the customer opted in.

II. The Federal Reserve Issued a New Overdraft Regulation in 2009.

Before Regulation E became effective, TCF "provided overdraft coverage…as a standard feature on checking accounts." *Id.* ¶ 19. Consistent with industry practice, it did not offer customers an opportunity to decline the service. In November 2009, the Federal Reserve decided customers ought to have a choice and "limit[ed] the ability of a financial institution to assess an overdraft fee for paying automated teller machine (ATM) and one-time debit card transactions that overdraw a consumer's account, *unless the consumer affirmatively consents, or*

opts in, to the institution's payment of overdrafts for these transactions."[3] Electronic Fund Transfers, 74 Fed. Reg. 59,033, 59,033 (Nov. 17, 2009) (emphasis added). The amended regulation, known as Regulation E, prohibits financial institutions from charging a fee for debit card transactions unless they had previously:

1) Provided the customer with a written notice that contained federally prescribed content about overdraft services;
2) Provided a reasonable opportunity for the customer to consent;
3) Actually obtained the customer's consent; and
4) Provided the customer written confirmation of the decision, which included a statement that the customer could revoke that consent.

See 12 C.F.R. § 205.17(b)(1)(i)–(iv).

The default under Regulation E is to opt out of overdraft service—i.e. unless a customer affirmatively consents to opt in, the Bank declines transactions when the balance is insufficient (which by definition includes declining what would otherwise be swipe negative/settle positive transactions). After July 2010, the only way customers could receive TCF overdraft service was to enroll. *Id.* § 205.17(c). The Federal Reserve considered the prevalence of swipe negative/settle positive transactions when finalizing the rule. 74 Fed. Reg. at 59,034.

[3] The Federal Reserve excluded from this rule overdrafts caused by checks and ACH transactions. 74 Fed. Reg. at 59,034.

III. Opt-In Rates Vary Significantly.

Although the CFPB alleges that TCF's 66% opt-in rate is higher than other banks, Compl. ¶ 5, there is no "proper" or "legal" enrollment rate. Indeed, the CFPB has acknowledged elsewhere[4] that "opt in rates vary widely,"[5] and that its comparison data "come from a small number of large banks" and "cannot be considered fully representative of the checking account market as a whole."[6] As a result, a "high" opt-in rate does not suggest misconduct.

(The complaint carefully avoids admitting that TCF's enrollment rate for customers who opted in *online*—and who therefore could not have been subjected to any allegedly misleading oral presentations—is not materially different from the enrollment rate for TCF's entire customer population. The Bureau learned this fact during its investigation, but chose not to mention it in the complaint.)

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[4] The Court may take judicial notice of the Bureau's public statements. *See, e.g.*, *Stahl v. U.S. Dep't of Agric.*, 327 F.3d 697, 700 (8th Cir. 2003) ("The district court may take judicial notice of public records and may thus consider them on a motion to dismiss."); *Hile v. Jimmy Johns Highway 55*, 899 F. Supp. 2d 843, 847 (D. Minn. 2012) (Kyle, J.) ("[W]hen ruling on a motion under Rule 12(b)(6), public records are not beyond the pleadings.").

[5] CFPB Fall 2015 Rulemaking Agenda, Nov. 20, 2015, at 2 (Declaration of Brian J. Hurd in Support of Defendant TCF National Bank's Motion to Dismiss ("Hurd Decl.") at Ex. 1). Indeed, the CFPB publicly reported that new-account opt-in rates at one bank were up to eight times higher than others, and that opt-in rates at some study banks "surpassed 50% in 2012." *CFPB Study of Overdraft Programs* at 31–32 (June 2013) (Hurd Decl. Ex. 2).

[6] *CFPB Data Point: Checking Account Overdraft* at 7 (July 2014) (Hurd Decl. Ex. 8).

IV. TCF Provided Disclosures Before, During, and After the Enrollment Decision.

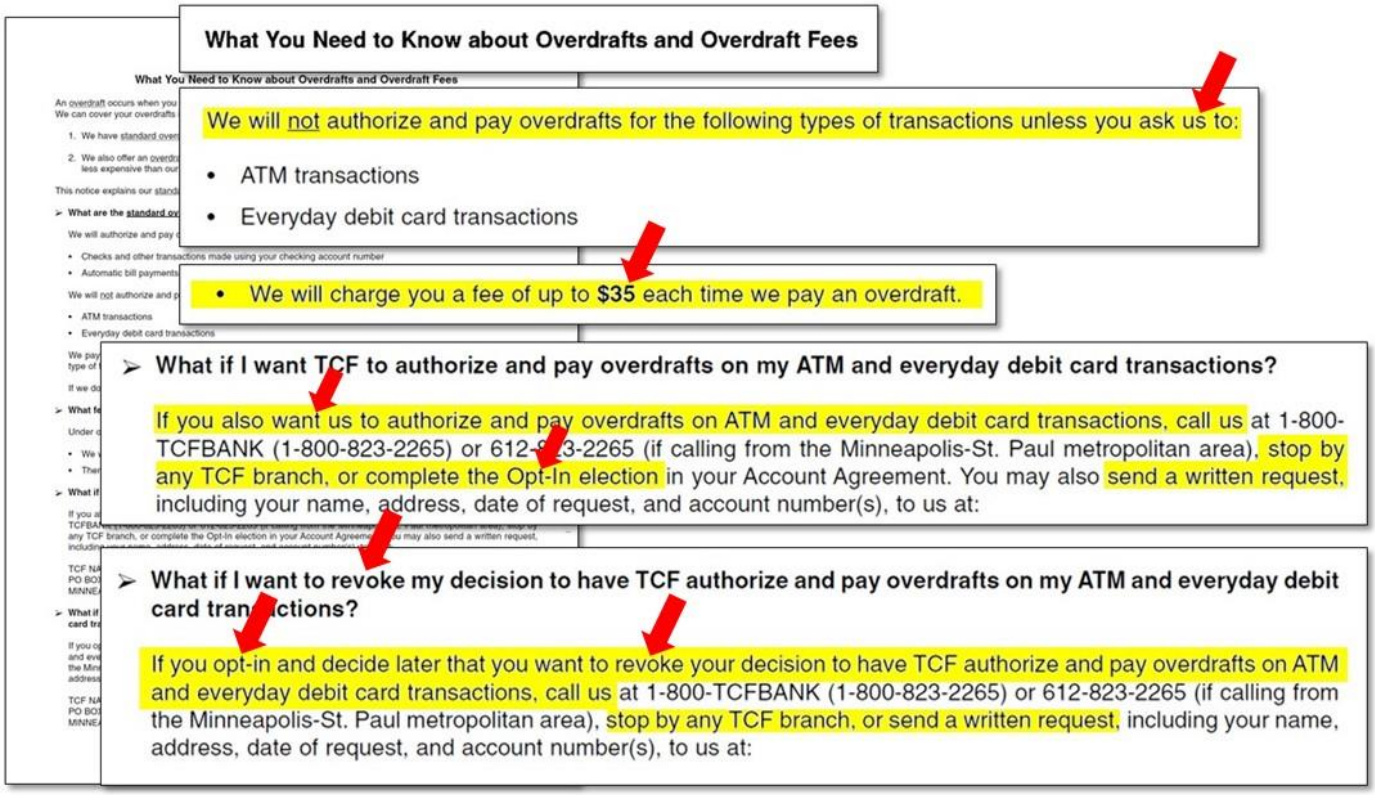
A. TCF Provided All Customers with the Federally-Prescribed Notice Before an Enrollment Decision.

The complaint alleges that "[t]he Opt-In Rule requires depository institutions to provide consumers with a [written] notice describing the institution's overdraft service, including, among other things, an explanation of the consumer's Opt-In right and instructions for how to Opt In." Compl. ¶54. The "first step" in TCF's account opening process was to give customers "a copy of TCF's version of the Notice." *Id.* ¶ 59.

The Federal Reserve developed a model Notice, Form A-9, entitled, "*What You Need to Know About Overdrafts and Overdraft Fees*." Hurd Decl. Ex. 3. Regulation E mandates that banks provide a notice to customers that is "substantially similar" to this model. 12 C.F.R. § 205.17(d). In particular, they must provide: (1) a description of the overdraft service; (2) a disclosure of the fees imposed; (3) a disclosure of the limits on the fees charged; (4) an explanation of the fact that the customer had the right to opt in; and (5) a description of any alternative plans that were available to cover overdrafts. *See id.* § 205.17(d)(1)–(5); 12 C.F.R. pt. 205 app. A (Hurd Decl. Ex. 4).

The CFPB does not dispute that TCF's version of the required Notice is substantially similar to the federal model. Among other things, it explains that

customers have a choice whether to enroll in overdraft service, and details (in **bold**) the fee TCF charges for an overdraft transaction.



The Federal Reserve also required that the Notice be a separate document "segregated from all other information." 12 C.F.R. § 205.17(b)(1)(i). The complaint tacitly recognizes that TCF complied with this requirement too. Compl. ¶ 63 ("After the Notice was set aside, the employee printed out a New Account Agreement[.]").

Regulation E required TCF to provide the Notice to all customers. 12 C.F.R. § 205.17(d). The CFPB alleges that TCF provided New Customers the Notice as the "first step in the [account opening] presentation" and informed them "in

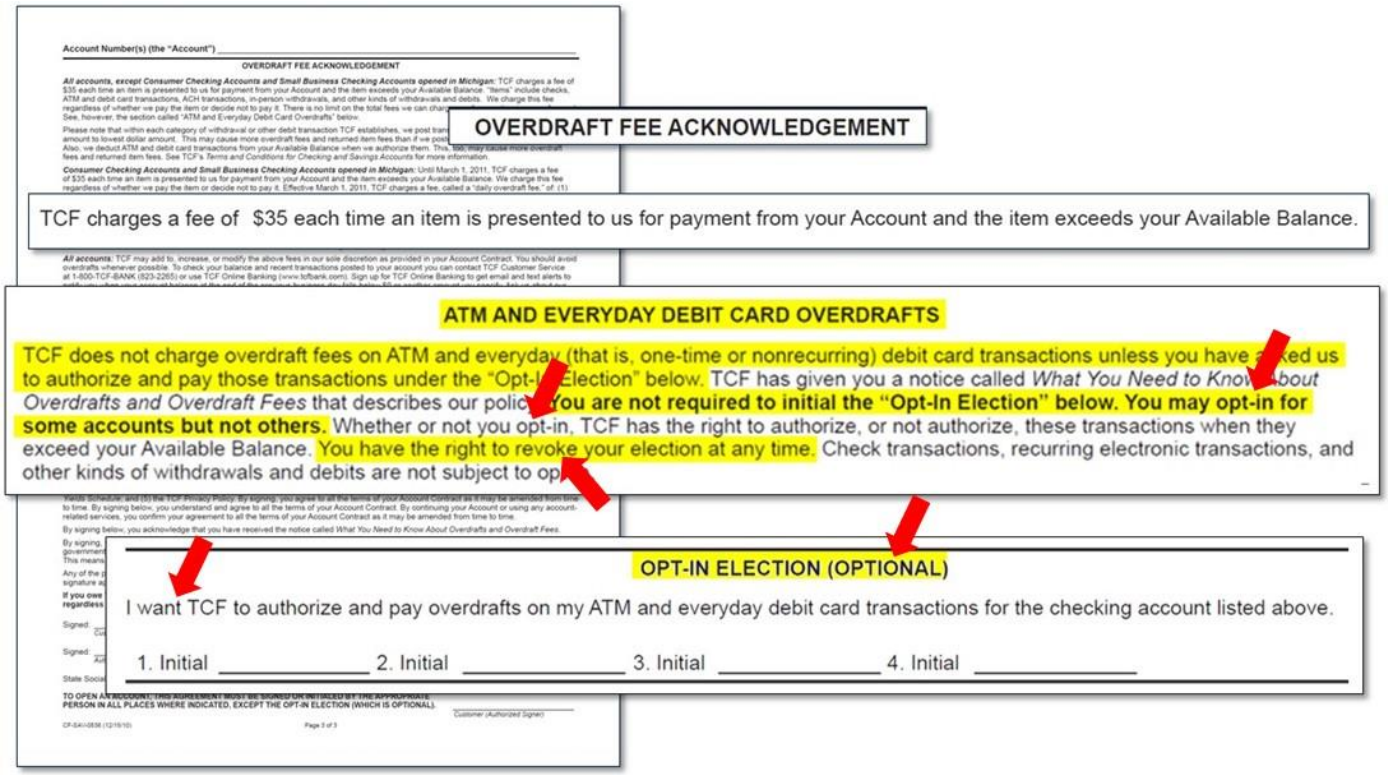
substance: 'This is the federally-prescribed notice describing our overdraft service.'" Compl. ¶ 59. The CFPB does not allege that TCF failed to deliver the Notice to Existing Customers before they were asked to enroll.

B. TCF's New Account Agreement Disclosed Relevant Information.

After providing the Notice to New Customers, TCF employees then "printed out a New Account Agreement and placed it in front of the consumer." *Id.* ¶ 63. The complaint references particular items in the Agreement, *id.* ¶¶ 64–67, and acknowledges that "the Opt-In section of the New Account Agreement included a written disclosure," *id.* ¶ 76; *see also* Hurd Decl. Ex. 5.

The three-page Agreement included an Overdraft Fee Acknowledgement that explained TCF's overdraft fee policy. Compl. ¶ 65; *see also* Hurd Decl. Ex. 5 at 3. The next section, entitled "ATM and Everyday Debit Card Overdrafts," referenced the Notice and explained that TCF "does not charge overdraft fees...unless you have asked us to authorize and pay those transactions under the 'Opt-In Election' below." Hurd Decl. Ex. 5 at 3. It then stated, in bold, "**You are not required to initial the 'Opt-in Election' below.**"[7] *Id.*

[7] While the content of the Agreement and Notice varied slightly over the years, the relevant disclosures were substantially similar throughout the alleged period.



Even though the complaint acknowledges that the Agreement contained these written disclosures, it makes the astonishing allegation that "consumers rarely read these disclosures." Compl. ¶ 76. There are no allegations that TCF employees told customers not to read the Notice or prevented customers from reading the Notice if they chose to.

According to the complaint, TCF employees presented the New Customer Opt-In decision by stating:

> This next section covers the Opt-In / Not Opt-In Election. By initialing here, you are allowing TCF to authorize and pay overdrafts on your ATM and everyday debit card transactions for this account. Please note that your decision does NOT affect any other transactions such as checks, ACH, or recurring debit card transactions.

Id. ¶ 68. The Bureau contends that this explanation was so short and uninformative that customers "tended not to pay attention to the decision," *id.* ¶ 70, and "did not understand the decision they had made," *id.* ¶ 83. It alleges that "[t]he script…left consumers with the impression that opting in was mandatory," *id.* ¶ 71, even though the place in the Agreement where customers would initial stated in bold that the decision was "**OPTIONAL**."

The CFPB also contends that unspecified statements from TCF employees left the "net impression" with customers "that there was no cost to opting in," *id.* ¶ 114, even though 1) there actually is no cost for opting in (as opposed to incurring an overdraft), and 2) the immediate preceding section of the Agreement, *which customers were required to acknowledge in writing*, explained that TCF charges fees for overdrafts.

The CFPB does not allege that TCF employees made any untruthful statements to New Customers.

C. TCF Used Scripts When Communicating with Existing Customers Over the Phone About their Opt-in Choices.

After TCF had sent Existing Customers the Notice, TCF employees contacted Existing Customers by phone and used scripts to guide those

conversations.[8] The CFPB relies upon these scripts, Compl. ¶ 88, and quotes them on several occasions, *id.* ¶¶ 89, 92–94.

Prior to the August 15, 2010 effective date of Regulation E, TCF scripts opened with an ice-breaker question asking whether the customer wanted his debit card to "continue working as it does today," *id.* ¶ 89, followed by a series of required disclosures,[9] *id.* ¶ 94, and then the mandatory enrollment question, "do you want TCF to continue authorizing and paying overdrafts on your ATM and everyday debit card transactions for this account?" *Id.* ¶ 96; *see also* Hurd Decl. Ex. 6. Customers were not enrolled unless they answered "yes" to *that* question. *Id.*

[8] The CFPB asserts that "TCF's communication strategy for [] other channels more or less tracked the approach the Bank used in the call campaign." Compl. ¶ 103.

[9] The first script, in effect from March 22 to April 26, 2010, asked customers whether they wanted to hear some important regulatory disclosures, *id.* ¶ 98; subsequent scripts required TCF employees to recite the required disclosures without asking that question. *See* Hurd Decl. Ex. 6.

IMPORTANT: YOU MUST DISCLOSE TO THE CUSTOMER EVERYTHING THAT IS SHOWN IN BOLD TYPE BELOW.

Introduction:

- **[Required] Hello, may I speak with (customer's name)? (Mr./Mrs./Ms. Customer's last name), this is _____ with TCF Bank. I am calling today regarding your TCF Check Card and some upcoming changes that would limit the usage of your card effective August 15, 2010. While reviewing your account activity I see you use your TCF Check Card often. Would you like your TCF Check Card to continue to work as it does today?**
- **[Required] Currently, TCF may, at its discretion, authorize your card transactions whether or not you have enough funds at the time of the transactions. There may be times when TCF would not authorize your purchases. For example, if your account was not in good standing.**

[Optional] Customer Q: Can you give me an example of how this works?

- For instance, you are at the grocery story or a gas station and you want to use your card for a purchase but you don't have enough available funds in your account at the time of the transaction. Currently, TCF is able to authorize this transaction. After August 15, 2010, TCF will not authorize this purchase unless you have opted-in to TCF Overdraft Service.

[Optional] Customer Q: Is this free? or Customer Q: What does it cost?

- **[Required] You will pay nothing extra for TCF's Overdraft Service. However, you will be charged an overdraft fee, currently $35 per item, if you overdraft your account. This includes overdrafts by check, teller withdrawals, ATM and card transactions, ACH and other electronic transactions. This fee may increase or change in the future.**
- **[Required] TCF encourages you to avoid overdrafts whenever possible, However, if this does happen, you must pay any overdraft immediately.**
- **[Required] TCF Q: So just to clarify, do you want TCF to continue authorizing and paying overdrafts on your ATM and everyday debit card transactions for this account?**
- **[Required]** Customer response: **Yes or No**
  - **IF THE CUSTOMER SAYS "YES" ENTER "I" ON THE OPT-IN TCHG FIELD.**
  - **IF THE CUSTOMER SAYS "NO", YOU MUST ENTER "O"IN THE TCHG FIELD – <u>YOU CANNOT LEAVE THE OPT-IN FIELD BLANK</u>.**

The CFPB contends that TCF considered a "yes" answer to the ice-breaker question as "an indication that the customer wanted to Opt In," Compl. ¶ 90, and that asking the question in this way "changed the election from an Opt-In to an Opt-Out," *id.* ¶ 122. The CFPB cites no facts to support the conclusion that the ice-breaker question somehow changed the default or undermined the customer's consent to overdraft service after the other disclosures were provided. There is no allegation that answering "yes" to the ice-breaker question was relied on by TCF to enroll a customer in overdraft service without also confirming consent based on the final question in the script.

D. TCF Provided Written Confirmation After the Enrollment Decision.

Finally, financial institutions must provide customers with written confirmation of their enrollment decision, including a statement informing them of their right to revoke their consent. 12 C.F.R. § 205.17(b)(1)(iv). The complaint includes no allegations that TCF failed to provide written confirmation to every customer who enrolled in TCF's overdraft service.

LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation marks omitted). The Court need not, however, accept factual assertions contradicted by the complaint or documents upon which the complaint relies. *See, e.g.*, *Cohen v. United States*, 129 F.2d 733, 736 (8th Cir. 1942) (court need not accept "facts which appear by a record or document included in the pleadings to be unfounded"); *Montero v. Bank of Am., N.A.*, No. 13-cv-850 (SRN/JSM), 2014 WL 562506, at *5 (D. Minn. Feb. 13, 2014) (dismissing claim "[b]ecause the documents attached to the Complaint directly contradict Plaintiff's assertions").

The CFPB referenced or quoted certain documents but declined to attach them to the complaint. These documents are incorporated by reference and should be considered in their entirety for completeness. *See Silver v. H&R Block, Inc.*,

105 F.3d 394, 397 (8th Cir. 1997) (court dealing with claim of misleading statements could consider "the *complete statements* in granting the motion to dismiss"; plaintiff "cannot defeat a motion to dismiss by choosing not to attach the full statements to the complaint" (emphasis added)); *see also Dylla v. Aetna Life Ins.*, No. 07-3203 (RHK/JSM), 2007 WL 4118929, at *2 (D. Minn. Nov. 16, 2007) (Kyle, J.) ("[T]he Court may consider materials that are outside the pleadings if such materials are necessarily embraced by them. For example, materials are necessarily embraced by the complaint if they were mentioned or incorporated by reference in the complaint." (citation and internal quotation marks omitted)).

ARGUMENT

I. TCF Did Not Engage in Deceptive or Abusive Acts or Practices.

Counts I and II assert claims as to New Customers, but the alleged violations are based on virtually identical facts. Both fail as a matter of law and should be dismissed.

A. TCF Did Not Deceive New Customers (Count II).

In light of the unchallenged written disclosures TCF provided to New Customers before, during, and after their enrollment decision, the CFPB cannot maintain a viable claim for consumer deception.

To state a claim for deceptive practices, the Bureau must show that there was a material "representation, omission, or practice that is *likely to mislead the*

consumer...acting reasonably [under] the circumstances." Federal Trade Commission (FTC) Policy Statement on Deception (emphasis added), *appended to In re Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174–76 (1984).[10] A representation or practice should not be viewed in isolation but instead "[t]he entire advertisement, transaction or course of dealing [should] be considered." *Id.* Deception only occurs if the "net impression" of the transaction is materially misleading to a reasonable consumer. *See id.* at 176 n.7; *Kraft, Inc. v. FTC*, 970 F.2d 311, 314 (7th Cir. 1992).

The CFPB alleges that New Customers were deceived because TCF "created the net impression that initialing the Opt-In section of the Agreement was mandatory," when in fact it was optional. Compl. ¶¶ 116–17. While the basis for the CFPB's allegation of what an untold number of customers understood is never disclosed in the complaint, the substance of the disclosures referenced in the complaint undermines this astonishing assertion.

- The Notice that TCF employees handed customers as the "first step" in the account opening process specifically told customers that TCF

[10] While the Consumer Financial Protection Act ("CFPA") does not define a "deceptive" practice, the Bureau has stated that the definition is identical to Section 5 of the FTC Act, 15 U.S.C. § 45(a). *See Consumer Fin. Prot. Bureau v. Mortg. Law Grp., LLP*, No. 14-cv-513-bbc, -- F. Supp. 3d --, 2016 WL 3951226, at *12 (W.D. Wis. July 20, 2016).

"will not authorize and pay overdrafts for [certain] transactions unless you ask us to[.]" Hurd Decl. Ex. 4.

- The Agreement stated that enrollment was optional. It expressly referred customers back to the Notice, and told customers that TCF "does not charge overdraft fees...unless you have asked us to authorize and pay those transactions under the 'Opt-In Election' below" and that "**You are not required to initial the 'Opt-In Election' below.**" Hurd Decl. Ex. 5 at 3. If the customer chose to opt-in, he initialed the Agreement directly under a bold, upper-case heading, "**OPT-IN ELECTION (OPTIONAL)**." *Id.*

The CFPB also alleges that "the net impression left [on New Customers] by TCF's process was that there was no cost to opting in" though overdraft fees could be charged to customers that opted in and used the service. Compl. ¶¶ 114–15. TCF's disclosures flatly contradict this contention:

- The Notice detailed (in **bold**) the fee TCF charged for an overdraft transaction. Hurd Decl. Ex. 4. Also, there was *no fee for enrolling in overdraft services*, only for incurring overdrafts.
- The Agreement required customers to acknowledge TCF's overdraft fee policy under the heading, "**OVERDRAFT FEE ACKNOWLEDGEMENT**." Hurd Decl. Ex. 5 at 3.

The deception claim cannot withstand these unambiguous disclosures. The law does not require that every material term found in a written disclosure be repeated orally at contract signing. Yet that is apparently the standard the CFPB seeks to impose on TCF. Compl. ¶ 59 (faulting TCF employees for not summarizing Notice); *id.* ¶ 74 (faulting oral script for failure to mention fees); *id.* ¶ 113(c) (oral script "did not adequately disclose other relevant terms and conditions, including fees"). And the Bureau cannot assert a "net impression" claim of consumer deception without presenting both the relevant oral statements *and* the documents the consumers reviewed or signed contemporaneous with hearing those oral statements.

Consumers are charged with acting "reasonably under the circumstances" and are presumed to be able to read and comprehend disclosure documents. *See Karakus v. Wells Fargo Bank, N.A.*, 941 F. Supp. 2d 318, 340 (E.D.N.Y. 2013) ("[A] reasonable consumer...is expected to read and be familiar with the terms of a document she signs.").

Although the CFPB contends that bank customers "rarely read these disclosures," Compl. ¶ 76, this assertion is legally irrelevant. Courts routinely reject unfair and deceptive practices claims when the customer received accurate and understandable written disclosures. *See, e.g.*, *Davis v. HSBC Bank Nev., N.A.*, 691 F.3d 1152, 1161–62, 1168–69 (9th Cir. 2012) (affirming dismissal of claim

that advertisement was unfair and deceptive for failing to mention fees because disclaimer said "other restrictions may apply" and terms and conditions disclosed fees); *cf. FTC v. IFC Credit Corp.*, 543 F. Supp. 2d 925, 946 (N.D. Ill. 2008) (granting motion to dismiss unfair practices claim because consumer could reasonably avoid harm simply by reading the contract before signing).

This approach accords with bedrock legal principles. A party cannot claim ignorance of the terms of a written agreement of which he had notice and to which he assented. *See, e.g.*, *Villines v. Gen. Motors Corp.*, 324 F.3d 948, 953 (8th Cir. 2003); *Gartner v. Eikill*, 319 N.W.2d 397, 398 (Minn. 1982) (en banc); Restatement (Second) of Contracts § 157 cmt. b (Am. Law. Inst. 1981) ("Generally, one who assents to a writing is presumed to know its contents and cannot escape being bound by its terms merely by contending that he did not read them; his assent is deemed to cover unknown as well as known terms.").

Nor can parties avoid responsibility for signing a contract by later contending that they had insufficient time to review. *See, e.g.*, *Karakus*, 941 F. Supp. 2d at 340 (rejecting deceptive practices claim based in part on allegation that defendant rushed plaintiff to sign loan documents; "This allegation is not nearly sufficient to overcome the principle that a reasonable consumer, at least in New York, is expected to read and be familiar with the terms of a document she

signs.").[11] Unsurprisingly, courts—including this one—have uniformly upheld other terms of the Agreement against challenges from consumers who claimed not to have read them.[12]

The holding in *Rickher v. Home Depot, Inc.*, 2007 WL 2317188 (N.D. Ill. Jul. 18, 2007), *aff'd*, 535 F.3d 661 (7th. Cir. 2008) is particularly instructive. There, a customer brought a class action against Home Depot under the Illinois Consumer Fraud and Deceptive Business Practices Act ("CFA"),[13] alleging that Home Depot deceived him into believing that an optional "damage waiver" for tool rentals was in fact mandatory. *Rickher*, 2007 WL 2317188, at *3. Like the CFPB, the customer alleged that Home Depot employees failed to make sufficient oral disclosures about the damage waiver. *Id.* at *4. The court rejected the claim

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[11] The New York Deceptive Practices Act is modeled on the FTC Act and "New York State Courts have looked to FTC Act case law in interpreting" that law. *Assocs. Capital Servs. Corp. v. Fairway Private Cars, Inc.*, 590 F. Supp. 10, 15 (E.D.N.Y. 1982) (citing *Lefkowitz v. Colo. State Christian Coll.*, 346 N.Y.S.2d 482, 487–91 (Sup. Ct., N.Y. Cty. 1973)).

[12] *See Williams v. TCF Nat'l Bank*, No. 12 C 05115, 2013 WL 708123, at *1, *4 (N.D. Ill. Feb. 26, 2013) (arbitration agreement found in separate "Terms and Conditions" pamphlet enforceable because consumer "had actual possession of the Terms"); Order at 10, *Pellett v. TCF Bank, N.A.*, No. 10 C 3943 (D. Minn. Nov. 24, 2010) (Doty, J.) ("Plaintiffs may not avoid their signed agreements by claiming that they did not read or understand the contents of those agreements"); *Pivoris v. TCF Fin. Corp.*, No. 07 C 2673, 2007 WL 4355040, at *4 (N.D. Ill. Dec. 7, 2007) (arbitration agreement enforceable where "Account Agreement itself made mention of the arbitration provision in plain English and in bold print").

[13] That law, like the CFPA, defines deceptive acts or practices with reference to the FTC Act. 815 Ill. Comp. Stat. 505/2.

because 1) the rental agreement notified customers that the damage waiver was optional, and 2) the customer admitted he did not read that part of the contract. *Id.* at *4, *5. As the court explained, "failure to read the agreement dooms his CFA claim" because "Plaintiff simply chose not to read the agreement and discover...for himself" that the damage waiver was optional. *Id.* at *5–6.

While written disclosures may not always cure otherwise deceptive practices—such as when there are explicit misrepresentations,[14] or where the written disclosure is buried in a lengthy document[15] or located in an unusual place one would not think to look[16]—the complaint contains absolutely no allegations of that kind. No TCF customer acting reasonably under the circumstances could have been deceived. The Bureau's apparent view that TCF customers should not be held to the clear disclosures they were provided breaks with longstanding principles of law. Count II should be dismissed.

B. TCF Did Not Abuse New Customers (Count I).

The CFPB likewise cannot maintain a viable claim for consumer abuse because the complaint has not plausibly alleged that TCF interfered with the

[14] *See, e.g.*, *FTC v. E.M.A. Nationwide, Inc.*, 767 F.3d 611, 632–33 (6th Cir. 2014) (disclosures contradicted by oral representations and only provided after consumer enrolled).

[15] *Id.* at 633 (deceptive practice where "disclaimers and more accurate information were buried in written documents").

[16] *FTC v. Cyberspace.com, LLC*, 453 F.3d 1196, 1200–01 (9th Cir. 2006) ("fine print notices" on rear of check).

decision of customers to enroll; the complaint does not allege that TCF prevented New Customers from reading the disclosures or otherwise made oral statements that contradicted them.

To state a claim for abusive practices, the CFPB must allege that TCF "*materially interfere[d]* with the ability of a consumer to understand a term or condition of a consumer financial product or service."[17] 12 U.S.C. § 5531(d)(1) (emphasis added). Recycling almost all the allegations underlying the deception claim, the CFPB contends that TCF "materially interfered with its New Customers' ability to understand" the terms and conditions governing overdraft service. Compl. ¶ 110. These allegations fall into three general categories, all of which fail as a matter of law.

First, the CFPB attacks TCF's decision to give customers the Notice at the start of the account opening process and ask for an enrollment decision later, after a series of other disclosures and acknowledgments. But that allegation ignores the fact that separation is consistent with Regulation E, which required that the Notice be "segregated" from the Agreement. 12 C.F.R. § 205.17(b)(1)(i). And, there is nothing abusive about giving the required Notice at the outset. The Agreement referred customers back to the Notice, stating, "TCF has given you a notice called

[17] The CFPA also prohibits as abusive an act or practice that "takes unreasonable advantage of" a consumer in various ways. 12 U.S.C. § 5531(d)(2). The Bureau relies only on the "material interference" aspect of an abusiveness claim. *See* Compl. ¶ 111.

What You Need to Know About Overdrafts and Overdraft Fees that describes our policy." Hurd Decl. Ex. 5. If anything, providing the Notice first attributes greater prominence to the disclosure.

The CFPB's newly-minted criticism also upends years of formal guidance from the Federal Reserve, which permits banks to provide the Notice "*prior to* or at account-opening" and includes no reminder requirement other than the written confirmation of enrollment provided afterwards. *See* 74 Fed. Reg. 59,033, 59,055 (Nov. 17, 2009), Official Staff Interpretations Comment 17(b)-5 (emphasis added). It is improper for the CFPB to attempt to impose liability based on its interpretation that contradicts official guidance in place at the time TCF enrolled New Customers. *See Christopher v. SmithKline Beecham Corp.*, 132 S. Ct. 2156, 2167 (2012) (refusing to apply new agency interpretation of "ambiguous regulations to impose potentially massive liability on respondent for conduct that occurred well before that interpretation was announced"); *PHH Corp.*, 839 F.3d at 49 (due process prevented the CFPB from retroactively applying different rules than predecessor regulator without fair notice).

Second, the CFPB contends that TCF materially interfered with New Customers' ability to understand their enrollment decisions by instructing employees to give "uninformative" and "cursory" responses to questions and use "one-sided" hypotheticals. Compl. ¶¶ 3, 85–86, 110. Accepting the truth of these

allegations only for the purposes of this motion, they do not amount to "material interference" as a matter of law.

It cannot be that "uninformative" or "cursory" oral explanations (as the complaint's totally conclusory allegations describe them) materially interfere with a customer's decision where the law requires *no* explanation. Financial institutions throughout America can and do enroll millions of customers *online*. If the allegedly cursory summaries are not detailed enough, then online enrollment must be *per se* abusive. Yet the Federal Reserve's guidance expressly permits online enrollment and does not require *any* oral disclosure. 74 Fed. Reg. at 59,055 (Official Staff Interpretation Comment 17(b)-4(iii)) (allowing customers to opt-in via "electronic means" including "at its Web site").

The CFPB further alleges that many customers did not bother to read the Notice or the Agreement. But individual decisions to read or not read disclosures do not dictate whether TCF's account-opening process was abusive. To properly allege abuse, the complaint must show that *TCF* took some action that "materially interfered" with a customer's ability to understand the decision he was making.

The complaint only contains the conclusory allegation that TCF interfered with customer understanding through one-sided hypotheticals and cursory explanations. It does not explain how TCF's alleged practices prevented New Customers from reading TCF's clear, unambiguous disclosures, or how TCF

undermined customers' understanding that overdraft service was optional and a fee would be charged if the customer overdrafted. By providing customers with unambiguous written disclosures before, during, and after the enrollment decision, TCF gave New Customers the ability to understand the service it offered.

Third, the CFPB alleges that TCF deprived customers of the ability to understand overdraft service terms by incentivizing employees to reach unreasonably aggressive enrollment targets. Compl. ¶ 110. But employee incentives or goals are not *per se* abusive without a connection to actual improper conduct and resulting harm. Unlike other cases where the CFPB has alleged that improper conduct *actually resulted from* incentives,[18] there are no allegations that *any* TCF employee engaged in any improper behavior, let alone improper behavior motivated by incentives. *See* Compl. ¶¶ 35–48.

Nothing in Regulation E or any other federal law prohibited the payment of financial incentives to employees, prohibited TCF from actively soliciting its customers to enroll in overdraft service, or required any particular oral statements to supplement the mandatory Notice and written confirmation. No matter how "uninformative" the Bureau says TCF's scripts were, it has not pleaded facts sufficient to withstand dismissal of its abusiveness claim.

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[18] *See, e.g.*, Consent Order at 4–5, *In re Wells Fargo Bank, N.A.*, CFPB No. 2016-CFPB-0015 (Sept. 8, 2016) (incentives led employees to open accounts without consumer's knowledge or consent).

C. The Bureau Cannot Retroactively Assert Claims that Pre-Date July 21, 2011.

"Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). Thus, there is a "deeply rooted" presumption against retroactive application of legislation. *Id.*

In its zeal to address overdraft service, the CFPB is ignoring this bedrock principle by attempting to retroactively impose duties and penalties. The Court should reject this effort.

Counts I and II allege that TCF violated Sections 1031 and 1036 of the CFPA. Those provisions—and the Bureau's authority to enforce them—did not become effective until July 21, 2011 (the "Effective Date"). Pub. L. No. 111-203, § 1037, 124 Stat. 1376 (July 21, 2010) (Sections 1031 and 1036 "shall take effect on the designated transfer date."); 75 Fed. Reg. 57,252 (Sept. 20, 2010) (setting designated transfer date as July 21, 2011). Consequently, the CFPB cannot use these provisions to challenge conduct that occurred before the Effective Date.

Courts apply the two-part test from *Landgraf* to determine if a law may be applied retroactively. *See* 511 U.S. at 280; *In re ADC Telecomms., Inc. Sec. Litig.*, 409 F.3d 974, 976 (8th Cir. 2005) (applying *Landgraf* test). First, courts ascertain "whether Congress has expressly prescribed the statute's proper reach." *Landgraf*,

511 U.S. at 280. If so, "'there is no need to resort to judicial default rules.'" *ADC Telecommunications*, 409 F.3d at 976 (quoting *Landgraf*, 511 U.S. at 280). If not, "the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. If it does, then the statute cannot be applied to past conduct. *Id.*

The CFPB cannot get past step one. Not only does the CFPA provide no express authorization of retroactivity, Congress's intent was the opposite. Congress specifically set the Effective Date of the CFPA *in the future*. Pub. L. No. 111-203, § 1037, 124 Stat. at 2011. By contrast, Congress made the effective date of other provisions of Dodd Frank immediate. *See id.* § 4, 124 Stat. at 1390 ("Except as otherwise specifically provided...this Act and such amendments shall take effect 1 day after the date of enactment of this Act."). Given Congress's decision to make some provisions immediately effective and others effective at some future date, it necessarily follows that Congress intended the new provisions of the CFPA to apply only prospectively.

Even absent this clear expression of Congressional intent, the abusive and deceptive prohibitions still could not be applied retroactively under *Landgraf* step two. As to Count I's allegations of abusive conduct, prior to passage of the CFPA

there was no law or regulation applicable to TCF that prohibited "abusive" conduct now covered by § 5531. Subjecting TCF to legal consequences for engaging in allegedly "abusive" behavior that pre-dates the Effective Date therefore would be the paradigmatic example of "impos[ing] new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280.

The CFPB also cannot enforce retroactively the deceptive prong of the CFPA. First, unlike with abusiveness, the FTC Act prohibited TCF from engaging in deceptive conduct before the Effective Date, but Congress nevertheless precluded the CFPB from enforcing the FTC Act. *See* 12 U.S.C. §§ 5481(14) (definition of Federal consumer financial law "does not include the Federal Trade Commission Act."); 5481(12) (definition of enumerated consumer laws excludes FTC Act); 5581(b)(5)(B)(ii) (giving the CFPB authority to enforce *regulations* related to unfair and deceptive acts promulgated under the FTC Act, not authority to enforce violations of the FTC Act itself). To allow the Bureau to prosecute deceptive conduct that allegedly occurred before the Effective Date—ostensibly under the CFPA, but bootstrapped by reference to the FTC Act—would let in the backdoor that which is explicitly prohibited from entering through the front.

Second, the CFPA exposes TCF to greater potential penalties than TCF faced before its enactment. Before the Effective Date, only the Office of the Comptroller of the Currency ("OCC"), through 12 U.S.C. § 1818, could seek a

civil money penalty against TCF for deceptive practices under the FTC Act. Under the CFPA, the CFPB can now also seek—and has sought in this case—civil money penalties under 12 U.S.C. § 5565.

Importantly, the CFPA did not displace the OCC's authority to bring suit under the FTC Act, creating the possibility that TCF could now face *two* enforcement actions—and two separate penalties—for the same conduct, when before it could only face one. *See* 12 U.S.C. § 5581(b)(2)(A), (c)(2)(C)(ii) (partially transferring OCC authority to enforce Federal consumer financial laws (which exclude FTC Act), while maintaining the OCC's authority to enforce 12 U.S.C. § 1818). This risk is not merely theoretical—in recent cases the CFPB and OCC have each sought (and received) civil money penalties for the same unfair or deceptive practices.[19] Thus, if given retroactive effect the CFPA would impermissibly "attach[] new legal consequences to events completed before its enactment." *Landgraf*, 511 U.S. at 270. The Court should therefore dismiss Counts I and II for conduct that pre-dates July 21, 2011.

[19] *See, e.g.*, Consent Order at 13–15, 31, *In re First National Bank of Omaha*, CFPB No. 2016-CFPB-0014 (Aug. 25, 2016) (civil money penalty of $4,500,000 to CFPB); Consent Order for a Civil Money Penalty at 2–3, *In re First National Bank of Omaha*, OCC No. 2016-076(Aug. 18, 2016) ($3,000,000 civil money penalty to OCC).

II. TCF Did Not Violate Regulation E (Count III).

Count III must be dismissed because the complaint does not plausibly contend TCF failed to comply with Regulation E in connection with its efforts to enroll Existing Customers in overdraft service.

Unlike New Customers, Existing Customers were accustomed to overdraft service, but were slated to default to opt-out status on August 15, 2010 if they did not affirmatively choose to enroll. The Bureau does not allege that TCF failed to provide the Notice to Existing Customers, nor does it contend that TCF failed to provide written confirmation of their enrollment decision. Instead, it claims that TCF violated Regulation E when it asked Existing Customers whether they wanted their card to "continue working as it does today." *Id.* ¶ 121. According to the CFPB, this "fram[ed] the decision" in a way that "turned Overdraft Service...into the default position," and, "[a]s a result, Existing Customers did not have a reasonable opportunity to consent nor did they affirmatively consent." *Id.* ¶¶ 122–23. This conclusion is based on a demonstrable misreading of the "reasonable opportunity to consent" requirement.

A. TCF Gave Customers a Reasonable Opportunity To Consent.

Regulation E states that a "financial institution provides a consumer with a reasonable opportunity to provide affirmative consent when, among other things, it provides *reasonable methods* by which the consumer may affirmatively consent."

74 Fed. Reg. at 59,042 (emphasis added). The regulation provides four examples, all of which focus on the *means* and *method* of obtaining affirmative consent, such as providing a mail-in form, a "readily available telephone number," a web-based form, or a form that "the consumer can fill out and present in person...to provide affirmative consent." *Id.*; *see also id.* at 59,055 (Official Staff Interpretations Comment 17(b)-4) (discussing "reasonable opportunity to provide affirmative consent"). The staff commentary for Regulation E makes clear that a "reasonable opportunity to consent" means that banks must provide "*reasonable methods*" to consent. *Id.*

The CFPB does not allege that TCF failed to provide reasonable enrollment options to Existing Customers. Indeed, the Bureau acknowledges that TCF gave customers the opportunity to enroll "through a number of [] communications channels[.]" Compl. ¶ 103. Nothing in the text of the regulation or the staff commentary suggests that the "reasonable opportunity" requirement has anything to do with the presentation or description of the customer's opt-in choice. But that is exactly the meaning the CFPB asks the Court to give it here.

Allowing the CFPB to apply this novel (and incorrect) interpretation of Regulation E to TCF's conduct from 2010 would violate TCF's due process rights in the exact same way that the Bureau violated PHH's rights by attempting to retroactively alter well established regulatory guidelines. *See PHH Corp.*, 839

F.3d at 44 ("But change becomes a problem—a fatal one—when the Government decides to turn around and *retroactively* apply that new interpretation to proscribe conduct that occurred *before* the new interpretation was issued." (emphasis in original)); *see also Christopher*, 132 S. Ct. at 2167. If the CFPB wants to change the meaning of "reasonable opportunity" to require (or prohibit) oral disclosures, or specify the content of those disclosures, it must engage in a prospective rulemaking—which, interestingly, it is already doing.[20] A retroactive enforcement action seeking to establish new interpretations is improper.

B. The Complaint Fails To Allege Plausibly that Customers Did Not Provide Affirmative Consent.

The Regulation E claim also fails because the CFPB does not plausibly allege that TCF failed to obtain "affirmative consent" from customers. Count III asserts that TCF "changed the election from an Opt-In to an Opt-Out," Compl. ¶ 122, by using call scripts that asked Existing Customers "something like" whether they would like their "TCF check card to continue to work as it does today" and then treating that "as *an indication* that the customer wanted to Opt In," *id.* ¶¶ 89–90 (emphasis added).

[20] *See* CFPB Agency Rule List, Fall 2016 (Hurd Decl. Ex. 9) (listing "Overdraft" in the "Prerule Stage"); *see also* CFPB Fall 2016 Rulemaking Agenda, Dec. 2, 2016 (Hurd Decl. Ex. 10) at 3 ("The Bureau is continuing to engage in additional research and has begun consumer testing initiatives relating to the opt-in process."); CFPB Fall 2015 Rulemaking Agenda, Nov. 20, 2015 (Hurd Decl. Ex. 1) at 2 ("The Bureau is preparing for a rulemaking concerning overdraft programs on checking accounts.").

The CFPB does not allege that TCF actually enrolled customers based solely on the response to this ice-breaker question. To the contrary, it acknowledges—as it must—that TCF's scripts called for additional disclosures about TCF's overdraft service, *including fees*, *id*. ¶ 94, followed by a question asking whether the customer wanted to enroll in overdraft service. *Id.* ¶ 96; *see also* Hurd Decl. Ex. 6.

There is simply no allegation that TCF enrolled Existing Customers without their knowledge, or under false pretenses, or defaulted Existing Customers into Opt-In status. Instead, TCF only enrolled Existing Customers who answered "Yes" to the enrollment question *at the end of the script*. As a matter of law, this does not constitute a violation of Regulation E.

The CFPB's "conversion" argument is also nonsensical. The Bureau alleges that TCF scripts led customers to believe that the default was to be opted into overdraft service because the script informed Existing Customers that "some upcoming regulatory changes...would limit the usage" of their TCF Check Cards, Compl. ¶ 89, and asked "whether they wanted their account 'to continue working as it does today,'" *id*. ¶ 121. But there is nothing wrong or misleading about these statements, the Bureau's *ipse dixit* assertion notwithstanding.

The challenged statements are factually accurate. At the time the calls were placed (i.e., before Regulation E became effective), Existing Customers were all enrolled in overdraft protection; if they did nothing, they automatically would have

been opted out of that service. If that happened, their cards would not have worked as they had—i.e., swipe negative/settle positive transactions would not have been approved and overdraft transactions would not have been honored. The CFPB cannot claim that TCF violated Regulation E by providing its customers with factually accurate information. Count III should be dismissed.

C. The CFPB Cannot Seek Restitution for Existing Customers Who Incurred Their First Overdraft Prior to March 6, 2014.

The CFPB contends that it can enforce alleged violations of Regulation E through the Electronic Funds Transfer Act ("EFTA"), 15 U.S.C. § 1693, and the CFPA, 12 U.S.C. § 5536(a)(1)(A). Claims under both statutes are time-barred to the extent the Bureau seeks restitution for customers who incurred an overdraft before *March 6, 2014*.[21]

The EFTA limits claims for "civil liability" to those brought "within one year from the date of the occurrence of the violation." 15 U.S.C. § 1693m(g). Courts have interpreted this to mean that the one-year limitations period runs from the date of the first challenged transfer. *See, e.g.*, *Harvey v. Google Inc.*, No. 15-cv-03590-EMC, 2015 WL 9268125, at *3 (N.D. Cal. Dec. 21, 2015); *Repay v. Bank of Am., N.A.*, No. 12 CV 10228, 2013 WL 6224641, at *5 (N.D. Ill. Nov. 27,

[21] TCF entered into a series of tolling agreements with the CFPB beginning on February 11, 2015. Accounting for brief lapses between extensions (totaling 23 days), tolling runs from March 6, 2015. Hurd Decl. Ex. 7.

2013); *Pelletier v. Pac. WebWorks, Inc.*, No. CIV S-09-3503 KJM KJN, 2012 WL 43281 (E.D. Cal. Jan. 9, 2012).

Although a question of first impression, the EFTA's one-year limitations period for civil liability governs the Bureau's action here. Where Congress wishes to provide a longer limitations period for government action than private action, it can and does do so explicitly. *See, e.g.*, 12 U.S.C. § 2614 (requiring that suits to enforce §§ 2607 and 2608 be brought within one year, "except that actions brought by [various government agencies] may be brought within 3 years from the date of the occurrence of the violation."). Because there is no separate statute of limitations provision for actions by regulators, the one-year limitations period should apply. *Cf. Consumer Fin. Prot. Bureau v. ITT Educ. Servs., Inc.*, No. 1:14-CV-00292-SEB-TAB, -- F. Supp. 3d --, 2015 WL 1013508 at *32–33 (S.D. Ind. Mar. 6, 2015) (applying TILA's one-year civil liability limitations period to the Bureau's claims).

Nor does the CFPA's three-year limitations period apply because the CFPA claim is entirely derivative of the alleged EFTA violation. Section 1054 of the CFPA authorizes the CFPB to bring suits in federal court for alleged CFPA violations no later than "3 years after the date of discovery of the violation." 12 U.S.C. § 5564. This general rule, however, is subject to an important caveat: "any action arising solely under an enumerated consumer law," including the EFTA, is

not governed by the three-year limitations period, but instead is governed by "the requirements of that provision of law [i.e. the enumerated consumer financial law], as applicable." *Id.* § 5564(g)(2)(A)–(B).

The Bureau alleges that TCF violated the CFPA, which makes it unlawful to "commit any act or omission in violation of a Federal consumer financial law." 12 U.S.C. § 5536; *see also* 12 U.S.C. § 5481(14) (defining "Federal consumer financial law" to include "enumerated consumer laws"). This means that Count III's CFPA claim is based solely on an alleged violation of an enumerated consumer law—the EFTA—and therefore subject to the one-year limitations period established by the same EFTA. Count III should be dismissed as time-barred for all Existing Customers who incurred their first overdraft fee before March 6, 2014.

III. The CFPB Is Unconstitutionally Structured Due to the Lack of Executive and Congressional Oversight.

The CFPB's structure is unconstitutional. *See PHH Corp.*, 839 F.3d at 8. Its lack of oversight impermissibly interferes with the President's ability to "'take Care that the Laws be faithfully executed,'" *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010) (quoting U.S. Const. art. II, § 1), and leaves the CFPB accountable only to itself. As a panel for the D.C. Circuit recently said, "when measured in terms of unilateral power, the Director of the

CFPB is the single most powerful official in the entire U.S. Government, other than the President." *PHH Corp.*, 839 F.3d at 17.

The CFPB has several structural infirmities which, considered separately or together, make the Bureau unconstitutionally free from oversight by elected officials. First, unlike nearly all other independent agencies, the CFPB is led by a single Director, not a multi-member commission. 12 U.S.C. § 5491(b)(1). "As compared to a single-Director structure, a multi-member independent agency also helps to avoid arbitrary decisionmaking and to protect individual liberty because the multi-member structure—and its inherent requirement for compromise and consensus—will tend to lead to decisions that are not as extreme, idiosyncratic, or otherwise off the rails." *PHH Corp.*, 839 F.3d at 27.

Second, the CFPB director does not serve at the pleasure of the President—he is appointed for a five-year term spanning across presidencies, and is subject only to for-cause removal. 12 U.S.C. § 5491(c)(1), (c)(3).

Third, the CFPB does not even answer to Congress for its budget—it independently funds itself through the Federal Reserve, and funds taken by the CFPB "shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate." *Id.* § 5497(a)(1), (a)(2)(C).

These structural infirmities create an agency "exceptional in our constitutional structure and unprecedented in our constitutional history." *PHH*

Corp., 839 F.3d at 21. Without oversight from either elected branch of government, the CFPB is unconstitutional. And because it is unconstitutional, it lacks authority to bring this action. *See Noel Canning v. NLRB*, 705 F.3d 490, 493 (D.C. Cir. 2013) (NLRB action "void *ab initio*" when commissioners were unconstitutionally appointed), *aff'd on other grounds*, 134 S. Ct. 2550 (2014).

The proper remedy in this case is to dismiss this action without prejudice to allow the Bureau to reconsider whether to bring an enforcement action *after* its structure conforms to the Constitution's requirements. *See NLRB v. Whitesell Corp.*, 638 F.3d 883, 888–89 (8th Cir. 2011) (after prior decision held NLRB panel was not properly constituted for statutory reasons; "Our prior denial does not preclude the Board, *now properly constituted*, from considering this matter anew and issuing its first valid decision." (emphasis added)); *Fed. Election Comm'n v. Legi-Tech, Inc.*, 75 F.3d 704, 708 (D.C. Cir. 1996) (properly reconstituted after *NRA Political Victory Fund*, *infra*, Federal Election Commission permissibly ratified past enforcement action); *see also Fed. Election Comm'n v. NRA Political Victory Fund*, 6 F.3d 821, 828 (D.C. Cir. 1993) (after severing unconstitutional structure; "appellants raise the constitutional challenge as a defense to an enforcement action, and we are aware of no theory that would permit us to declare the Commission's structure unconstitutional without providing relief to the appellants in this case").

This enforcement action has been entirely (and therefore unconstitutionally) shielded from executive oversight. Indeed, as noted earlier, the CFPB filed this suit on inauguration eve, likely in an effort to insulate this action from any Presidential review. Therefore, the case should be dismissed.

CONCLUSION

For the foregoing reasons the Complaint should be dismissed.

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Respectfully submitted,

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UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Consumer Financial Protection Bureau,

Plaintiff,

vs.

TCF National Bank,

Defendant.

Case No. 17-cv-0166-RHK-KMM

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