PUBLIC VERSION

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

In the Matter of: **FANG FANG,** A former institution-affiliated party of J.P. Morgan Securities (Asia Pacific) Limited Central, Hong Kong, China A Non-Bank Subsidiary of a Registered Bank Holding Company	Docket Nos.: 17-006-E-I 17-006-CMP-I

ORDER REGARDING CROSS MOTIONS FOR SUMMARY DISPOSITION[1]

[1] This order was initially issued under temporary seal for the reasons provided in notes 4 and 5 and page 118 *infra*. On June 17, 2022, the parties filed a Joint Status Report notifying the undersigned's office that no portion of the order should remain under seal in furtherance of the public interest. Consequently, this order is deemed unsealed in its unredacted form—with certain individuals and entities remaining pseudonymized per note 116—and will be posted in its entirety at https://www.ofia.gov/decisions.html in accordance with normal practice.

PUBLIC VERSION

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The Board of Governors of the Federal Reserve System ("Board of Governors," "Board," or "FRB") commenced this action against Respondent Fang Fang ("Respondent" or "Fang") on March 9, 2017, filing a Notice of Intent to Prohibit and Notice of Assessment ("Notice") that seeks an order of prohibition and the imposition of a $1 million civil money penalty against Respondent pursuant to 12 U.S.C. §§ 1818(e) and 1818(i). The Notice alleges that Respondent, in his capacity as a Managing Director of J.P. Morgan Securities (Asia Pacific) Limited ("JPMSAP") and head of investment banking in China for JPMorgan Chase & Co. ("JPMorgan," "JPMC," "JPM," or "the Firm"), engaged in actionable misconduct in connection with his participation in and management of JPMC's client referral hiring program ("Client Referral Program" or "CRP") in the Asia Pacific region from 2008 through the program's cessation in 2013.

Following the reassignment of this matter in the wake of the Supreme Court's decision in *Lucia v. SEC*,[2] Enforcement Counsel for the Board of Governors ("Enforcement Counsel") and Respondent (collectively "the Parties") have now filed cross-motions for summary disposition, each contending that there are no material facts in dispute that would preclude a resolution of this matter in their favor as a matter of law.[3]

Specifically, Enforcement Counsel argues that Respondent's undisputed involvement with the Client Referral Program, which "provided internships and other employment opportunities within the Firm for candidates who were referred by foreign government officials and existing or prospective commercial clients," violated Firm policies and constituted unsafe or unsound banking practices, a breach of Respondent's fiduciary duty to JPMC, and a violation of the Foreign Corrupt Practices Act ("FCPA") insofar as employment offers under the CRP were made, and the program

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

[3] This matter has had a somewhat convoluted procedural history, including a denial of Respondent's previous motion for summary disposition in 2017 and the subsequent resolution of certain substantive issues by the Board in rejecting Respondent's interlocutory appeal. *See infra* at 46-49 for highlights salient to the instant motions.

overall devised, to obtain improper business advantages. March 18, 2022 Motion for Summary Disposition ("FRB Mot.") at 3; *see id.* at 18-32.[4] Enforcement Counsel further contends that the undisputed material facts reveal Respondent's willful and continuing disregard for the Firm's safety and soundness through his conduct, which benefited Respondent financially and caused JPMC to suffer significant monetary and reputational loss. *See id.* at 32-38.

Respondent, in turn, argues that the action against him should be disposed of on a number of threshold grounds, including that the undersigned has not been constitutionally appointed and the proceedings are intrinsically defective; that the Board lacks authority to bring this action against Respondent or to enforce the relevant statutory framework in these circumstances; that the claims in the Notice are barred by the applicable statute of limitations; and that Respondent has been denied due process throughout these proceedings in various ways. *See* March 18, 2022 Motion for Summary Disposition ("Resp. Mot.") at 1-21.[5] In addition, Respondent contests Enforcement Counsel's ability to prove the merits of the necessary statutory elements of misconduct, effect, and culpability, arguing that the undisputed material facts foreclose the possibility of a judgment against him on any of the Notice's claims and that summary disposition should therefore be granted in his favor. *See id.* at 21-47.

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[4] Enforcement Counsel's Motion, its Statement of Undisputed Facts in support of that Motion ("FRB SOF"), its Opposition to Respondent's summary disposition motion ("FRB Opp."), and its Response to Respondent's statement of undisputed facts ("FRB Opp. SOF"), as well as certain supporting exhibits to these filings, have all been filed under seal pursuant to Enforcement Counsel's authority under 12 C.F.R. § 263.33(b) and its representation that disclosure of those documents would be contrary to the public interest. *See* March 18, 2022 Notice of Filing Under Seal; April 21, 2022 Notice of Filing Under Seal. Pursuant to this Tribunal's March 9, 2022 Order, and to better enable the undersigned to issue a maximally public order on the instant motions, Enforcement Counsel also specifically identified which parts of its submissions are considered to be confidential by including such information in red, bracketed text. *See* March 9, 2022 Order Denying in Part Respondent's Motion for Enlargement of Summary Disposition Page Limitation at 2.

[5] The undersigned notes that Respondent's submissions in connection with the instant summary disposition briefing—including his Motion, his Statement of Undisputed Facts in support of that Motion ("Resp. SOF"), his Opposition to Enforcement Counsel's summary disposition motion ("Resp. Opp."), and his Response to Enforcement Counsel's statement of undisputed facts ("Resp. Opp. SOF")—contain unredacted information that Enforcement Counsel has designated as confidential, most notably the names of specific CRP candidates and referring clients in connection with whom Respondent is alleged to have committed misconduct, and are deemed sealed. *See* note 116 *infra*.

For the reasons set forth below, the undersigned is not persuaded by Respondent's threshold arguments and further finds that the misconduct, effect, and culpability elements of Sections 1818(e) and 1818(i) have each been satisfied in at least one respect by the undisputed material facts adduced by Enforcement Counsel. As a result, the undersigned denies Respondent's motion and recommends the entry of summary disposition in Enforcement Counsel's favor in the manner and to the extent detailed in this Order.

I. Summary Disposition Standard

The Board's Uniform Rules of Practice and Procedure ("Uniform Rules") provide that summary disposition on a given claim is appropriate when the "undisputed pleaded facts" and other evidence properly before this tribunal demonstrates that (1) "[t]here is no genuine issue as to any material fact," and (2) "[t]he moving party is entitled to a decision in its favor as a matter of law."[6] A genuine issue of material fact is one that, if the subject of dispute, "might affect the outcome of the suit under the governing law."[7] The summary disposition standard "is similar to that of the summary judgment standard under Rule 56 of the Federal Rules of Civil Procedure."[8] Thus, when determining the existence of a genuine factual dispute, all evidence must be evaluated "in the light most favorable to the non-moving party."[9] That means that this tribunal must "draw 'all justifiable inferences' in the non-moving party's favor and accept the non-moving party's evidence as true," although "mere allegations or denials" will not suffice.[10] Furthermore, "in granting a motion for summary of disposition, a trier of fact is not obliged to credit the non-moving party's factual assertions when they are not supported on the record," and the Tribunal "is not

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[6] 12 C.F.R. § 263.29(a).

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

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

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

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

required to move a case past the summary [disposition] stage when inferences drawn from the evidence and upon which the non-moving party relies are implausible."[11]

Any party moving for summary disposition of all or part of the proceeding must submit, along with such motion, "a statement of the material facts as to which the moving party contends there is no genuine issue."[12] A party that opposes summary disposition, moreover, must likewise "file a statement setting forth those material facts as to which he or she contends a genuine dispute exists."[13] In both cases, the enumeration of material facts "must be supported by documentary evidence [in] the form of admissions in pleadings, stipulations, depositions, transcripts, affidavits, [or] any other evidentiary materials that the . . . party contends support [its] position."[14] Where, as here, the Parties have filed cross-motions for summary disposition, "the underlying facts and inferences in each party's motion" are to be considered in the light most favorable to the opposing party,[15] and summary disposition will be granted "only if one of the moving parties is entitled to judgment as a matter of law upon material facts that are not genuinely disputed."[16] If this Tribunal determines that summary disposition is merited only on certain of a party's claims, it may recommend a grant of partial summary disposition and proceed to a hearing on the remaining disputed material issues.[17]

[11] *Blanton*, 2017 WL 4510840, at *6.
[12] 12 C.F.R. § 263.29(b)(2).
[13] *Id.*
[14] *Id.*
[15] *Schaerr v. Dep't of Justice*, 435 F. Supp. 3d 99, 107 (D.D.C. 2020).
[16] *Heffernan*, 417 F. Supp. 3d at 7 (internal quotation marks and citation omitted).
[17] *See* 12 C.F.R. § 263.30.

II. Background and Summary of Facts

The following is drawn from the Parties' pleadings, their respective statements of material fact, and the exhibits submitted in support thereof.[18] Unless otherwise stated, the facts relayed below are not materially disputed. Where the Parties appear to be in some genuine factual dispute, both accounts are noted as well as the evidence that each side has marshaled in support. The undersigned will then address where appropriate in this Order the extent to which these disputes implicate facts that are material to the resolution of some aspect of the instant action.

JPMC's Asia Banking

JPMC is a U.S. holding company and parent corporation of, among other entities, JPMorgan Chase Bank, N.A. ("JPMCB").[19] JPMSAP, which is headquartered in Hong Kong, "principally carries out investment banking for [JPMC] in the Asia Pacific region."[20] JPMSAP is an indirect subsidiary of both JPMC and J.P. Morgan International Finance Limited, which is an Edge Act Corporation organized under 12 U.S.C. §§ 611-614 to do business overseas and wholly owned by JPMCB.[21] The Edge Act authorizes "the establishment of international banking and financial corporations," chartered and supervised by the Board of Governors, to enable U.S. banks to "compete more effectively with foreign banks in offshore banking operations."[22]

Fang began his employment at JPMSAP in 2001.[23] By 2007, he had become a Managing Director and head of JPMC's China Investment Banking line of business, as well as Vice Chairman

[18] Exhibits submitted by Enforcement Counsel in support of its Motion and in opposition to Respondents' Motion are styled "FRB-MSD" and "FRB-BIO," respectively. Likewise, exhibits submitted by Respondent in support of his Motion and in opposition to Enforcement Counsel's Motion are styled "R-MSD" and "R-BIO".

[19] *See* FRB Opp. at 36 n.107; FRB-BIO-175 (Declaration of Karl Christensen) ("Christensen Decl.") ¶ 5(d).

[20] Resp. SOF ¶ 1.

[21] *See* FRB Opp. at 36 n.107; FRB-BIO-175 (Christensen Decl.) ¶¶ 5(a)-(c), (e).

[22] *Am. Int'l Group, Inc. v. Bank of Am. Corp.*, 712 F.3d 775, 778-79 (2d Cir. 2013); *see* 12 U.S.C. § 611a.

[23] *See* Resp. SOF ¶ 3.

of the Asia Pacific region.[24] In this capacity, Fang "was the most senior relationship manager for [China investment banking] clients" and "owned all of the client relationships at a senior-most level within the China context."[25]

Internships, Junior Bankers, and the JRM

The recruitment, hiring, and staffing of junior bankers—those at the analyst and associate levels—for JPMC's Investment Banking ("IB") line of business in the Asia Pacific region, including campus hiring, lateral hiring, and the highly competitive summer internship program, was primarily the responsibility of the Junior Resource Management Group ("JRM") during the relevant period.[26] The JRM consisted of a group head with "overall responsibility over junior personnel and campus recruiting" in the region ("JRM Head"), a staffer with broad recruiting duties who also worked on hiring, staffing, and performance matters ("JRM Staffer"), and an administrative assistant ("JRM Assistant").[27] Timothy Fletcher served as the JRM Head during the time at issue in the Notice, from 2008 to 2013.[28] Angela Hu was the JRM Staffer from 2009 until sometime in 2011, when she was succeeded by Ying Liu.[29] And Isabella Kwan appears to have served as the JRM Assistant throughout.[30]

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[24] *See* FRB SOF ¶ 1; Resp. SOF ¶ 3.

[25] FRB SOF ¶ 73 (internal quotation marks and citation omitted).

[26] *See id.* ¶¶ 42, 49, 54; Resp. SOF ¶¶ 1-2; *see also* FRB-MSD-19 (Deposition of Angela Hu) ("Hu Dep.") at 23:17-28:16 (describing typical recruitment and hiring process), 28:17-32:16 (describing summer internship program and estimating that applicants had a 1 in 1,000 chance of being selected).

[27] FRB SOF ¶ 47; *see id.* ¶¶ 44, 49, 52; Resp. Opp. SOF at 1 (not disputing structure of JRM).

[28] *See* FRB SOF ¶ 3. Fletcher was previously the respondent in a related and consolidated enforcement action before this Tribunal that has since been resolved. *See* February 25, 2019 Joint Notice of Settlement and Notice of Voluntary Dismissal as to Respondent Timothy Fletcher. The undersigned observes that a number of paragraphs in Enforcement Counsel's Statement of Undisputed Facts pertain only to Fletcher and his state of mind and thus appear to be artifacts of a previous stage of this matter when the action was still consolidated. *See*, *e.g.*, FRB SOF ¶ 19 ("Fletcher was familiar with the Compliance Manual for Asia Pacific and admits that he must have had training on the Asia Pacific IB Corporate Finance Policies and Procedures Manual."). Enforcement Counsel should take greater care in the future to ensure that its submissions do not contain superfluous or outdated material.

[29] *See* FRB SOF ¶ 50; FRB-MSD-109 (email chain including March 6, 2013 email from C. Wo to M. George) (explaining JRM staffing).

[30] *See* FRB SOF ¶ 53; Resp. Opp. SOF at 1 (not disputing).

The JRM also administered the Client Referral Program, a separate avenue through which aspiring junior investment bankers could find employment at JPMC—but only those with the right connections.[31] This program, for which young candidates (usually relatives or family friends) were privately referred to JPMSAP bankers "by clients and other relationship contacts" and then submitted to JRM for further consideration, offered fixed-term contracts or summer internships in Asia and elsewhere that—unlike normal campus hiring or the regular summer program—were not intended to be a path to full-time employment.[32] Rather, the ability of the candidates to begin their banking career at JPMC was seen as a significant benefit "in terms of training, experience, and improving the resume."[33] As JRM Staffer Hu put it, by participating in this program, these hires benefited from "the halo effect of the JP Morgan brand name," which was "a good thing to have on one's CV if one wants to pursue a career in the financial services world."[34]

Referral candidates faced a "different bar" for hiring and employment than junior bankers who went through the normal selection processes.[35] Respondent notes that "[i]ndividuals who received offers through the CRP were not meant to have the same qualifications as those who did not receive offers through it."[36] To that end, "[t]here was no GPA standard or minimum for CRP

[31] *See* FRB SOF ¶ 43; Resp. Opp. SOF at 1 (not disputing).

[32] FRB SOF ¶ 59; *see also id.* ¶ 62; Resp. SOF ¶ 17. The undersigned credits Respondent's assertion that it was possible for CRP hires to be "converted to full-time due to positive performance," Resp. Opp. SOF at 12, but Respondent has adduced no evidence to suggest that employment at JPMC beyond the initial fixed term or summer program was an affirmative goal of the Firm with respect to junior bankers participating in the CRP, and there is substantial evidence *infra* to suggest otherwise.

[33] R-MSD-108 (email chain including January 31, 2013 email from M. George to Y. Choi et al.); *see also* FRB SOF ¶ 62.

[34] FRB-MSD-19 (Hu Dep.) at 99:10-16; *see also* FRB SOF ¶ 62.

[35] FRB SOF ¶ 60 (quoting FRB-MSD-4 (Deposition of Timothy Fletcher) ("Fletcher Dep.") at 166:22).

[36] Resp. Opp. SOF at 11; *see also* FRB-MSD-4 (Fletcher Dep.) at 167:4-19 (contrasting the "very experienced, highly trained, and intelligent potential hires" from the normal campus hiring program with "many of the CRP candidates . . . [who] did not have the same training, the same backgrounds, the same exposures and preparation").

candidates,"[37] the interview questions were not as challenging,[38] and CRP hires were not expected to perform at the same level as other junior bankers.[39] Specific positions were created for CRP hires that were not counted towards the Firm's year-end headcount of investment banker analysts and associates, and CRP hires did not undergo any performance review process for their work.[40] Likewise, a separate summer program existed on an "invitation only" basis for referred candidates, in which college-age participants—"the sons and daughters of the Chairman and/or CEOs of major clients and target clients"—received four weeks of training in Hong Kong and, unlike normal summer hires, did not perform any substantive work.[41]

As discussed further *infra*, the summer training program was created at the prompting of Respondent and his then-supervisor Todd Marin, both of whom in June 2009 felt that such a program would be beneficial to JPMSAP.[42] Respondent even attributed the loss of specific business to the lack of a summer program employing the relatives of clients, stating unequivocally

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[37] FRB SOF ¶ 60 (citing FRB-MSD-19 (Hu Dep.) at 40:14-15); *see also* FRB-MSD-4 (Fletcher Dep.) at 171:11-18 (stating that education in banking or finance was "[n]ot a prerequisite" for CRP hires and that "I don't think we would have dwelled too much on work experience").

[38] *See* FRB-MSD-4 (Fletcher Dep.) at 167:22-168:6 ("We didn't pose as challenging case study questions. We wouldn't expect the individual to have an idea of what area they wanted to focus in. There were just a number of things that would be different during that interviewing process.").

[39] *See id.* at 176:11-16 ("The CRP analyst came in without the background or experience or training that the regular analyst had, and so the workload was both different but also probably not as intensive or rigorous as that which we expected from our full-time analysts.").

[40] *See* FRB SOF ¶¶ 62-63 (citing FRB-MSD-4 (Fletcher Dep.) at 123:21-124:7, 180:9-22; FRB-MSD-19 (Hu Dep.) at 40:21-41:7, 45:13-46:3); Resp. Opp. SOF at 12 (noting Fletcher's position that "reviewing and ranking CRP hires did not make sense because they were employed for one year or less").

[41] FRB-MSD-21 (email chain including June 17, 2009 email from T. Marin to Fang, T. Fletcher, and J. Lu); *see* FRB SOF ¶ 65; Resp. Opp. SOF at 13. With respect to the participants in the summer program, Respondent observes that the son of JPMSAP Chairman and CEO Gaby Abdelnour attended the corresponding version of the program run by JPMC's Private Banking line of business, although that program also was typically exclusively a program for client referrals. Resp. Opp. SOF at 13; *see also* R-BIO-411 (email chain including March 21, 2011 email from P. Wang to A. Cohen) ("We wanted to let you know that Gaby has asked if his son, a first year at American University, can join our summer program this year. . . . Although this is a client program and it's the first time we've had an internal request, I'd like to say yes.").

[42] *See* FRB-MSD-21 (email chain including June 17, 2009 email exchange between Fang and T. Marin) (Marin: "I recently spoke at a summer program that [Private Banking] has launched for the sons and daughters of their highest net worth clients. . . . was thinking if we might want to consider the same for the IB." Fang: "In fact, it was me who brought this idea (learned from [Goldman Sachs]) to Mike Fung late last year and proposed to jointly sponsor a similar program. . . . You all know I have always been a big believer of the sons and daughters program.").

his belief that "[w]e lost a deal to [Deutsche Bank ("DB")] today because they got [the] chairman's daughter [to] work for them this summer."[43]

Evolution of the Client Referral Program

Although the summer training program for referral candidates did not come to fruition until 2010,[44] JPMC had begun offering prestigious temporary positions to the young relatives of actual or prospective investment banking clients in the Asia Pacific region under the auspices of a formal, Firm-approved framework several years earlier.[45] On March 31, 2006, then-JRM Head Helge Weiner-Trapness emailed all Asia-Pacific investment bankers announcing the creation of a "Sons & Daughters" program intended to permit JPMSAP "to make offers to people . . . [whose] parents or relatives hold[] senior ownership or management positions in companies that the Firm may have or wish to have as its clients, or other regulatory or governmental or quasi-governmental positions" while recognizing that such offers could create "the appearance of a conflict of interest or even a regulatory issue."[46] The email began by emphasizing in the strongest possible terms that it was never permissible to extend a job offer to the relative of a client in exchange for any sort of business advantage:

> As you know, the Firm does not condone the hiring of the children or other relatives of clients or potential clients of the Firm or other people who might be helpful to the Firm for the purpose of securing or potentially securing business for the Firm. In fact, the Firm's policies expressly forbid this. ***There are no exceptions.***[47]

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[43] *Id.* (email chain including June 17, 2009 email from Fang to T. Marin, T. Fletcher, and J. Lu).

[44] *See* R-MSD-94 (email chain including March 3, 2010 email from I. Kwan to C. Wo) (stating that JRM was "organizing a [four-week] training program for a group of 10 to 15 students . . . [who] are all referred by client"); FRB-MSD-25 (email chain including April 21, 2010 email from A. Hu to T. Fletcher) ("[F]ang's view is this is a very competitive program, costs us lots of resources to run and sponsors need to make a strong case for their referrals. . . . [F]ang is very happy that we are doing this program and said he can sleep better at night knowing that we now have a structured program to entertain the little darlings.").

[45] *See* Resp. SOF ¶ 25.

[46] FRB-MSD-16 (March 31, 2006 email from N. Chan to G. Tan et al. relaying Weiner-Trapness's message).

[47] *Id.* (emphasis added).

To safeguard against this, the email described "clear parameters" for permissible hiring of client relatives and stated that "[n]o such hire should be made without working closely with Legal and providing Legal all the necessary information about the proposed candidate that Legal requires for the necessary analysis."[48] Among the parameters set forth in the email, in addition to the approval of the Legal & Compliance Department ("L&C") and JRM, was that "the candidate should be, from an objective perspective, adequately qualified (education and, if relevant, job experience) for the position [being offered]."[49] The email then reiterated, unqualifiedly, that "*[t]he hire obviously will not be made by the Firm as part of any agreement (formal or otherwise) to secure a transaction for the Firm*."[50] This was true whether or not the related party was a government official.[51]

Throughout the life of the program, the process for the review and approval of client referral candidates at JPMSAP was roughly as follows: First, clients would refer candidates to bankers in any of the specific Investment Banking "units or industry, product, or country groups."[52] Next, the heads of those units or groups—for example, Respondent, as Head of Investment Banking in China—would typically weigh in on those candidates and decide whether they should be referred to JRM for the next level of review and approval.[53] At times, Todd Marin (Head of Asia Pacific Investment Banking) and Gaby Abdelnour (Chairman and CEO of JPMSAP), Respondent's direct superiors, would offer their own views on the suitability of certain

[48] *Id.*

[49] *Id.*

[50] *Id.* (emphasis added).

[51] *See id.* (noting that "[t]his is particularly crucial and important when the principal involved holds a government position or may have close governmental contacts in that jurisdiction," but framing the policy to apply equally to non-governmental clients).

[52] Resp. SOF ¶ 17; *see also* FRB SOF ¶ 59.

[53] *See* Resp. SOF ¶ 17; FRB SOF ¶ 75 ("For China referrals, China coverage bankers, executive directors, and managing directors would bring forward candidates, and it was Fang's role to say no to some.").

referral candidates before JRM's involvement.[54] Once JRM had reviewed the candidate's qualifications to its satisfaction, it would present the candidate to L&C for further review and approval from a legal and compliance perspective.[55] Finally, the details of candidates who were cleared by L&C would be given to Human Resources ("HR") to work out the specifics of a formal employment offer.[56]

One aspect of the L&C preclearance process that deserves particular mention is the questionnaire, which was required to be completed for each of the fixed-term CRP candidates "to ensure that bankers complied with [JPMC's] anti-corruption policies" as well as applicable anti-corruption laws and regulations.[57] Among other things, the questionnaire asked about (1) whether the candidate had any family or other relationship in connection with a client, potential client, or government official; (2) "[w]hether JPMC was working on or pitching for a deal involving a client or prospective client related to the referral candidate"; (3) "[w]hether JPMC was seeking a future opportunity to work with or develop a relationship with the referring client/potential client"; and (4) "[w]hat benefit, if any, JPMC was expecting in employing the referral candidate."[58] For client-

[54] *See* Resp. SOF ¶ 19; *see also*, *e.g.*, FRB-MSD-19 (Hu Dep.) at 41:10-13 ("You get different people approving . . . so if it's China, sometimes it's Mr. Fang and Mr. Fletcher. If they decline, sometimes people go above them to Mr. Gaby Abdelnour or Mr. Todd Marin directly.").

[55] *See* Resp. SOF ¶ 17; FRB SOF ¶ 78 (stating that "JRM was responsible for coordinating clearance for referred candidates with the appropriate L&C personnel").

[56] *See* Resp. SOF ¶ 17.

[57] FRB SOF ¶ 77; *see* Resp. SOF ¶¶ 28, 43. L&C did not require that these questionnaires be completed for participants in the CRP summer training program. *See* R-MSD-94 (email chain including March 4, 2010 email from K. Wilson to C. Wo regarding inquiry from I. Kwan); R-MSD-98 (email chain including March 4, 2011 email from I. Kwan to A. Hu et al.); Resp. Opp. SOF at 12-13 (stating that "L&C approved the overall 'summer camp' training program but did not require approval for individual candidates placed in it because it was an unpaid training program of brief duration").

[58] FRB SOF ¶ 79; *see also* FRB-MSD-167 (representative questionnaire); Resp. SOF ¶ 43; Resp. Opp. SOF at 17 (stating that "[t]he questionnaire was modified by L&C from time to time to strengthen its compliance with applicable laws and regulations").

related questions, the JRM Assistant "would reach out to the sponsor for answers, collate the information and put it into the questionnaire, and send the questionnaire to [L&C]."[59]

The program grew. In the spring of 2008, newly appointed JRM Head Fletcher expressed concerns to Marin regarding the volume of requests for the placement of client-referred candidates into the CRP.[60] The Head of HR for the Investment Banking line of business also wrote to Fletcher asking that he approve fewer referral placements going forward and that a better process be developed for identifying suitable referral hires.[61] Following a telephone conversation with Fletcher, the HR Head reported that the two of them had reached an agreement that "the return of these referrals" should be tracked, and that "[b]ankers who ask for the intern spot have to prove that it brings value."[62]

It appears undisputed that from this point forward, those involved in the CRP focused increasingly on what Respondent terms the "business purpose" or "business value" to JPMC of the referral candidates.[63] At Todd Marin's behest, JRM began keeping spreadsheets tracking the business revenue associated with each referral candidate.[64] In an effort to trim the roster of some existing referral hires in late August and early September 2008, Marin and Fletcher also asked Respondent to determine "the importance of retaining them from a client/revenue standpoint" and to identify "whether there are any referral hires whose sponsors deals may not be as imminent in

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[59] FRB SOF ¶ 80; *see* Resp. Opp. SOF at 2 (not disputing).

[60] *See* Resp. SOF ¶¶ 32, 34; R-MSD-55 (email chain including March 10, 2008 email from T. Fletcher to T. Marin) ("I am getting a number of requests on sons & daughters programme. . . . do you have views on limitations on number of positions in S&D programme, or just use judgement."); R-MSD-56 (email chain including April 3, 2008 email from T. Fletcher to T. Marin) ("The referral programme prospective hires are intensifying in number. Each [Managing Director] is trying to pick me off claiming theirs is most important.").

[61] *See* Resp. SOF ¶ 40; R-MSD-64 (email chain including May 20, 2008 email from J. Lui to T. Fletcher et al.) ("While I understand the demand from clients, you will appreciate that referred interns are not intended as pipeline for your full-time intake. They also take up company resources and management time.").

[62] R-MSD-64 (email chain including May 20, 2008 email from J. Lui to A. Cheung et al.).

[63] Resp. SOF ¶¶ 35, 41; *see also id.* at 19 ("The Firm's Requirement of Business Value for the CRP Hire.").

[64] *See* FRB SOF ¶ 69; Resp. SOF ¶ 36.

today's market."[65] Overall, clients were divided into "low priority" and "high priority" and only referrals from high priority clients would be considered by Respondent and others.[66]

Discussion at JPMSAP regarding the need for an "[i]mproved, more effective full-time sons and daughters program" in the Asia Pacific region to match those of JPMC's competitors continued in 2009.[67] After supporting the creation of a summer training program for CRP candidates (*see supra*), Respondent emailed Abdelnour in September 2009 to tout the "almost linear relationship" in China between employing client relatives and receiving valuable mandates on client business deals.[68] The email proposed further discussion between the two regarding how the China lines of business in particular could "*accommodate more 'powerful' sons and daughters that could benefit the entire platform*."[69]

Shortly afterward, JRM Head Fletcher and JRM Staffer Hu began helping to devise proposed changes to the CRP through a PowerPoint presentation entitled "Emerging Asia Client Referral Program."[70] One goal of these changes was to implement "better . . . deal conversion or revenue attribution and relationship" for CRP fixed-term hires.[71] The presentation accordingly

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[65] Resp. SOF ¶ 35 (quoting R-MSD-58 (email chain including August 29, 2008 email from T. Marin to Fang et al.); R-MSD-59 (email chain including September 1, 2008 email from T. Fletcher to Fang et al.).

[66] *See* FRB SOF ¶¶ 70-71; Resp. Opp. SOF at 15 (not disputing that Fang "would evaluate certain client requests for candidate placement" based on the perceived importance of the client from his perspective); FRB-MSD-4 (Fletcher Dep.) at 140:10-16 (stating that "Fang wouldn't surface or support a name that were surfaced by one of his bankers that were a low priority client").

[67] FRB-MSD-22 (email chain including September 4, 2009 email from R. Lamba to Fang et al. regarding discussion during the China IB group's "morning breakout sessions"); *see also* FRB SOF ¶¶ 92-95; Resp. SOF ¶¶ 48-51; Resp. Opp. SOF at 19 (noting that this discussion took place at "an offsite meeting attended by the senior bankers in Asia Investment Banking").

[68] FRB-MSD-22 (email chain including September 5, 2009 email from Fang to G. Abdelnour) (stating that "[p]eople believe UBS, [Morgan Stanley], and [Goldman Sachs] are doing a much better job" of running client referral programs). This was not the first time that Fang had referred to a "linear relationship" between employing relatives of clients and securing business mandates. *See* FRB-MSD-21 (email chain including June 17, 2009 email from Fang to T. Marin et al.) (asserting that a "sons and daughters program . . . almost has a linear relationship with mandates, at least in China").

[69] FRB-MSD-22 (email chain including September 5, 2009 email from Fang to G. Abdelnour) (emphasis added).

[70] *See* FRB SOF ¶¶ 94-95; Resp. SOF ¶¶ 50-51; Resp. Opp. SOF at 18, 20; FRB-MSD-23 (November 17, 2009 email chain between T. Fletcher and A. Hu attaching PowerPoint presentation ("2009 Presentation")).

[71] FRB SOF ¶ 93 (quoting FRB-MSD-24 (September 22, 2009 email from T. Fletcher to A. Hu)).

emphasized, as "selection criteria," that making an offer of an internship or one-year contract to client referrals should be contingent on a "***[d]irectly attributable linkage to business opportunity***" and that there should be "[c]lear accountability for deal conversion,"[72] which included tracking whether specific referrals had in fact resulted in "a deal at the end of the day."[73] JRM Staffer Hu recalled that Respondent was among those individuals with whom these proposed revisions to the CRP had been discussed.[74] A "Year End Update" presentation in March 2010 referenced the implementation of these changes under the heading "Revamped Client Referral Program."[75]

Anti-Corruption Policies and Procedures

Not only did JRM emphasize, in connection with the inception of the Sons & Daughters Program in March 2006, that offering positions to the relatives of clients or potential clients in order to secure business was expressly prohibited, but JPMC's policies and procedures throughout the life of the CRP echoed this message.[76] Company-wide policy identified the provision of internships to relatives of government officials—including corporate officials of state-run

[72] FRB-MSD-23 (2009 Presentation) at 5 (emphasis added).

[73] FRB SOF ¶ 95 (quoting FRB-MSD-19 (Hu Dep.) at 75:18-19). Among other things, "the presentation also tracked 'conversion' associated with past referral hires, which represented 'conversion from marking discussions to mandate,'" and offered a "historical deal conversion record" that reflected "whether and what mandates sponsoring bankers claimed a particular CRP hire contributed to." *Id.* (citations omitted).

[74] *See* FRB-MSD-19 (Hu Dep.) at 78:7-22 (Q: "Who suggested these revisions?" A: "Again, combination of discussions between myself, Mr. Fletcher, and various senior bankers. . . . I think Mr. Fletcher and I spoke with Mr. Fang, Ms. Leung for Hong Kong, I think Mr. Kao Ching also spoke to Mr. Fletcher."). Enforcement Counsel also asserts, based on the wording of an April 2010 email from the JRM Staffer to the JRM Head, that Respondent "suggested that $3 million in tangible fees was a 'sensible benchmark' for considering a candidate for the CRP." FRB SOF ¶ 97 (quoting email chain including April 21, 2010 email from A. Hu to T. Fletcher). Respondent disputes this interpretation of Hu's email on several grounds, *see* Resp. Opp. SOF at 21, and the undersigned finds that it is a disputed question of fact whether the benchmark attributed to Fang was intended to establish a minimum amount of new business that a referral hire would bring, as opposed to reflecting the business a client had already generated and representing "a filter for 'good clients,'" as Hu later testified, *id.* (quoting FRB-MSD-19 (Hu Dep.) at 94:1-15 (benchmark meant only considering referrals from "clients that have already paid fees"), as well as the extent to which any benchmark was in fact implemented for the CRP, *see id.* (citing FRB-MSD-19 (Hu Dep.) at 95:6-96:2).

[75] R-MSD-93 (scanned materials including presentation by Fletcher and Hu entitled "JRM 2009 Year End Update").

[76] *See* FRB-MSD-16 (March 31, 2006 email from N. Chan to G. Tan et al.) (relaying message from then-JRM Head that such practices were "expressly forbid[den]" and that there were "no exceptions"); *see also supra* at 12.

enterprises, who were prevalent in China[77]—as an improper avenue for gaining a business advantage at least as early as 2007, stating that "all JPMC employees in all JPMC subsidiaries, affiliates and offices world-wide" were prohibited from giving "things of value to, or for the benefit of, a public official unless [that gift] . . . could not reasonably be interpreted as an attempt to gain an improper advantage."[78] The Anti-Corruption Policy also warned that "[v]iolations of the FCPA or any other anti-bribery laws may result in civil or criminal fines and punishment directed at the individual or at JPMC," and directed employees to report any such violative behavior.[79]

Beginning in 2011, this aspect of the firm-wide Anti-Corruption Policy was revised to extend to all representatives of commercial clients and potential clients, not just public officials:

> No employee may directly or indirectly offer, promise, grant or authorize the giving of money or anything else of value to a government official to influence official action or obtain an improper advantage. The same applies to a representative of a non-government-owned commercial entity in a business transaction.
>
> ***
>
> In addition, the Policy prohibits *indirect payments* to government officials if the circumstances indicate that any benefit from the payment or gift may possibly be passed on to a government official either to influence official action or to gain an improper advantage. The same is true if any benefit from the payment or gift *may possibly be passed on to a representative of a non-government-owned commercial entity in consideration for an improper advantage in a business transaction.*[80]

[77] *See* FRB-MSD-3 (JPMC Anti-Corruption Policy, effective September 6, 2007) ("2007 Anti-Corruption Policy") at 4 ("Care must be taken in countries with government-managed economies, since corporate officials in such countries may be considered public officials, even when performing what in other countries would be considered private roles.").

[78] *Id.* at 1, 4; *see also id.* at 4 ("Keep in mind that 'value' can include such things as the offer of internships or training for relatives of a public official, . . . not just gifts and entertainment."); Resp. SOF ¶ 6.

[79] FRB-MSD-3 (2007 Anti-Corruption Policy) at 6.

[80] FRB-MSD-5 (JPMC Anti-Corruption Policy, effective June 6, 2011) ("2011 Anti-Corruption Policy") at 2-3 (emphasis added).

The revised policy was careful to reiterate that "the definition of a 'bribe' is broader than the payment or offer or money [and] can include . . . [f]avoring relatives [of] business partners in employment with JPMorgan Chase."[81] As an example, the policy stated that "it would be improper to offer employment to a government official's relative . . . with the understanding that the official would as a result offer a business advantage to JPMorgan Chase."[82] The policy cautioned that "[i]f the intent is to obtain something from the official in exchange for providing the official with the benefit, *it will not matter that the advantage conveyed by the official is something the official may otherwise have done in any event*."[83] The policy further stated that "[t]he potential criminal penalties, both for the firm and for individuals, are severe."[84]

To underline the point that "commercial bribery" as well as bribery of government officials was prohibited by the Firm, the 2011 Anti-Corruption Policy also contained a new section that left no doubt as to the impropriety of quid pro quo exchanges of internships or training positions for relatives for the prospect of a business advantage with a commercial client:

> This Policy prohibits commercial bribery, in addition to bribery of government officials. A commercial bribe occurs when a person confers, or offers or agrees to confer, any benefit upon the recipient with the intent to influence improperly the recipient's conduct in relation to their employer's business affairs. . . . This means that no such offer, promise, grant or gift may be made *if it could reasonably be understood* as an effort to influence improperly *a representative of a non-government-owned commercial entity* to grant JPMorgan Chase a business advantage. . . .
>
> [I]n certain U.S. states, such as New York, and in certain non-U.S. jurisdictions, such as the U.K. and The People's Republic of China, commercial bribery is a crime. As with bribery of government officials, in commercial bribery it does not matter if any payment or benefit is actually made or received, or if anything is actually done by the recipient; it is improper simply to offer or to solicit such a

[81] *Id.* at 3.
[82] *Id.* at 3.
[83] *Id.* at 3-4 (emphasis added).
[84] *Id.* at 2-3.

> payment or benefit. *It also does not matter whether the person to whom the benefit is offered, promised or given is the same person as the person who is to perform improperly the relevant function.*[85]

The Anti-Corruption Policy remained steadfast in highlighting the corruption risk inherent in offering internships or other positions to relatives of clients for the expectation of business over the following two years as well, up to and beyond the life of the CRP.[86] Further, as with prior iterations of the Anti-Corruption Policy, JPMC employees had a responsibility to "immediately" report "any activity prohibited by this Policy" as soon as they became aware of it.[87]

JPMC's Code of Conduct during the relevant period, which applied "to employees and directors of JPMorgan Chase & Co. and its direct and indirect subsidiaries,"[88] likewise contained such reporting responsibilities.[89] The 2011 Code of Conduct, for example, stated that individuals "must promptly report any known or suspected violation of the Code, any internal firm policy, or any law or regulation applicable to the firm's business, whether the violation involves [that individual] or another person subject to the code."[90] The Code went on to note that "[j]ust as you will be held responsible for your own actions, you can also be held responsible for the actions of others *if you knew or should have known* that they were in violation of any applicable policy, law or regulation."[91] Similarly, the 2012 Code of Conduct reminded employees and directors "that it is important to comply not just with the letter, but also the spirit and intent, of the law."[92] It stated

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[85] *Id.* at 7 (emphases added).

[86] *See* FRB-MSD-160 (JPMC Anti-Corruption Policy "as of 5/14/2012") ("2012 Anti-Corruption Policy") at 1 ("Bribery Prohibited"), 2 ("Bribery of a Government Official"), 7 ("Commercial Bribery"); FRB-MSD-161 (JPMC Anti-Corruption Policy "as of 5/16/13"); FRB-MSD-162 (JPMC Anti-Corruption Policy, effective September 30, 2013) ("Revised 2013 Anti-Corruption Policy").

[87] FRB-MSD-5 (2011 Anti-Corruption Policy) at 11.

[88] FRB-MSD-151 (2007 Code of Conduct).

[89] *See* Resp. SOF ¶ 14 ("The Codes required employees to report violations or suspected violations of any JPM policy but anticipated that employees would use L&C contacts for reporting guidance.").

[90] FRB-MSD-7 (2011 Code of Conduct) at 8.

[91] *Id.* (emphasis added).

[92] FRB-MSD-155 (2012 Code of Conduct) at 8.

in no uncertain terms that "[v]iolating the law . . . may weaken customer confidence and put our reputation at risk, and can result in regulator criticism, legal action, fines and penalties, and other negative repercussions."[93] And these Codes not only adverted to other Firm policies such as the Anti-Corruption Policy but contained their own précis of JPMC's prohibition on offering anything of value to government officials or corporate representatives "to win or keep business or influence a business decision."[94]

As a Managing Director and supervisor of investment bankers in the China IB group, Respondent also had a separate duty to ensure that his subordinates were "meeting the firm's policies and procedures, and acting within their authority and in accordance with the law and regulatory requirements."[95] Under the Asia Pacific Investment Banking Corporate Finance group's regulations, Respondent and all IB senior management bore "responsibility for ensuring the maintenance of appropriate standards of conduct and adherence to proper procedures."[96] Respondent was required to escalate any compliance issues manifesting within his ambit to his immediate supervisor and, as needed, to L&C personnel, and even after escalation had a duty to follow up to "ensure that the problem is reviewed and resolved promptly, and that appropriate steps are taken to prevent a recurrence."[97]

If, for example, Respondent had reason to believe that sponsoring bankers in the China IB group were proposing to offer an analyst position to the son-in-law of a Chinese executive "in

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[93] *Id.*

[94] *Id.* at 29 (stating that "[i]n general, you should *never* give a gift that[] is (or could reasonably be perceived to be) an inducement to do business with our Company") (emphasis in original); *see also id.* at 18; FRB-MSD-7 (2011 Code of Conduct) at 20; FRB-MSD-156 (2013 Code of Conduct) at 22.

[95] FRB-MSD-9 (2010 Asia Pacific Compliance Manual) at 15-16; *see also* FRB-MSD-169 (2010 Asia Pacific IB Corporate Finance Policies and Procedures Manual) § 2.6 at 101 ("IB supervisory personnel are directly responsible for the regulatory supervision of all employees assigned to them.").

[96] FRB-MSD-169 (2010 Asia Pacific IB Corporate Finance Policies and Procedures Manual) § 2.6 at 102.

[97] *Id.* at 101.

return for securing [JPMC's] role" in an upcoming initial public offering ("IPO"),[98] then Fang had a duty to escalate this conduct to the extent that he knew or suspected that it might violate JPMC's Anti-Corruption Policy. The same would be true if, say, he was copied on an email stating that offering a given CRP candidate a position would "ensure us a senior role . . . when the deal come [*sic*] out" and viewed this as being potentially violative.[99] Yet there is nothing in the extensive record before this Tribunal to suggest that Respondent ever expressed concerns regarding the apparent *quid pro quo* nature of any contemplated CRP hire during the span of the program, let alone escalated those concerns to his supervisor and to L&C as the policies would require.

Fang and the CRP

In his own words, Respondent had "always been a big believer" in the Client Referral Program throughout his tenure as Head of China Investment Banking, up through the end of the program in April 2013.[100] And indeed, the undisputed record evidence shows that Respondent was heavily involved with the CRP and exerted significant influence over the selection of referral candidates from China.[101] Respondent also repeatedly played an active role in determining whether the fixed-term contracts of CRP participants should be renewed, weighing the value of the client relationship and the prospect of impending deals.[102] In an email in September 2010, JRM Staffer Hu characterized Respondent as "the ultimate gatekeeper for China relationships,"[103] and nothing the undersigned has seen in the course of the instant briefing belies that description.

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[98] FRB-MSD-33 (email chain including February 28, 2011 email from J. Liang to A. Hu, I. Kwan, and Fang).

[99] FRB-MSD-42 (email chain including September 21, 2011 email from T. Xu to O. de Grivel and F. Gong, forwarded to Fang the same day).

[100] FRB-MSD-22 (email chain including June 17, 2009 email from Fang to T. Marin, T. Fletcher, and J. Lu); *see* FRB-MSD-137 (email chain including April 16, 2013 email from Fang to C. Leung).

[101] *See infra* at 26-42 for a number of examples.

[102] *See* FRB SOF ¶ 76; Resp. Opp. SOF at 17 (not disputing substance); *see also*, *e.g.*, FRB-MSD-56 (email chain including May 14, 2012 email from Fang to Y. Liu); FRB-MSD-133 (email chain including December 14, 2011 email from Fang to D. Suen et al.).

[103] FRB-MSD-20 (email chain including September 23, 2010 email from A. Hu to K. Clayton); *see also*, *e.g.*, FRB-MSD-4 (Fletcher Dep.) at 138:2-139:3, 148:7-8 (noting that Fang owned virtually "all of the client relationships

As discussed further *infra*, the undisputed record evidence also conclusively shows that Respondent viewed the Client Referral Program as a profitable gateway to business for JPMC.[104] In that same September 2010 email, JRM Staffer Hu stated that Respondent was "extremely self-disciplined about rolling [CRP hires] off after one year *in order to refresh the quota for new business leads*"[105]—this, too, is consistent with the record. The Parties proffer frequent communications between Fang and JRM, Marin, or sponsoring bankers in which Respondent gives his views regarding particular referral candidates or referral hires and the tangible value that their employment might bring to JPMSAP based on his understanding of the referring client.[106]

Finally, the undisputed record evidence shows that Respondent unquestionably understood that it was improper to offer short-term positions to individuals at the behest of clients or potential clients in exchange for business and that doing so could expose JPMC to significant liability. Not only did JPMC's policies and procedures during the relevant period state in no uncertain terms that such behavior was prohibited, as discussed *supra*, but Respondent himself penned a lengthy email underscoring this point to his own team. On November 12, 2009, senior banker Elaine La Roche emailed Fang and two others, attaching a news release regarding investigations into Morgan Stanley's business practices in China.[107] La Roche remarked:

> What I would draw your attention to is the highlighted part about *the hiring of the daughter and how chinese and US investigators [are] seeking to find whether it was for a quid pro quo*. While I am certain that MS has as strict compliance rules as we do, I think that

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at a senior-most level within the China context" and describing the great extent of Fang's involvement with reviewing, promoting, and approving referral candidates from China).

[104] *See*, *e.g.*, FRB-MSD-21 (email chain including June 17, 2009 email from Fang to T. Marin, T. Fletcher, and J. Lu) ("We lost a deal to DB today because they got chairman's daughter [to] work for them this summer.").

[105] FRB-MSD-20 (email chain including September 23, 2010 email from A. Hu to K. Clayton) (emphasis added).

[106] *See*, *e.g.*, FRB-MSD-92 (email chain including June 8, 2008 email from Fang to G. Abdelnour) ("I do have a few cases where I think we can leverage the father's connection."); FRB-MSD-30 (email chain including November 9, 2011 email from Fang to Y. Liu) ("We won't hire her until the major deal materializes.").

[107] *See* FRB-MSD-18 (email chain including November 12, 2009 email from E. La Roche to Fang et al.).

> we need to monitor this closely as *it may have broader implications for our relationship hires*.[108]

Respondent then sent this article to his team, warning them of the importance of adhering "to the highest professional standards when conducting business in order to protect the firm and ourselves against significant reputation risk and liability."[109] He stated further:

> You may have read in the news already about the Morgan Stanley case . . . , which reminds us again that corruption represents a serious risk to all foreign companies operating in China. The risks extend beyond financial losses to *potential significant damage to reputation and substantial liability including criminal exposure*.
>
> While our businesses in China are having the best momentum ever, I'd like to emphasize that we should never compromise our business discipline and integrity in exchange for short term profits. J.P. Morgan has an Anti-Corruption Policy to uphold the firm's commitment to fundamental principles stated in the "Foreign Corrupt Practices Act" (FCPA) . . . . *We are prohibited from offering or giving or authorizing the offer or gift of anything to any Public Official in order to secure an improper advantage*.
>
> Taking lessons from this Morgan Stanley case, I would like to specifically highlight that local Chinese anti-bribery laws as well as FCPA may apply in the following situations. Approval from IB Management and pre-clearance from Legal & Compliance are required to ensure that predefined requirements are met before any offers are made [in connection with] . . . *any proposed hiring of close relatives of Public Officials or candidates (including interns) recommended by any Public Official*. . . . If in doubt, we should consult with Legal & Compliance before undertaking any action.[110]

Furthermore, although Respondent's email centered on the corruption risk inherent in the hiring of relatives of public officials rather than commercial clients generally, it is undisputed that Respondent completed training in July 2011 making it clear that the Anti-Corruption Policy had been "extended to include commercial entities by expressly prohibiting employees from bribing

[108] *Id.* (emphases added).

[109] FRB-MSD-17 (November 14, 2009 email from Fang to T. Marin et al.).

[110] *Id.* (emphases added).

any corporate officer or executive to win business."[111] Respondent also was responsible for understanding the contours of the policy, this specific training notwithstanding.[112] The undersigned therefore finds, based on the undisputed material facts, that Respondent knew or should have known, during the pendency of the Client Referral Program, that the quid pro quo exchange of referral hires for an advantage in securing client business posed "serious risk . . . of potential significant damage to reputation and substantial liability including criminal exposure" for JPMC and was prohibited by the Firm's Anti-Corruption Policy.[113]

Candidates and Quid Pro Quo

Enforcement Counsel adduces facts concerning more than fifteen CRP candidates in support of its claims regarding Respondent's misconduct;[114] Respondent duly disputes the proffered narrative for each.[115] Based on her review of the Parties' submissions regarding these candidates in aggregate and in consideration of the record as a whole, the undersigned finds that there is indisputable and uncontroverted evidence that Fang expressly tied CRP referral hires to a *quid pro quo* expectation of gaining a concrete advantage with the referring commercial client in numerous emails over the course of the CRP. For purposes of this Order, the undersigned will focus only on those candidates whose facts permit the least degree of contrary interpretation, noting Respondent's objections as appropriate.

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[111] FRB-MSD-14 (PowerPoint Presentation entitled "J.P. Morgan: Anti-Corruption Training" and dated July 26, 2011) at 12; *see also id.* at 19 (noting that "[a]ny offer of JPMorgan Chase employment or internship (whether paid or unpaid) to any person upon the recommendation of friends, relatives, or associates" counted as a "thing of value" under the FCPA and the Firm's Anti-Corruption Policy); FRB-MSD-12 (indicating Fang's completion of this training).

[112] *See*, *e.g.*, FRB-MSD-5 (2011 Anti-Corruption Policy) at 7-8; FRB-MSD-7 (2011 Code of Conduct) at 1 ("We are all accountable for our actions, and for knowing and abiding by the policies that apply to us. Managers have a special responsibility, through example and communication, to ensure that employees under their supervision understand and comply with the Code and other relevant policies.").

[113] FRB-MSD-17 (November 14, 2009 email from Fang to T. Marin et al.).

[114] *See* FRB SOF ¶¶ 99-101, 106-280.

[115] *See* Resp. Opp. SOF at 23-67.

Candidate A

In September 2008, for example, Fang forwarded the JRM Head an email from Michelle Wang, a JPMSAP banker, regarding a referral candidate (here termed "Candidate A")[116] who was a putative relative of an official at Company A, a state-owned entity.[117] Wang's email reaffirmed that Candidate A was "very important to [JPMC's] relationship with [Company A]," which had "a pending placement subject to market condition."[118] Wang then stated that the referring official had "made it clear that [Candidate A] is *our ticket to this mandate*."[119] Responding to Fang, the JRM Head wrote that "it sounds like we've established that it's important to him, and I presume that this deal still has enough likelihood that we want to preserve the optionality of being part of it. Are you yourself going to also maintain the pressure on this sponsor so that he knows that we have delivered for him."[120] To which Fang responded, in no uncertain terms: "Yes we will continue to keep pressure on...***until we get some revenue from them to 'compensate' this***."[121]

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[116] Enforcement Counsel represents, through its use of bracketing in its sealed submissions, that any disclosure of the names of CRP candidates, the referring individuals, or the companies with whom those individuals are associated would be contrary to the public interest. *See* note 4 *supra*. Accordingly, and in an effort to maximize the extent to which this Order may be publicly issued, the undersigned will use pseudonyms for those candidates and related individuals or entities that are referenced in detail. A sealed key will be provided to the Parties in connection with this Order's issuance that identifies the real names that are obscured here and links them to their corresponding sobriquets.

[117] *See* FRB-MSD-27 (email chain including September 2, 2008 email from Fang to T. Fletcher); *see also* FRB-MSD-34 (email chain including April 13, 2008 email from M. Wang to Fang) (indicating that Candidate A "is way under-qualified and we have to pull a lot of strings to get her in"). Respondent contends that because Candidate A was not among the candidates identified in the Notice of Charges, she "should be excluded" here. Resp. Opp. SOF at 25; *see also* Resp. SOF ¶ 68 n.9. As Enforcement Counsel observes, *see* FRP Opp. SOF at 25-26, the Notice of Charges alleges only that the candidates identified therein are "representative examples" of Respondent's misconduct. Notice ¶ 32. The undersigned agrees with Enforcement Counsel that the Notice provided Respondent with fair notice of the claims against him and denies Respondent's objection to the inclusion of Candidate A and any other referral candidates not specifically named in the Notice.

[118] FRB-MSD-27 (email chain including September 2, 2008 email from M. Wang to Fang).

[119] *Id.* (emphasis added).

[120] *Id.* (September 3, 2008 email from T. Fletcher to Fang et al.).

[121] *Id.* (September 3, 2008 email from Fang to T. Fletcher et al.) (emphasis added); *see also* FRB SOF ¶¶ 106-109.

In response, Respondent asserts that Candidate A was not a relative of the executive ("Executive A"), but a family friend.[122] Respondent further asserts without dispute that the email exchange in question occurred several months after Candidate A had been offered and accepted the position.[123] Respondent notes that the L&C questionnaire for Candidate A disclosed her connection to Executive A; disclosed the fact that JPMC was pitching a deal to Company A; and stated that there was "[n]o expected benefit" to employing Candidate A other than that it would "help [JPMC] establish a closer coverage relationship with [Executive A], who is a major decision maker in the underwriter selection process."[124] Respondent cites to a 2017 declaration by JRM Head Fletcher explaining that the term "pressure," as used by him and Fang in this correspondence, was "shorthand for JPMorgan's ongoing efforts to generate goodwill and build the relationship with the client."[125] Finally, Respondent states that JPMC ultimately "did not work on a mandate for [Company A] and subsequent JRM documents comparing referral candidates to revenue reflected no revenue from [Company A]."[126]

Even resolving all justifiable inferences in Respondent's favor, the undersigned finds that the email exchange cited by Enforcement Counsel demonstrates a perceived link, from Respondent's perspective, between Candidate A's employment and JPMC receiving some revenue from Company A "to compensate."[127] That Candidate A may have been a family friend to Executive A rather than a relative is immaterial, given Wang's statement that Candidate A was

[122] *See* Resp. Opp. SOF at 25.

[123] *See* Resp. SOF ¶ 75; Resp. Opp. SOF at 25; FRB Opp. SOF at 28.

[124] Resp. SOF ¶ 73 (quoting R-MSD-125 (February 12, 2008 L&C questionnaire)).

[125] R-MSD-24 (December 11, 2017 Declaration of Timothy Fletcher) ("Fletcher Decl.") ¶ 108; *see* Resp. Opp. SOF at 26.

[126] Resp. Opp. SOF at 26 (citing R-MSD-128).

[127] FRB-MSD-27 (email chain including September 3, 2008 email from Fang to T. Fletcher et al.) (internal quotation marks omitted).

JPMC's "ticket to this mandate."[128] The fact that Candidate A had already been employed for four months at the time of this conversation is likewise immaterial to whether Respondent perceived a relationship between the fact of the employment and the prospect of a subsequent deal—the deal had not yet taken place, and Fang was, to all appearances, seeking to leverage Candidate A's employment into JPMC's participation when and if it did. The undersigned also agrees with Enforcement Counsel that it is immaterial whether or not JPMC did in fact receive business from Company A as a result of this hiring; the Firm's Anti-Corruption Policy prohibited the giving of benefits to public officials like Executive A in order to obtain an advantage whether or not that advantage was actually obtained.[129] The undersigned does not credit Fletcher's self-serving interpretation of his messages with Respondent, which is at odds with those emails' text, including Respondent's plain statement that he would pressure the referring executive for revenue to compensate the job placement. And the undersigned does draw an adverse inference that Respondent supported the hiring of Candidate A "with the expectation that it would generate or be in exchange for future business for JPMC," given Respondent's invocation of his Fifth Amendment rights in response to that question at his October 2017 deposition.[130]

Candidate B

In April 2010, Fang learned that the son ("Candidate B") of a high-ranking executive at a Chinese company ("Company B") was seeking a summer internship with JPMC but had

[128] *Id.* (September 2, 2008 email from M. Wang to Fang).

[129] *See* FRB Opp. SOF at 28; FRB-MSD-3 (2007 Anti-Corruption Policy) at 2. It is unclear whether the document proffered by Enforcement Counsel as the 2008 Anti-Corruption Policy is the final version of that iteration of the policy, but the undersigned has no reason to believe that the 2008 version differed substantively from the 2007 version and later versions in this respect. *See* FRB Opp. SOF at 28 (citing FRB-MSD-165).

[130] FRB SOF ¶ 110; *see* FRB-MSD-35 (October 27, 2017 Deposition of Fang Fang) ("Fang Dep.") at 60:13-63:25; *infra* at 49-51 (discussing adverse inferences). Contrary to Respondent's suggestion, L&C approval of Candidate A's hiring based on a questionnaire stating that the hiring was to "establish a closer relationship with . . . a major decision maker in the underwriting selection process" does not weigh *against* a finding that Respondent expected the hiring to lead to tangible business for the Firm. R-MSD-125 (February 12, 2008 L&C questionnaire); *see* Resp. Opp. SOF at 26-27.

experienced difficulties with HR through the normal process.[131] Fang then forwarded this email to JRM Staffer Hu and senior banker Lance Chen, stating that "*[w]e can certainly leverage this once this is done*."[132] Three days later, Hu informed Fang that Candidate B's father ("Executive B") had reached out to Peter Lighte, a banker in JPMSAP's Corporate Banking line of business, about a place for his son in the IB group's summer training program.[133] Hu told Fang that Lighte knew Executive B "quite well" and asked whether a program spot should be reserved for Candidate B.[134] Fang responded that "*[i]f we can't leverage this from IB, then we shouldn't do it*."[135] After a telephone call with Fang, Hu briefed JRM Head Fletcher about their discussion by email, writing:

> Fang called me right after our call with Roger. This kid's dad is extremely difficult to deal with – apparently our people tried to cover him before but he never even bothered returning their calls. ***Fang needs a concrete mandate from either [Company B] or a related company before we take this kid.*** Philip and Lance now cover [Company B] ***so Fang will speak to them to see which deal we want to ask for***. . . .[136]

The next day, true to Hu's email, Fang reached out to Chen and another banker in the IB group, Philip Zhai, seeking more information on Executive B and Company B.[137] At the end of his email, Fang asked, "***Is there any mandate currently we are pitching to [Company B] that we can 'exchange' for?*** As you know, we are in the business of doing deals not doing charity school work."[138] Ultimately, the team concluded that Executive B was not sufficiently influential in selecting banks for deals, nor was he likely to recommend JPMC for business in any event, and

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[131] *See* FRB-MSD-134 (email chain including April 9, 2010 email from S. Quan to Fang); FRB SOF ¶¶ 273-278; Resp. SOF ¶¶ 166-171.

[132] FRB-MSD-134 (email chain including April 10, 2010 email from Fang to A. Hu and L. Chen) (emphasis added).

[133] *See* FRB-MSD-135 (email chain including April 13, 2010 email from A. Hu to Fang and T. Fletcher).

[134] *Id.* (April 14, 2010 email from A. Hu to Fang).

[135] *Id.* (April 14, 2010 email from Fang to A. Hu).

[136] R-MSD-364 (email chain including April 14, 2010 email from A. Hu to T. Fletcher).

[137] *See* FRB-MSD-29 (email chain including April 15, 2010 email from Fang to L. Chen and P. Zhai) ("Do you know this guy? Is he important in decision making internally? Has he been supportive to us?").

[138] *Id.* (emphasis added).

that there was therefore "no solid business opportunity" to justify the referral placement.[139] Circling back to Lighte about the referral a week later, Hu wrote: "As mentioned previously we needed to run the list past Fang for China clients. Well, apparently [Candidate B's] dad has snubbed us in the past and is not seen as a supporter of JPM IB. . . . *Nor is there an attractive mandate on the horizon*."[140] As a result, no offer was extended to Candidate B.[141]

Respondent disputes Enforcement Counsel's characterization of these events on several grounds.[142] First, Respondent proffers Fletcher's *post hoc* interpretation of Fang's words, asserting that he "understood that [Fang's] use of the term 'leverage' meant that the referral hire would be for the purpose of strengthening the client relationship, and that client relationship would potentially lead to opportunities to pitch business."[143] Fletcher also stated that he understood Hu's email—in which she relayed that "Fang needs a concrete mandate . . . before we take this kid" and that he would "see which deal we want to ask for"—to be merely "a shorthand way to indicate that Fang would only support hiring [Candidate B] if Fang felt that JPMC could build a productive business relationship with [Company B]."[144] Respondent states that facts regarding Candidate B should not be considered because Candidate B was not named in the Notice, an argument the undersigned rejects above.[145] And Respondent asserts that no offer was made to Candidate B because Executive B "was unwilling to develop a relationship with the Firm" and because Company B "had no potential as a client, so was not appropriate as a referrer."[146]

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[139] R-MSD-365 (email chain including April 15, 2010 email from A. Hu to Fang).
[140] R-MSD-366 (email chain including April 21, 2010 email from A. Hu to P. Lighte).
[141] *See id.* (April 21, 2010 email from P. Lighte to A. Hu) ("[I]n light of the circumstances, I will not pursue.").
[142] *See* Resp. Opp. SOF at 65-67.
[143] *Id.* at 65 (citing R-MSD-24 (Fletcher Decl.) ¶¶ 84-86).
[144] *Id.* (citing R-BIO-402 (January 2, 2018 Declaration of Timothy Fletcher) ("Fletcher 2nd Decl.") ¶¶ 26-27).
[145] *See id.* at 66; *see also supra* note 117.
[146] Resp. Opp. SOF at 67.

None of Respondent's objections meaningfully controvert the facts adduced by Enforcement Counsel as to Candidate B. Even drawing all justifiable inferences in favor of Respondent, it is evident from the emails cited by the Parties that Respondent was only willing to support Candidate B for a summer internship if there was a "concrete mandate" that JPMSAP could "ask for" in return.[147] There is no other fair interpretation of the statements made by and attributed to Respondent other than that he specifically conditioned the provision of a spot in the summer training program for Candidate B on the ability to "exchange" that spot for a specific mandate from Executive B, because Respondent was not "in the business of . . . doing charity school work."[148] The undersigned is not obliged to credit implausible and self-serving assertions from Fletcher regarding the meaning of Respondent's words, as such assertions are not supported by the record.[149] And the undersigned again draws an adverse inference from Respondent's assertion of his Fifth Amendment rights in response to questions regarding his motivations in connection with the potential hiring of Candidate B.[150]

Candidate C

In March 2010, Fang was approached by the Chairman of a Chinese state-owned group enterprise ("Enterprise C") about a junior banking position for his son ("Candidate C").[151] Relaying this information to other senior bankers at JPMSAP, Fang stated that "[g]iven the size of the group and the existing and potential business opportunities from this group . . . , I responded

[147] R-MSD-364 (email chain including April 14, 2010 email from A. Hu to T. Fletcher).

[148] FRB-MSD-29 (email chain including April 15, 2010 email from Fang to L. Chen and P. Zhai).

[149] *See Blanton*, 2017 WL 4510840, at *6; *see also* FRB-MSD-19 (Hu Dep.) at 106:11-19 (stating that her email was conveying to Fletcher that there had to be "an identifiable business opportunity from either [Company A] or a company related to it, before [Fang] would consider this kid").

[150] *See* FRB SOF ¶ 279; FRB-MSD-35 (Fang Dep.) at 98:6-100:25; *see also infra* at 49-51.

[151] *See* FRB-MSD-52 (email chain including March 8, 2010 email from Fang to O. de Grivel, S. Liu, and P. Zhai); FRB SOF ¶¶ 147-156; Resp. SOF ¶¶ 91-101.

to this request positively."[152] Sherry Liu, head of the China Financial Institutions Group ("FIG") team, replied in agreement, stating, "[Enterprise C] is an important client. We need to help his son that definitely will give us leverage of business opportunities for both fig and non fig for jpm."[153] Fang forwarded this email to the JRM Staffer, who informed the JRM Head that Fang was proposing to hire Candidate C.[154]

On March 29, 2010, JRM Assistant Kwan emailed Fang asking him to provide some information for the L&C pre-clearance questionnaire being completed in connection with Candidate C's hiring.[155] While Fang disclosed that Candidate C was the son of an official of a state-owned company and that JPMC was in discussions with a subsidiary of Enterprise C "for a potential financing transaction at the moment," Kwan did not ask Fang whether there was any expected benefit to JPMC in employing Candidate C, nor did Fang volunteer that information, despite it being a boilerplate part of the L&C questionnaire and key to compliance with JPMC's Anti-Corruption Policy regarding the hiring of relatives of state officials.[156] The completed questionnaire provided to L&C for its approval affirmatively stated that there was "[n]o expected benefit" to JPMC in hiring Candidate C.[157]

On April 27, 2010, Candidate C received a year-long, fixed-term offer of employment with JPMC.[158] On May 6, 2010, Fang relayed that JPMC had secured "a mandate to be sole bookrunner"

[152] FRB-MSD-52 (email chain including March 8, 2010 email from Fang to O. de Grivel, S. Liu, and P. Zhai) (also asking for thoughts "on how we can leverage more on this account going forward").
[153] *Id.* (March 8, 2010 email from S. Liu to Fang et al.).
[154] *Id.* (March 11, 2010 email from A. Hu to T. Fletcher).
[155] *See* R-MSD-201 (email chain including March 29, 2010 email from I. Kwan to Fang, A. Hu, and T. Wong).
[156] *See id.* (March 29, 2010 email from Fang to I. Kwan, A. Hu, and T. Wong); *see also supra* at 14-15.
[157] FRB-MSD-167 at 2; *see also* R-MSD-202 (March 29, 2010 email from I. Kwan to C. Wo et al.).
[158] *See* FRB-MSD-53 (email chain including April 27, 2010 email from Fang to A. Hu).

on a $300 million deal for Enterprise C's Hong Kong subsidiary, adding that "[t]his will be our first transaction for this group."[159]

More potential business with Enterprise C was in the offing, however. As Candidate C's contract with JPMC drew to a close in late March 2011, the JRM Staffer told the JRM Head that Fang had indicated that a one-year renewal and extension would be necessary, because JPMC was "JBR [joint bookrunner] without being JGC [joint global coordinator] at present and they are trying to squeeze into JGC role."[160] In connection with this renewal, Kwan provided L&C with an updated questionnaire for its approval, which again stated that there was "no expected benefit" to JPMC in extending the contract of Candidate C.[161]

One year later, in May 2012, Fang determined that Candidate C's contract should once again be renewed, stating that "*[g]iven where we are on [Enterprise C]*, I think we may need another contract for [Candidate C]."[162] Candidate C ultimately exited JPMC in December 2012, after the Firm's HR department informed Fang that further extensions of Candidate C's contract would not be possible.[163] Fang worked with HR to give Candidate C a last-minute promotion to the position of associate so that his reference letter would reflect the new title.[164] In January 2014, following governmental scrutiny into JPMC's hiring of Candidate C, Reuters reported that the

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[159] FRB-MSD-54 (May 6, 2010 email from Fang to G. Abdelnour et al.).

[160] FRB- MSD-55 (email chain including March 23, 2011 email from A. Hu to T. Fletcher); *see also* FRB-MSD-19 (Hu Dep.) at 143:4-17 (explaining that joint global coordinator was a more senior, higher profile, and more desirable role than joint bookrunner).

[161] R-MSD-206 (email chain including March 29, 2011 email from I. Kwan to C. Wo); *see also* R-MSD-209 (email chain including March 29, 2011 email from C. Wo to I. Kwan) (noting that L&C had approved the renewal subject to Candidate C being walled off from any pitches or transactions relating to Enterprise C).

[162] FRB-MSD-56 (email chain including May 14, 2012 email from Fang to Y. Liu) (emphasis added).

[163] *See* R-MSD-212 (email chain including September 3, 2012 email from J. Liu to Fang et al.); R-MSD-215 (email chain including November 23, 2012 email from M. Szeto to Candidate C).

[164] *See* R-MSD-213 (email chain including September 13, 2012 email from Fang to J. Lui et al.) ("We all would like to find a way to make [the promotion] happen by this year end."); R-MSD-214 (email chain including October 9, 2012 email from M. Szeto to Y. Liu) (confirming that Candidate C's new title would take effect "just [a] few days before" the end of his contract).

Firm had withdrawn from its participation in the mandate it had secured for the IPO of another Enterprise C subsidiary.[165]

Respondent contests this narrative, asserting that JPMC had a "long, multi-level relationship" with Enterprise C that predated the referral of Candidate C, and stating that the Firm had "a soft mandate" in place with Enterprise C in early April 2010, prior to Candidate C's offer.[166] Respondent also asserts that Candidate C's "referral to JPMSAP did not occur in connection with any deal," as "Fang was not working on deals for [Enterprise C]."[167] In addition, Respondent states that the email discussion regarding the first renewal of Candidate C's contract took place "several weeks after JPM had already been picked for the [subsidiary of Enterprise C] IPO deal."[168] Finally, Respondent contends without evidence that "the goal of the [Candidate C] hire was goodwill and relationship building."[169]

Resolving all justifiable inferences in Respondent's favor, the undersigned concludes that a material factual dispute exists regarding whether Candidate C was hired, or his first contract renewed, in order to secure specific business from Enterprise C or in expectation of gaining a particular business advantage. It is uncontroverted, however, that when informed that Candidate C's second contract would be expiring soon, Respondent stated that "another contract" would be necessary "given where we are on [Enterprise C]."[170] Furthermore, the undersigned draws an adverse inference from Respondent's invocation of the Fifth Amendment in response to questions regarding Candidate C's employment, including whether Respondent "supported hiring

[165] *See* FRB SOF ¶¶ 156-157; FRB-MSD-59 (*New York Times*, Aug. 17, 2013, "Hiring in China by JPMorgan Under Scrutiny") ("August 2013 NYT Article"); FRB-MSD-60 (Reuters, Jan. 20, 2014, "JPMorgan Drops Second China IPO Amid 'Princeling' Probe") ("January 2014 Reuters Article").

[166] Resp. SOF ¶¶ 94, 95; *see id.* ¶ 98; Resp. Opp. SOF at 36-37.

[167] Resp. SOF ¶ 97; *see* Resp. Opp. SOF at 35-36.

[168] Resp. Opp. SOF at 38.

[169] *Id.* at 39.

[170] FRB-MSD-55 (email chain including May 14, 2012 email from Fang to Y. Liu).

[Candidate C] with the expectation that it would generate or be in exchange for future business at JPMC"; whether Respondent "supported extending [Candidate C's] fixed-term contract by one year because there was possible business from [Enterprise C]"; and whether Respondent "failed to disclose to the L&C group that [Candidate C's] initial job offer or extension were tied to future business for JPMC."[171]

Candidate D

In July 2012, Fang emailed colleagues regarding the possibility of a $30 to $50 million business deal with a Chinese insurance company ("Company D").[172] He stated that he had spoken to the Chairman of the company ("Executive D"), who was "now a bit more positive and is willing to look at it further."[173] In a separate email to Philip Zhai and JRM Assistant Kwan, however, Fang noted that "***[a]s part of the 'swap,'*** [Executive D] wants his daughter (last year in high school) to spend sometime [*sic*] with us this summer."[174] Fang finished by writing, "I agreed to put her into our training program and told him that it will end July 27. He is happy."[175] The Chairman's daughter ("Candidate D") was invited to attend the summer training program, and a week later JPMC received a $20 million business commitment from the company.[176]

In response, Respondent states that the summer program had already started at the time Executive D made his request, and that as a result Candidate D only attended the four-week program during its last eleven days.[177] Respondent also asserts without supporting evidence that

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[171] FRB SOF ¶ 158; *see* FRB-MSD-35 (Fang Dep.) at 68:14-76:18.

[172] *See* FRB SOF ¶¶ 247-250; Resp. SOF ¶ 147.

[173] FRB-MSD-117 (email chain including July 11, 2012 email from Fang to P. Zhai et al.).

[174] *Id.* (July 11, 2012 email from Fang to Y. Liu and P. Zhai) (emphasis added).

[175] *Id.*

[176] *See* FRB-MSD-118 (email chain including July 12, 2012 email from Y. Liu to candidate); FRB-MSD-119 (email chain including July 18, 2012 email from P. Zhai to Fang et al.) ("Dear Team, [j]ust had a dinner with [Company D] . . . and they agree to proceed with this investment of 20m.").

[177] *See* Resp. Opp. SOF at 58.

Company D "was not looking for any investment banking work," and adduces facts to suggest that in any event the IPO that Company D was interested in investing in was postponed, and thus the $20 million mandate referenced by Enforcement Counsel never ultimately occurred.[178]

As with Candidate A above, it is immaterial whether or not JPMC did in fact receive business from Company D as a result of Fang's agreement to place Candidate D into the summer program; the Firm's Anti-Corruption Policy prohibited the giving of benefits, directly or indirectly, to "a representative of a non-government-owned commercial entity" in order to influence that individual and obtain an advantage, whether or not that advantage is actually obtained.[179] It is similarly immaterial, and for similar reasons, that Candidate D may have joined the training program in progress and only attended the last portion of it, as long as the offer of placement in the program "could reasonably be understood" to be in exchange for a business advantage.[180] Here, it is uncontroverted that Respondent plainly detailed a proposed transaction whereby Candidate D would be given a place in the then-in-progress summer program and Executive D would give business to JPMC "as part of the swap."[181] There is no other fair reading of Respondent's words. The undersigned also draws an adverse inference from Respondent's invocation of his Fifth Amendment rights in response to, among other things, whether he supported Candidate D's participation in the summer program and whether the offer to Candidate D was made "with the expectation that it would generate or be in exchange for future business" with Company D.[182]

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[178] *Id.*; *see* Resp. SOF ¶ 147; R-MSD-324 (email chain including August 27, 2012 email from S. Li to Fang et al.).

[179] FRB-MSD-5 (2011 Anti-Corruption Policy) at 7.

[180] *Id.* ("As with the bribery of government officials, in commercial bribery it does not matter if any payment or benefit is actually made or received, or if anything is actually done by the recipient; it is improper simply to offer to solicit such a payment or benefit.").

[181] FRB-MSD-117 (email chain including July 11, 2012 email from Fang to P. Zhai et al.).

[182] FRB SOF ¶ 251; *see* FRB-MSD-35 (Fang Dep.) at 93:14-95:17.

Candidate E and Other Candidates

There are more examples of Respondent making an explicit connection between placement of a referral candidate and the expectation of business over the course of the CRP, the cumulative effect of which is to describe an unmistakable pattern of *quid pro quo* statements that Respondent cannot in aggregate controvert.

- In June 2008, regarding the request of a Chinese government official that a position be found for his son at JPMC in New York: "The father indicated to me repeatedly that he is willing to go extra miles to help JPM in whatever way we think he can. *And I do have a few cases where I think we can leverage the father's connection.*"[183]
- In November 2011, forwarding a candidate's resume to JRM Staffer Hu: "This is a senior client referral for a full time position. . . . *We won't hire her until the major deal materializes*."[184]
- In December 2011, regarding the analyst contract of the daughter of a CEO: "*[G]iven the deal potentials* with both [the CEO's companies], *we will extend the daughter* for another six months."[185]
- In March 2012, regarding the potential referral of the classmate of the daughter of an executive with whom JPMC was doing business: "*[W]e need to make sure the father recognize the goodwill.*"[186]
- In March 2013, regarding the request of a Chairlady of a Chinese company to arrange a summer intern position for her son: "*The key is if she has real business for us.*"[187]

In each of these instances, Respondent invoked the Fifth Amendment[188] when asked about his statements, and the undersigned accordingly draws an adverse inference that Respondent's words can and should be taken at face value: as evidence, that is, that Respondent repeatedly viewed the

[183] FRB-MSD-92 (email chain including June 8, 2008 email from Fang to G. Abdelnour) (emphasis added); *see* FRB SOF ¶ 218; Resp. Opp. SOF at 49.

[184] FRB-MSD-30 (email chain including November 9, 2011 email from Fang to Y. Liu) (emphasis added); *see* FRB SOF ¶ 100; Resp. Opp. SOF at 23.

[185] FRB-MSD-133 (email chain including December 14, 2011 email from Fang to D. Suen et al.) (emphases added); *see* FRB SOF ¶ 270; Resp. Opp. SOF at 64.

[186] FRB-MSD-49 (email chain including March 1, 2012 email from Fang to F. Gong) (emphasis added); *see* FRB SOF ¶ 140; Resp. Opp. SOF at 34.

[187] FRB-MSD-31 (email chain including March 4, 2013 email from Fang to D. Wang) (emphasis added); *see* FRB SOF ¶ 101; Resp. Opp. SOF at 23-24.

[188] *See* FRB-MSD-35 (Fang Dep.) at 30:4-31:6, 34:5-15, 54:23-55:19, 79:13-80:4, 92:8-93:2.

CRP as a vehicle through which JPMC could gain business advantages through the accommodation of client desires for the placement of referral candidates in junior banker or internship positions within the Firm.

Others involved with the CRP also contemporaneously referenced or included Respondent when discussing offers extended under the program in explicitly transactional terms.[189] In February 2011, JPMSAP banker Jianhong Liang emailed Respondent and the JRM Team regarding an analyst position for the son-in-law of the Chairman of a Chinese ceramics company whose upcoming $300 million IPO the Firm was interested in securing.[190] In presenting the candidate, Liang noted that JPMC was pitching for the ceramics company's $300 million IPO. He then wrote: "Considering the size and the role (we are asking for sole book), ***after discussing with Fang this morning***, would like to offer him the position *in return for securing our role [in the IPO]*."[191] In response, JRM Staffer Hu noted to Liang and Respondent that the candidate was "quite far off our global program analyst standard," and a referral hire position was arranged for him as a result.[192]

One final candidate is worth mention here in the same vein. In a September 2011 email thread on which Respondent was copied and referenced, Firm investment bankers repeatedly made

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[189] Beyond Respondent's specific involvement, there can be no doubt that the CRP was used as an avenue for *quid pro quo* exchanges. Discussing a particular referral candidate in July 2008, for example, JRM Head Fletcher asked the sponsoring banker to consider how to "*get the best quid pro quo from the relationship* upon confirmation of the offer." FRB-MSD-26 (email chain including July 1, 2008 email from T. Fletcher to B. Gu et al.) (emphasis added). In response, the sponsor stated that "*[t]he client has communicated clearly the quid pro quo on this hire* and the team should start working on the [company] IPO asap." *Id.* (July 1, 2008 email from B. Gu to T. Fletcher et al.) (emphasis added). In March 2011, as well, JRM Staffer Hu described the Client Referral Program as being "strictly one year for everyone else *unless they bring in a new profitable deal to justify an extension*, otherwise they must move on. In this case there is not even one deal let alone two." FRB-MSD-40 (email chain including March 24, 2011 email from A. Hu to B. Zhao et al.) (emphasis added). And in February 2012, Fletcher wrote regarding a referral candidate that "*[u]nless there's a fee tied to a summer offer*, we'll pass on making an offer." FRM-MSD-28 (email chain including February 10, 2012 email from T. Fletcher to C. Chien) (emphasis added).

[190] *See* FRB-MSD-33 (email chain including February 28, 2011 email from J. Liang to Fang, A. Hu, and I. Kwan).

[191] *Id.* (emphases added).

[192] *Id.* (February 28, 2011 email from A. Hu to Fang, J. Liang, I. Kwan, and T. Fletcher); *see* FRB SOF ¶ 105; Resp. Opp. SOF at 24-25.

it clear that there was an express deal with a Chinese executive ("Executive E") to provide his niece ("Candidate E") with continued employment at JPMC in exchange for the Firm securing the lucrative role of Joint Global Coordinator ("JGC") for the forthcoming IPO of the executive's company ("Company E").[193]

> [Candidate E] is quite happy and had a private talk with me after meeting. She repeated the same expectation that Frank provided from [Executive E] last week for a permanent position. And this is [*sic*] should be somehow check point ***to ensure us a senior role (leading JGC) when the deal come out***. She said RBS just want to be a bookrunner and offered her a lot.[194]

Frank Gong then forwarded this email to Respondent and JRM Staffer Hu, writing: "*I discussed with Fang & Angela* on [Candidate E]. Angela is working on it, we should find a solution asap."[195] Following the addition of JRM Head Fletcher to the email chain, Olivier de Grivel underlined again the connection between a position for Candidate E and business for JPMC:

> [Candidate E] is family: direct niece of [Executive E]. . . . ***Link to ipo jbr is very direct*** as said directly so by [Executive E] to Frank.[196]

Adding to this, Tiger Xu informed Fletcher—still copying Respondent—that Company E's IPO was potentially worth $3 to 5 billion and "could be the largest China FIG deal next year."[197] Xu

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[193] *See* FRB SOF ¶¶ 124-135; Resp. Opp. SOF at 28-32. At the time, Candidate E had finished a four-month internship and one-year fixed-term contract with JPMC through the Client Referral Program. *See* FRB-MSD-46 (email chain including July 13, 2011 email from A. Hu to T. Fletcher). When her sponsoring bankers at FIG indicated through JRM Staffer Hu that she was interested in a year-long extension of her contract, JRM Head Fletcher pushed back, noting that he was "not terribly supportive" given the number of other CRP referrals from Company E, and asking about "the status of a mandate, and the prospects of a deal." FRB-MSD-43 (email chain including August 12, 2011 email from T. Fletcher to T. Xu et al.) (adding "Someone convince me this is worth it."); *see also* FRB-MSD-46 (email chain including July 13, 2011 email from A. Hu to T. Fletcher and S. Gunner) ("This is getting out of control – why do we need to offer extension to every FIG CRP? Elsewhere extensions are rarely granted – exceptions rather than the norm. [Candidate E] is yet another [Company E] referral."). In response, the sponsoring bankers informed Fletcher that Candidate E had been "referred from [Executive E] directly . . . [a]nd she is important to us for this pitch. [Company E] is our target for 2012 and that is reason [*sic*] why we need to retain her with us." FRB-MSD-43 (email chain including August 12, 2011 email from T. Xu to T. Fletcher et al.).

[194] FRB-MSD-42 (email chain including September 21, 2011 email from T. Xu to O. de Grivel and F. Gong) (emphasis added).

[195] *Id.* (September 21, 2011 email from F. Gong to Fang, A. Hu, T. Xu, and O. de Grivel) (emphasis added).

[196] *Id.* (September 21, 2011 email from O. de Grivel to Fang et al.) (emphasis added).

[197] *Id.* (September 22, 2011 email from T. Xu to Fang et al.) (emphasis added).

then noted that given "the juicy size" of the deal, all of JPMC's major competitors were also "trying to lobby" for it, with Goldman employing Executive E's son and RBS "trying to approach [Candidate E] to compete [with] us."[198] To discuss things further, Fletcher organized a call on the matter the following week with Respondent, Hu, and de Grivel.[199]

Ultimately, Candidate E was offered a short-term contract extension in Beijing from November through mid-December 2011 and then a permanent (non-CRP) global analyst position in Hong Kong beginning in January 2012.[200] In late February 2012, nearly two months after beginning her global analyst contract, Candidate E had not yet shown up to work at the Hong Kong office.[201] Nevertheless, and despite the fact that as a global analyst on a full-time contract, Candidate E did not enjoy the same job security as a normal fixed-term CRP hire,[202] Candidate E's absenteeism did not put her job in jeopardy.[203] Rather, sponsoring bankers Xu and de Grivel reached out to Respondent to support excluding Candidate E from FIG's annual headcount so the group could hire another junior banker to do the necessary work:

> [Candidate E] is the only referral hire now in fig headcount . . . . *I believe this is the right commercial decision.* However, given the headcount pressure we are all under, we need to isolate this outside fig headcount. This is particularly acute today as we need to add one

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[198] *Id.*

[199] *Id.* (September 26, 2011 email from T. Fletcher to Fang, O. de Grivel, and A. Hu); *see also id.* (September 26, 2011 email from A. Hu to F. Gong) (providing call information to Gong).

[200] *See* FRB-MSD-45 (email chain including October 3, 2011 email from T. Fletcher to Fang et al.) ("We can agree to a Jan 2012 offer for global analyst. Can also agree to a short contract now if she prefers to start now, terminating in December."); R-MSD-151 (email chain including October 19, 2011 email from Y. Liu to D. Ashworth and T. Fletcher).

[201] *See* FRB-MSD-47 (email chain including February 22, 2012 email from Y. Liu to T. Fletcher).

[202] *See* FRB-MSD-45 (email chain including October 3, 2011 email from T. Fletcher to Fang et al.) ("[A]s a global analyst, these hires have the same job security as anyone else, which in markets like this, is not great.").

[203] *See* FRB-MSD-47 (email chain including February 22, 2012 email from T. Fletcher to Y. Liu) ("They argued intensely for [Candidate E] to be extended for another year. Apparently, this is the chairman's request. We can talk about it again with them, in particular, getting her motivated. But I don't think we'll be able to get any relief here."); *see also id.* (February 22, 2012 response from Y. Liu to T. Fletcher) ("I see. [Candidate E] is a global analyst, not a CRP though. So if she doesn't leave, we'll be stuck with her for longer than a year."); (February 22, 2012 response from T. Fletcher to Y. Liu later that day) ("I think there's an understanding that we would review this position and that it isn't permanent, and instead if we needed to, we would manage the exit. I do think its outrageous that she doesn't even show up.").

> prc junior (analyst or junior assoc) to properly serve the chinese fig clients. *Our juniors are overly stretched at risk of burning out and leaving.* Can I ask you to convince Todd + Therese to do so. It has to come from you.[204]

In making this request, de Grivel reiterated to Respondent that Candidate E had been offered the global analyst position "*as part of our [Company E] ipo strategy and after [Executive E] confirmed that J.P. Morgan would have 'a very senior position in the ipo'*."[205]

Respondent asserts without dispute that de Grivel and Xu were members of the FIG team who reported directly to JPMSAP Chairman Abdelnour and did not need Respondent's approval for any referral hires.[206] It is also undisputed that Respondent played no apparent role in Candidate E's initial hire through the CRP in early 2010.[207] Respondent further asserts, albeit without documentary support, that Company E "never gave a mandate to JPM," and states that "[t]here is no evidence that [Respondent] responded to or took any action related to" the email from de Grivel regarding the FIG headcount issues following Candidate E's extension.[208]

Notwithstanding these assertions, Respondent cannot deny that he was included in discussions pertaining to Candidate E in late 2011[209] and early 2012[210] and was in a position, at the very least, to understand that others at JPMSAP had, on multiple occasions during this period, directly linked the Firm's chances of securing a role in Company E's IPO to the continued

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[204] FRB-MSD-44 (February 21, 2012 email from O. de Grivel to Fang et al.) (emphases added).

[205] *Id.* (emphasis added) (also stating that Candidate E was retained "given her family background").

[206] *See* Resp. SOF ¶ 76; Resp. Opp. SOF at 28, 30, 31.

[207] *See* Resp. Opp. SOF at 28; R-MSD-34 (email chain including February 5, 2010 email from O. de Grivel to J. Lui, S. Liu, and B. Zhao); R-MSD-130 (email chain including February 8, 2010 email from J. Lui to S. Gunner et al.).

[208] Resp. Opp. SOF at 31.

[209] *See* FRB-MSD-42 (email chain including September 21, 2011 email from F. Gong to Fang et al.) ("I discussed with Fang & Angela on [Candidate E]. Angela is working on it, we should find a solution asap.").

[210] *See* FRB-MSD-44 (February 21, 2012 email from O. de Grivel to Fang et al.) ("Frank, Fang, As you know, as part of our [Company E] ipo strategy and after [Executive E] confirmed that J.P. Morgan would have 'a very senior position in the ipo' we have kept [Candidate E] as an analyst given her family background.").

employment and accommodation of Candidate E.[211] Respondent also knew or should have known that such behavior was against Firm policy—even if no business materialized as a result—and that he had a duty to report it to the Firm's Global Security & Investigations office or his designated L&C officer, yet it appears undisputed that he did not raise any such concerns to anyone.[212] Finally, the undersigned draws an adverse inference from Respondent's assertion of his Fifth Amendment rights in response to questions regarding Candidate E, including whether Respondent expected that hiring Candidate E would generate, or be in exchange for, future business for JPMC and whether he took any action to ensure that L&C was informed of the connection between Candidate E's employment and JPMC's perceived chances for a role in Company E's IPO.[213]

The Program Ends

In January 2013, Assistant General Counsel Matthew George in L&C began to express concerns regarding the Firm's practice of using internships as "short-term employment arrangements" for candidates referred by JPMC clients and public officials in the Asia Pacific region.[214] George stated that because "[e]mployment with JPMorgan is seen as a significant benefit (in terms of training, experience and improving the resume)," client referral hires "could create perception issues" even if there was "absolutely no expectation that JPMorgan receive a benefit from the client in return for the offer of employment."[215] He therefore concluded that "from an anti-bribery and corruption standpoint, [JPMC] cannot create positions to accommodate client

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[211] *See*, *e.g.*, FRB-MSD-42 (email chain including September 21, 2011 email from O. de Grivel to Fang et al.) ("[Candidate E] is family: direct niece of [Executive E]. . . . Link to ipo jbr is very direct as said directly so by [Executive E] to Frank.").

[212] *See supra* at 20-21; *see also* FRB-MSD-5 (2011 Anti-Corruption Policy) at 11; FRB-MSD-7 (2011 Code of Conduct) at 8; Resp. SOF ¶ 14 (acknowledging that "[t]he Codes required employees to report violations or suspected violations of any JPM policy but anticipated that employees would use L&C contacts for reporting guidance").

[213] *See* FRB SOF ¶ 136; FRB-MSD-35 (Fang Dep.) at 88:7-90:14.

[214] R-MSD-108 (email chain including January 18, 2013 email from M. George to C. Wo et al.).

[215] *Id.* (January 31, 2013 email from M. George to C. Wo et al.).

requests," and that any client referrals should be placed into a normal hiring process for short-term junior positions where "they will not receive any special consideration."[216]

After learning more about the "long history" of "the referred-hire review process" and JRM's role in it,[217] George initiated a conversation with JRM Staffer Liu in April 2013 regarding the Client Referral Program.[218] Citing the Firm's "zero tolerance for bribery[] as set out in the Anti-Corruption Policy," George told Liu that he was not comfortable approving any further hires or offers under programs that "are open only to candidates referred by JPM clients," including the CRP fixed-term contract program, the JRM summer intern program "for client referred candidates who fail to secure an internship in JPMorgan's official summer intern program," and the summer training program for referred candidates.[219] George then stated that the HR department could assist JRM in developing a program that would comply with the Anti-Corruption Policy, to which client-referred candidates would be able to apply "provided they meet qualification requirements" and "obtain the position on their merits."[220]

On April 15, 2013, the JRM Staffer informed senior banker Catherine Leung that, due to the timing of this correspondence, it was "highly unlikely" that JRM would have a program that summer for client-referred trainees or interns.[221] Leung then brought the matter to Respondent, forwarding George's message and asking if Respondent was "aware that there would be no summer program for client referrals per below? . . . We should ask the related divisions to design

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[216] *Id.*

[217] R-MSD-109 (email chain including March 5, 2013 email from C. Wo to M. George).

[218] *See* FRB-MSD-137 (email chain including April 12, 2013 email from M. George to Y. Liu et al.).

[219] *Id.*

[220] *Id.*; *see also* R-MSD-111 (email chain including April 16, 2013 email from M. George to V. Walkley et al.) ("Our plan for [the Asia Pacific region] going forward is as follows: we will be discontinuing any programs designed to accommodate client referred clients only, and the creation of roles at the request of clients.").

[221] FRB-MSD-137 (email chain including April 15, 2013 email from Y. Liu to C. Leung).

one asap [rather] than just simply accept that there may not be one."[222] Respondent responded immediately, stating his agreement "that we must have one in some form for this summer" and telling Leung that he would "push from this end as well."[223] Although no evidence has been adduced regarding the nature of any future summer programs, the Parties appear to agree that the CRP in its previous form ceased operating from this point forward.[224]

Investigation, Penalties, and Harm

In August 2013, the *New York Times* reported that the Securities and Exchange Commission ("SEC") had opened an investigation into JPMC's referral hiring practices in the Asia Pacific region, including its hiring of Candidate C.[225] In January 2014, Reuters reported that JPMC had withdrawn from multiple IPOs of Chinese companies connected with referral candidates due to the ongoing investigation.[226] On March 21, 2014, Respondent was placed on leave with full pay pending the outcome of the Firm's own investigation into the CRP.[227] Respondent submitted a written resignation the next day, stating that he was "disappointed by J.P. Morgan's decision and the actions leading up to the decision."[228]

On November 17, 2016, JPMC entered into settlements with three U.S. government entities—the SEC, the Department of Justice ("DOJ"), and the Board of Governors—in connection with the Client Referral Program (together "the settlement agreements").[229] The DOJ non-prosecution agreement ("NPA"), which resolved charges that JPMC's referral hiring practices in

[222] *Id.* (April 16, 2013 email from C. Leung to Fang).
[223] *Id.* (April 16, 2013 email from Fang to C. Leung).
[224] *See* Resp. SOF ¶ 66; FRB Opp. SOF at 25 (not disputing).
[225] *See* FRB SOF ¶ 308; FRB-MSD-59 (August 2013 NYT Article).
[226] *See* FRB SOF ¶ 157; FRB-MSD-60 (January 2014 Reuters Article).
[227] *See* FRB SOF ¶ 312; Resp. Opp. SOF at 1 (not disputing); FRB-MSD-149 (March 21, 2014 letter from R. Hunter to Fang).
[228] FRB-MSD-148 (email chain including March 22, 2014 email from Fang to T. Esperdy and N. Aguzin); *see* FRB SOF ¶ 312; Resp. Opp. SOF at 1 (not disputing).
[229] *See* FRB SOF ¶¶ 296-304; Resp. SOF ¶ 172.

Asia constituted criminal violations of the FCPA, identified Respondent as one of the employees on whom the DOJ's allegations of misconduct against JPMC were based.[230] Pursuant to the NPA, JPMC paid a penalty of $72 million and agreed to undertake a broad swathe of FCPA-related remedial measures.[231] JPMC also admitted, among other things, that JPMSAP bankers had implemented the CRP "to hire referred candidates specifically for the purpose of influencing senior officials at clients to award business to the Company and, in certain instances, to achieve the very *quid pro quo* arrangements the compliance review process and JPMorgan's policies sought to prevent."[232]

Similarly, the settlement agreement and cease-and-desist order with the SEC included findings that "[JPMSAP] investment bankers sought to use the Client Referral Program to exchange valuable employment for assistance with obtaining or retaining banking business from senior executives with its clients, potential clients, and foreign government officials."[233] It is undisputed that Respondent is referenced and quoted multiple times in the Order as one of the individuals at JPMSAP whose actions formed the basis of the SEC's action against JPMC.[234] The Order concluded that the conduct detailed therein constituted civil violations of the anti-bribery,

[230] *See* FRB SOF ¶ 299; FRB-MSD-86 (November 17, 2016 DOJ Non-Prosecution Agreement) ("DOJ NPA") Attachment A ¶¶ 19, 46, 56-58, 63-66 (quoting emails from Respondent and referring to him as "JPMorgan-APAC Employee 1").

[231] *See* FRB-MSD-86 (DOJ NPA) at 2-4.

[232] *Id.* at Attachment A ¶ 11; *see also id.* ¶ 12 (stating that "in or about November 2009, [JPMSAP] executives and senior bankers institutionalized the practice of making hires for the purpose of winning specific business mandates, and revamped the Client Referral Program to improve its efficacy by prioritizing those hires linked to upcoming client transactions").

[233] *See* FRB-MSD-138 (November 17, 2016 SEC Cease-and-Desist Order) ("SEC Order") ¶ 28. The Order provided that its factual findings were "made pursuant to [JPMC's] Offer of Settlement and are not binding on any other person or entity in this or any other proceeding." *Id.* at 1 n.1.

[234] *See id.* ¶¶ 34, 65, 67, 70.

books and records, and internal controls provisions of the FCPA,[235] and JPMC agreed to undertake remediation and compliance measures and pay a disgorgement of $130 million as a result.[236]

Finally, the cease-and-desist order issued against JPMC by the Board of Governors found, among other things, that JPMSAP's investment banking group, from 2008 through 2013, "operated a referral hiring program whereby candidates who were referred, directly or indirectly, by foreign government officials and existing or prospective commercial clients, . . . were offered internships, training, and other employment opportunities in order to obtain improper business advantages for the Firm" in violation of JPMC firm-wide policy, federal law, and the laws of foreign jurisdictions in which JPMC conducts business.[237] The Order further directed JPMC to implement various compliance, remediation, and oversight measures and to pay a civil money penalty of $61,932,500 "for the violations of law and unsafe or unsound practices described [in the Order]."[238]

Relevant Procedural History

The Board commenced the instant action against Respondent on March 10, 2017, seeking an order of prohibition and the assessment of a second-tier civil money penalty based on Respondent's alleged participation in the Client Referral Program "in violation of Firm policies and U.S. anti-bribery law."[239] On June 30, 2017, Respondent filed a motion for summary disposition, raising questions regarding, *inter alia*, the Board's authority to determine FCPA violations, the timeliness of the action under the applicable statute of limitations, and Respondent's

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[235] *See id.* ¶¶ 72-78.

[236] *See id.* at 24-25.

[237] R-MSD-374 (November 17, 2016 FRB Cease-and-Desist Order) ("FRB Order") at 2; *see also id.* at 3 (stating, *inter alia*, that "senior management in JPMC's [Asia Pacific] investment banking group was aware that the Firm offered internships, training, and other employment opportunities to candidates who were referred, directly or indirectly, by foreign government officials and existing or prospective commercial clients in order to obtain or retain business for the Firm").

[238] *Id.* at 8; *see* Resp. SOF ¶ 172 (acknowledging that JPMC "paid approximately $62 million to the Board to resolve claims based on unsafe and unsound banking practices related to the CRP").

[239] Notice at 1; *see id.* ¶¶ 55, 62.

putative right to a jury trial.[240] Administrative Law Judge ("ALJ") Christopher B. McNeil, then-presiding judge in this matter, denied this motion on July 24, 2017,[241] and Respondent sought interlocutory review pursuant to Rule 28 of the Board's Uniform Rules.[242]

On January 30, 2018, the Board denied Respondent's motion for interlocutory review ("Board Order").[243] In doing so, the Board ruled that there were no substantial grounds for a difference of opinion on the issues raised by Respondent that might yield a result in Respondent's favor if interlocutory review were granted.[244] With respect to Respondent's argument that the Board lacked jurisdiction over alleged FCPA violations, for example, the Board observed that its enforcement authority under 12 U.S.C. § 1818 may be premised on any alleged violation of law, whether civil or criminal and whether banking-related or otherwise.[245] As to Respondent's argument that he was entitled to trial by jury in an Article III court, the Board stated that a jury trial is not required "[i]n cases in which public rights are being litigated—e.g., cases in which the Government sues in its sovereign capacity to enforce public rights created by statutes within the power of Congress to enact."[246] And regarding Respondent's contention that this action was time-barred under the applicable statute of limitations, the Board began by noting that the Notice alleged specific misconduct occurring within the five-year limitations period, which allegations (including allegations of FCPA violations) would be timely brought in any event.[247] The Board then stated

[240] *See* June 30, 2017 Memorandum in Support of Respondent Fang Fang's Motion for Summary Disposition at 2-3.

[241] Respondent moved for reconsideration of his motion on August 7, 2017, which Judge McNeil also denied.

[242] *See* July 24, 2017 Order Regarding Respondent Fang Fang's Motion for Summary Disposition; August 17, 2017 Request for Interlocutory Review of Administrative Law Judge's Order Denying Summary Disposition; *see also* 12 C.F.R. § 263.28(b) (permitting interlocutory review if, *inter alia*, "[t]he ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion").

[243] *See* January 30, 2018 Determination on Request for Interlocutory Appeal ("Board Order").

[244] *See id.* at 4-7.

[245] *See id.* at 4-5 (citing cases).

[246] *Id.* at 5-6 (internal quotation marks and citation omitted).

[247] *See id.* at 6.

that the Notice alleged more broadly that Respondent's overall involvement in the Client Referral Program through the program's end in 2013 was actionably improper, thus rendering timely the Notice's allegations of unsafe or unsound banking practices and breaches of fiduciary duty, whether or not Respondent's conduct had "separately violated the [FCPA]."[248]

On September 11, 2018, the Board issued an order reassigning this case in response to the Supreme Court's *Lucia* decision.[249] Pursuant to the Board's order, ALJ C. Richard Miserendino replaced Judge McNeil as presiding judge in this matter, and the parties were directed to raise any objections they might have to the orders or decisions of the prior ALJ for Judge Miserendino's reconsideration. Respondent then filed objections to a number of Judge McNeil's rulings, including (again) the order denying Respondent's motion for summary disposition.[250]

Judge Miserendino subsequently retired without ruling on any of the parties' objections, and the Board reassigned this matter to the undersigned on January 13, 2020. On January 14, 2020, the undersigned issued a "Notice of Reassignment and Order Requiring Joint Status Report," which directed the Parties to file a joint status report including a list of pending objections or motions, if any, which required rulings. On February 28, 2020, the Parties filed a report stating, among other things, that Respondent's November 2, 2018 objection to Judge McNeil's summary disposition order ("Objection") remained pending.

On April 17, 2020, having reviewed Respondent's Objection and Enforcement Counsel's response thereto, the undersigned issued an order concluding that Respondent's June 30, 2017

[248] *Id.* at 7 (further stating that "Respondent's focus on [the timeliness of] allegations that specifically involve violations of [the FCPA] are misplaced").

[249] *See* September 11, 2018 Order Assigning this Matter to Judge Miserendino ("September 11, 2018 Order").

[250] *See* November 2, 2018 Objection to the Prior Administrative Law Judge's July 24, 2017 Order Regarding Respondent Fang Fang's Motion for Summary Disposition.

summary disposition motion had been properly denied.[251] In that Order, the undersigned noted that the Board had already ruled on the arguments raised by Respondent in his Objection, stating that "[t]o the extent that the Board Order compels particular conclusions, . . . Respondent has offered no authority to suggest that this Tribunal may disregard the express interpretation of the Board in favor of its own alternative holdings."[252] The undersigned further stated that "[i]f Respondent wishes for the Board to revisit its conclusions on the matter, [he] must ask the Board directly at some later stage of these proceedings."[253] The undersigned also addressed each of Respondent's arguments on their merits, finding with respect to the statute of limitations not only that the Notice alleged misconduct within the limitations period,[254] but also that Respondent had misstated the applicable standard for the accrual of claims in Section 1818 enforcement actions—a topic addressed further in this Order.[255]

Pleading the Fifth

On October 27, 2017, Enforcement Counsel conducted a deposition of Respondent in connection with the instant action.[256] During that deposition, upon advice of counsel, Respondent invoked his Fifth Amendment right against self-incrimination in response to the vast majority of

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[251] *See* April 17, 2020 Order Rejecting Respondent's Objection to the Prior Administrative Law Judge's Order Regarding Respondent's June 30, 2017 Motion for Summary Disposition ("April 17, 2020 Order").

[252] *Id.* at 3; *see also Iran Air v. Kugleman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993) ("[O]nce the agency has ruled on a given matter, . . . it is not open to reargument by the administrative law judge.") (internal quotation marks and citation omitted); *Nash v. Bowen*, 869 F.2d 675, 680 (2d Cir. 1989) (noting that ALJs are "subordinate to the [agency] in matters of policy and interpretation of the law").

[253] April 17, 2020 Order at 3.

[254] *See id.* at 3-8 (statute of limitations); 8-11 (Board authority to premise actions on FCPA violations), 11 (Respondent's lack of entitlement to jury trial).

[255] *See id.* at 5 (rejecting Respondent's argument that Section 1818 enforcement actions are "timely only if the respondent engaged in some actionable misconduct in the five years prior to the action being filed"). The undersigned observes that Respondent's statute of limitations arguments in the instant briefing not only largely replicate his previous arguments, already rejected by the Board and multiple times by the undersigned and Judge McNeil, but again misstate the applicable standard for claims accrual in matters before this Tribunal. *See* Resp. Mot. at 9-12; *see also* Part IV.C *infra*.

[256] *See generally* FRB-MSD-35 (Fang Dep.).

Enforcement Counsel's questions regarding the Client Referral Program, specific referral candidates, and Respondent's work generally at JPMC.[257] Based on this, Enforcement Counsel argues that (1) this Tribunal should draw adverse inferences against Respondent where appropriate "concerning the issues about which he was questioned" and refused to answer, including Respondent's "involvement in the CRP, his understanding of the circumstances under which specific candidates were considered for and/or offered positions in the program, and his knowledge of the Firm's policies and procedures";[258] and (2) Respondent should not be permitted to testify regarding such issues at any hearing before this Tribunal.[259] The undersigned agrees with Enforcement Counsel in part.

The Supreme Court has held that "the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them."[260] This rule, which "applies in equal force to administrative proceedings,"[261] permits adverse inferences to be drawn against a non-moving party at the summary disposition stage based on that party's invocation of the Fifth Amendment, where the moving party has adduced some further evidence supporting that inference.[262] Here, as detailed above, there is ample

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[257] *See id.* at 6:21-25 (indicating intention to assert Fifth Amendment on a question-by-question basis); *see also*, *e.g.*, *id.* at 11:4-8 ("Q: Did you conduct business using any personal email accounts? A: Again, based on the advice of my counsel, I exercise my right to remain silent under US and Hong Kong law."), 12:24-13:3 (Q: "Is fang.fang@jpmorgan.com your work email address? A: Same answer. Q: You can't tell me your work email address? A: Same answer.").

[258] FRB Mot. at 16, 17.

[259] *See id.* at 17-18.

[260] *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *see also*, *e.g.*, *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998) ("Parties are free to invoke the Fifth Amendment in civil cases, but the court is equally free to draw adverse inferences from their failure of proof.").

[261] *MacKay v. DEA*, 664 F.3d 808, 820 (10th Cir. 2011); *accord In the Matter of Richard Salmon*, No. AA-EC-95-05, 1998 WL 609758, at *3 n.2 (Sep. 1, 1998) (FRB final decision on OCC prohibition action); *In the Matter of Harold Hoffman*, Nos. 88-156c & b, 1989 WL 609345, *6 (Sep. 12, 1989) (FDIC final decision) ("[T]he administrative hearing held in this case is not a criminal action, and the protections against self-incrimination which Respondent claims are inapplicable.").

[262] *See*, *e.g.*, *SEC v. Whittemore*, 659 F.3d 1, 12 (D.C. Cir. 2011) ("[A]n adverse inference is permissible in civil cases when independent evidence exists of the fact to which the party refuses to answer.") (internal quotation marks and

evidence that—for example—Respondent expected that the hiring of various referral candidates would generate or be in exchange for future business for JPMC, a topic on which Respondent asserted his right against self-incrimination each time it was raised at his deposition.[263] Adverse inferences against Respondent as the non-moving party are therefore appropriate on this and similar issues where evidence has been presented and he has chosen to remain silent.

The undersigned will not preclude Respondent from offering hearing testimony, however, should he have the opportunity and then choose to do so. Respondent's silence at his deposition has disadvantaged Enforcement Counsel to the extent that it has been deprived of the ability to test Respondent's own account against the facts at hand; to prevent Respondent from speaking in his own defense would only ensure that his account could never be tested.[264] In *In the Matter of Preston Brooks*, the Board of Governors affirmed the ALJ's determination that the respondent could testify at hearing despite having previously "refused to answer any substantive [deposition] questions on Fifth Amendment grounds," noting that to prevent a willing respondent from offering testimony in their own defense would amount to an "extreme sanction."[265] So too will the undersigned decline to penalize Respondent in this way, absent some significantly greater showing of prejudice than Enforcement Counsel has yet made.[266]

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citation omitted); *Colello*, 139 F.3d at 678 (holding that district court did not err in drawing adverse inference at summary judgment stage given additional evidence presented by SEC in support of that ruling).

[263] *See* pages 28-42 *supra*.

[264] *Cf. SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 192 (3d Cir. 1994) ("Because the privilege [against self-incrimination] is constitutionally based, the detriment to the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side.") (further citing *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1291 (D. Minn. 1985), as an example of a court that had appropriately balanced both parties' interests and permitted the defendant to testify at trial despite earlier invoking the Fifth Amendment, when "[t]he agency [plaintiff] had been able to thoroughly prepare its case and was not solely dependent on the defendant for pertinent information").

[265] *In the Matter of Preston Brooks*, No. AA-EC-91-154, 1993 WL 393489, at *2-3 (Oct. 1, 1993) (FRB final decision on OCC prohibition action); *see also Salmon*, 1998 WL 609758, at *2 (respondent permitted to testify even though he had previously asserted his Fifth Amendment right against self-incrimination during the proceeding).

[266] The undersigned notes Respondent's representation that he exercised his Fifth Amendment right during the 2017 deposition "due to a 'live' ongoing criminal investigation being conducted then by . . . the anticorruption authority in Hong Kong, where [he] resides." Resp. Opp. at 1. Respondent also represents that Enforcement Counsel "has

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

Any evaluation of the Parties' cross-motions for summary disposition must begin with the statutory elements that undergird the Board's claims. The Board brings this action against Respondent as an institution-affiliated party ("IAP") of a supervised financial institution for a prohibition order under 12 U.S.C. § 1818(e) and a second-tier civil money penalty under 12 U.S.C. § 1818(i).[267] To merit a prohibition order against an IAP under Section 1818(e), an agency must prove the separate elements of misconduct, effect, and culpability. The misconduct element may be satisfied, among other ways, by a showing that the IAP has (1) "directly or indirectly violated any law or regulation [or] any cease-and-desist order which has become final," (2) "engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution," or (3) "committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty." 12 U.S.C. § 1818(e)(1)(A). The effect element may be satisfied, in turn, by showing either that the institution at issue thereby "has suffered or probably will suffer financial loss or other damage," that the institution's depositors' interests "have been or could be prejudiced," or that the charged party "has received financial gain or other benefit." *Id.* § 1818(e)(1)(B). And the culpability element may be satisfied by showing that the alleged violation, practice, or breach either "involves personal dishonesty" by the IAP or "demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution." *Id.* § 1818(e)(1)(C).

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made no effort to re-depose [him]" in the four and a half years since that deposition, *id.*, a fact that would be salient to the question of Enforcement Counsel's prejudice if true but with respect to which Respondent has not adduced any documentary or testimonial evidence.

[267] *See* Notice ¶¶ 2, 48-50. Respondent argues that he is not an IAP within the meaning of Section 1818, *see* Resp. Mot. at 4-5, but as discussed further in Part IV.B.1 *infra*, this argument is unavailing.

The assessment of civil money penalties under Section 1818(i) also contains an "effect" element of a sort, at least with respect to the criteria necessary for the imposition of the second-tier penalty sought by the Board.[268] The statute authorizes different levels of money penalties contingent on an increasingly stringent showing by the agency regarding the nature and consequences of the alleged misconduct. The lowest level, a first-tier penalty, may be assessed solely upon a showing of misconduct: specifically, that an IAP has violated some law, regulation, order, or written condition or agreement with a federal banking agency.[269] For a second-tier penalty to be assessed, by contrast, the agency must show not only misconduct,[270] but also some external consequence or characteristic of the misconduct: (1) that it "is part of a pattern of misconduct"; (2) that it "causes or is likely to cause more than a minimal loss to such depository institution"; or (3) that it "results in pecuniary gain or other benefit to such party."[271] As with Section 1818(e), fulfillment of this prong for the assessment of a second-tier money penalty does not require satisfaction of all three conditions; a second-tier penalty may be assessed (assuming misconduct has been shown) if the misconduct is part of a pattern even if it has not caused more than a minimal loss to the institution, and so forth.

Although the misconduct prongs of both Sections 1818(e) and (i) may be satisfied by an IAP's engagement or participation in an "unsafe or unsound practice" related to the depository institution with whom he or she is affiliated, that phrase is nowhere defined in the Federal Deposit Insurance ("FDI") Act or its subsequent amendments. John Horne, Chairman of the Federal Home

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

[269] *Id.* § 1818(i)(2)(A).

[270] In addition to the violations described in Section 1818(i)(2)(A), a second-tier showing of misconduct can be made as to a breach of a fiduciary duty or the reckless engagement in unsafe or unsound practices while conducting the institution's affairs, *see id.* § 1818(i)(2)(B)(i), which the Notice also alleges, *see* Notice ¶¶ 45, 61.

[271] 12 U.S.C. § 1818(i)(2)(B)(ii).

Loan Bank Board ("FHLBB") during the passage of the Financial Institutions Supervisory Act of 1966, submitted a memorandum to Congress that described such practices as encompassing "any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds."[272] This so-called Horne Standard has long guided federal banking agencies, including the Board of Governors, in bringing and resolving enforcement actions.[273] It has also been recognized as "the authoritative definition of an unsafe or unsound practice" by federal appellate courts.[274] The undersigned accordingly adopts the Horne Standard when evaluating allegations of unsafe or unsound practices under the relevant statutes.

Furthermore, while Respondent contends that conduct may not be deemed "unsafe or unsound" for purposes of Sections 1818(e) and 1818(i) unless it poses "an abnormal risk of harm to the *financial integrity* of the [institution],"[275] this is not the law. The banking agencies have repeatedly and expressly declined to impose a requirement that risky, imprudent conduct must directly affect an institution's financial soundness or stability in order to be considered "unsafe or unsound," adhering instead to the Horne Standard discussed *supra*. In its *Smith & Kiolbasa* decision in March 2021, for example, the Board of Governors observed that it "has found [actionably imprudent] practices unsafe or unsound if they could be expected to create a risk of

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

[273] *See*, *e.g.*, *In the Matter of Frank E. Smith and Mark A. Kiolbasa*, No. 18-036-E-I, 2021 WL 1590337, at **21-24 (Mar. 24, 2021) (FRB final decision); *In the Matter of Patrick Adams*, No. AA-EC-11-50, 2014 WL 8735096 (Sep. 30, 2014) (OCC final decision) (discussing Horne Standard in detail).

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

[275] Resp. Mot. at 29 (emphasis in original).

harm or damage to a bank, without necessarily attempting to measure their impact on the bank's overall financial stability."[276] The Board further explained that "[a] construction of 'unsafe or unsound' conduct that focuses on the nature of the act rather than any 'direct effect' of such act on the institution's financial stability is consistent with the structure of [S]ection 1818."[277] The undersigned will therefore apply the Horne Standard, unadorned by any further requirement, to the question of whether Respondent's alleged misconduct constituted unsafe or unsound practices within the meaning of the statute.

Here, with respect to the misconduct element of Section 1818(e) and as applicable for Section 1818(i), the Board alleges in the Notice that Respondent (1) "engaged in unsafe or unsound practices by failing to follow policies and procedures aimed at preventing violations of applicable anti-bribery laws,"[278] and "by failing to supervise his subordinates during the course of their employment and to prevent or report his subordinates' failure to follow [those same] policies and procedures";[279] (2) violated the FCPA by "knowingly" participating in JPMC's admitted FCPA violations, in which "internships, training, and other employment opportunities [were] offered to candidates referred, directly or indirectly, by foreign government officials" in exchange for improper influence over official acts or decisions;[280] and (3) breached his fiduciary duty to JPMC by exposing the Firm to risk of harm through his failure "to act as a prudent and diligent person

[276] *Smith and Kiolbasa*, 2021 WL 1590337, at *21; *see also*, *e.g.*, *Patrick Adams*, 2014 WL 8735096, at **3-4 (rejecting an unsafe or unsound practices standard that "requires that a practice produce specific effects that threaten an institution's financial stability"); *In the Matter of Marine Bank & Trust Co.*, No. 10-825b, 2013 WL 2456822, at *4-5 (Mar. 19, 2013) (FDIC final decision) (declining to apply more restrictive standard).

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

[278] Notice ¶ 46.

[279] *Id.* ¶ 47.

[280] *Id.* ¶¶ 48-50.

would in operating a referral hiring program" as well as his failure "to adequately supervise other employees [in connection with the CRP] or to escalate their conduct within the Firm."[281]

Likewise, with respect to culpability, the Board alleges that Respondent acted with actionable personal dishonesty, recklessness, and willful and continuing disregard for the safety and soundness of JPMC.[282] And with respect to the statutory "effect" elements, the Board alleges that Respondent's conduct constituted a pattern of misconduct that conferred financial gain or other benefit upon him and caused JPMC to suffer more than minimal financial and reputational damage.[283]

IV. Respondent's Threshold Arguments

Before addressing the statutory elements of the claims against him, Respondent moves for disposition of this action on a host of threshold grounds, including the ostensibly unconstitutional appointment of Office of Financial Institution Adjudication ("OFIA") ALJs, the Board's authority to enforce the relevant statutory framework in this context or to bring actions against Respondent in particular, the timeliness of this action, and the denial of Respondent's due process rights at various points during this proceeding. The undersigned will take each argument in turn.

A. Appointments Clause

The Supreme Court's *Lucia* decision held that ALJs at the SEC were "inferior officers of the United States" subject to the strictures of the Appointments Clause of the United States

[281] *Id.* ¶¶ 53-54.

[282] *See id.* ¶¶ 55, 61. Enforcement Counsel's instant motion does not seek summary disposition on its allegation that Respondent acted with personal dishonesty, which it states that it instead "intends to prove at hearing." FRB Mot. at 35 n.76.

[283] *See* Notice ¶¶ 55, 61. The Notice also pleads off-handedly in the alternative that Respondent's alleged misconduct also caused or could cause prejudice to depositor interests, *see id.* ¶ 55, but Enforcement Counsel's instant motion does not pursue this claim and it appears to be boilerplate language in any event, *see id.* at 1 (alleging only Respondent's gain and JPMC's loss as actionable effects), so the undersigned need not treat it here.

Constitution.[284] On April 30, 2020, Respondent moved to terminate these proceedings, arguing that the statutory processes by which OFIA ALJs are appointed and removed were inherently unconstitutional under *Lucia*, that the undersigned herself had not been constitutionally appointed, and that these defects together and individually required "a complete restart of proceedings with a judge who can satisfy constitutional requirements."[285] On August 4, 2020, the undersigned issued an order addressing each of Respondent's arguments in detail and denying his motion.[286] Respondent now makes arguments that are substantively identical to those he made two years ago, without any acknowledgment of this Tribunal's prior ruling.[287] The undersigned rejects these arguments again, for the same reasons, and the arguments are preserved for Board review.[288]

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[284] *See* 138 S. Ct. at 2053-55.

[285] April 30, 2020 Motion to Terminate Proceedings at 1.

[286] *See* Order Denying Respondent's Motion to Terminate, 2020 WL 13157346 (OFIA Aug. 4, 2020).

[287] *See* Resp. Mot. at 1-4; FRB Opp. at 26-27.

[288] On May 20, 2022, Respondent filed a Notice of Supplemental Authority attaching a May 18, 2022 decision from the Fifth Circuit Court of Appeals in *Jarkesy v. Securities and Exchange Commission*, which Respondent states "is the most recent decision from a federal circuit court of appeal to review the constitutionality of the removal process for administrative law judges and the constitutional requirement for a trial by jury in certain agency proceedings." While the undersigned notes the Fifth Circuit's decision, it is not binding on this Tribunal. First, the Board of Governors has already ruled that Respondent is not entitled to a jury trial—an argument that Respondent does not even raise in the instant briefing—and the undersigned is bound by this determination, *see supra* at 49, which is in any event the conclusion best supported by Supreme Court precedent. *See Oil States Energy Svcs. v. Greene's Energy Grp. LLC*, 138 S. Ct. 1365, 1373 (2018); *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53-55 (1989); *Atlas Roofing v. Occup. Health & Safety Comm'n*, 430 U.S. 442, 449-50 (1977); *see also Jarkesy v. SEC*, __ F.4th ____, No. 20-61007, 2022 WL 1563613, at **14-20 (May 18, 2022) (Davis, J., dissenting). Second, where the Supreme Court and the Board have not squarely addressed an issue, the undersigned gives deference to the law of the D.C. Circuit and the circuit in which the home office of the depository institution in question is located as the twin fora to which a respondent is entitled to appeal any final decision of the Board. *See* 12 U.S.C. § 1818(h)(2). In the absence of some showing that JPMSAP or its U.S.-chartered parents JPMC and J.P. Morgan International Finance Limited are headquartered in the Fifth Circuit, the *Jarkesy* decision has no special bearing on this Tribunal's conclusions—and with respect to the constitutionality of the ALJ removal process in particular, the undersigned notes that the holding in *Jarkesy* "is in tension, if not direct conflict" with a recent decision of the Ninth Circuit. *Jarkesy*, 2022 WL 1563613, at *23 (Davis, J., dissenting); *see Decker Coal Co. v. Pehringer*, 8 F.4th 1123, 1133 (9th Cir. 2021) (finding that ALJs who perform "a purely adjudicatory function" may be insulated from direct presidential removal). The undersigned will leave the determination of which circuit's reasoning is more persuasive and more consistent with precedent to the Board of Governors upon its review of the instant case.

B. Scope of Board Authority

Respondent argues that the Board lacks authority to bring this enforcement action against him because (1) he is not an institution-affiliated party of an insured depository institution within the meaning of 12 U.S.C. § 1813(u);[289] and (2) the FDI Act does not confer jurisdiction to the federal banking agencies over "foreign conduct of foreign citizens at foreign nonbank subsidiaries."[290] Both arguments are incorrect.

1. The Board Has Enforcement Authority Over Respondent as an IAP of the Firm

As noted in Part III *supra*, only individuals who are IAPs may properly be the subject of enforcement actions before this Tribunal. Respondent asserts that, as an employee of a nonbank subsidiary of a bank holding company, he does not qualify as an IAP.[291] This is wrong. Section 1813(u) defines the term "institution-affiliated party" as including, in relevant part, "any director, officer, [or] employee . . . of, or agent for, an insured depository institution," as well as "any other person as determined by the appropriate Federal banking agency (by regulation or case-by-case) who participates in the conduct of the affairs of an insured depository institution."[292] Respondent fits within this definition in multiple respects.

First, it is beyond dispute that the Board of Governors is an "appropriate Federal banking agency" to supervise and regulate JPMC, as a bank holding company, and JPMSAP, as a nonbank subsidiary of a bank holding company.[293] Respondent notes that JPMSAP "principally carries out

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[289] *See* Resp. Mot. at 4-5.

[290] *Id.* at 5; *see id.* at 5-9.

[291] *See id.* at 5.

[292] 12 U.S.C. § 1813(u)(1), (3).

[293] *See id.* § 1813(q)(3)(F) (Board has jurisdiction over "any bank holding company and any subsidiary (other than a depository institution) of a bank holding company"); *see also* FRB SOF ¶¶ 4-5. The undersigned addresses Respondent's argument that the Board has no jurisdiction over *foreign* nonbank subsidiaries of bank holding companies, such as JPMSAP, in Part IV.B.2 *infra*.

investment banking for [JPMC] in the Asia Pacific region."[294] JPMSAP is also an indirect subsidiary of J.P. Morgan International Finance Limited, an Edge Act corporation organized under 12 U.S.C. §§ 611-614 to do business overseas and wholly owned by JPMCB, a U.S. bank and "insured depository institution."[295] As noted, Edge Act corporations are "international banking and financial corporations" under the supervision of the Board of Governors that have been chartered to enable U.S. banks to "compete more effectively with foreign banks in offshore banking operations."[296]

Second, the FDI Act expressly provides that the Board's authority to institute Section 1818 enforcement actions "shall apply to any bank holding company, . . . to any subsidiary (other than a bank) of a bank holding company, . . . and to any organization organized or operating under Section 25(a) of the Federal Reserve Act"—that is, the Edge Act—"in the same manner as they apply to a State member insured bank."[297] In other words, bank holding companies such as JPMC, nonbank subsidiaries of bank holding companies such as JPMSAP, and Edge Act Corporations such as J.P. Morgan International Finance Limited are treated as "insured depository institutions" for purposes of the Board's enforcement authority under Section 1818.[298]

To sum up, then, Respondent was an employee of JPMSAP, which, although it is not an insured depository institution, is treated as such with respect to enforcement actions instituted by the Board of Governors. JPMSAP's parent is a subsidiary of a U.S. bank, explicitly formed to

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[294] Resp. SOF ¶ 1.

[295] *See* FRB Opp. at 36 n.107; FRB-BIO-175 (Christensen Decl.) ¶¶ 5(a)-(c), (e); *see also* 12 U.S.C. § 1813(c)(2) (defining "insured depository institution").

[296] *Am. Int'l Group, Inc.*, 712 F.3d at 778-79; *see* 12 U.S.C. § 611a.

[297] 12 U.S.C. § 1818(b)(3).

[298] *See*, *e.g.*, *In the Matter of Ghaith Pharaon*, Nos. 991-037-CMP & 1-037-E, 1997 WL 125217, at *1 n.2 (Jan. 31, 1997) (FRB final decision) (enforcement action against individual as institution-affiliated party of bank holding company, stating that "Section 1818(e) is applicable with respect to bank holding companies by operation of 12 U.S.C. § 1818(b)(3)"); *see also* FRB Opp. at 39-40.

allow that bank to conduct its affairs more easily overseas, and is itself treated as an insured depository institution in Board actions before this Tribunal due to its status as an Edge Act corporation.[299] And Respondent was subject to JPMC's firm-wide policies and procedures and for all intents and purposes acted as an agent of JPMC in the Asia Pacific Region.[300] The Board, as the "appropriate Federal banking agency," may justly determine that Respondent has participated in the conduct of the affairs of institutions that are equivalent, in this context, to insured depository institutions.[301] In all of these ways, Respondent is an IAP.

The Board of Governors exercises supervisory authority over JPMSAP, J.P. Morgan International Finance Limited, and JPMC. It may institute Section 1818 enforcement actions related to those institutions in furtherance of this supervisory authority. Respondent is affiliated with those institutions within the meaning of 12 U.S.C. § 1813(u).

2. The FDI Act May Reach Extraterritorially If the Statutory Elements Are Met

Respondent argues that the FDI Act does not empower the Board of Governors to bring enforcement actions against foreign employees of foreign nonbank subsidiaries for alleged misconduct taking place overseas.[302] Respondent asserts that where a statute contains no express indication that it was meant to apply extraterritorially, its reach is limited only to conduct that, unlike his own, occurred within the United States.[303] In response, Enforcement Counsel states that

[299] *See* 12 U.S.C. § 611a.

[300] *See* Resp. SOF ¶ 1; FRB-MSD-3 (2007 Anti-Corruption Policy) (applying to "all JPMC employees in all JPMC subsidiaries, affiliates and offices worldwide"); *see also* RESTATEMENT (THIRD) OF AGENCY §§ 1.01 cmt. c ("[T]he concept of agency posits a consensual relationship in which one person . . . acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person. The person represented has a right to control the actions of the agent."), 2.02(1) ("An agent has actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives.").

[301] *See* 12 U.S.C. § 1813(u)(3).

[302] *See* Resp. Mot. at 5-9.

[303] *See id.* at 6-7.

the Board's enforcement powers extend to "*any*" nonbank subsidiary of a bank holding company, whether foreign or domestic, and as such Respondent's actions in connection with the Client Referral Program fall within the Board's jurisdiction "regardless of his citizenship or the location of his misconduct."[304] Enforcement Counsel also argues that the Board has jurisdiction over Respondent's actions because the statute clearly grants it enforcement authority over Edge Act corporations and their subsidiaries (and the individuals affiliated with them), which by their nature operate outside U.S. borders.[305] The undersigned agrees with Enforcement Counsel.

The judicial doctrine of "presumption against extraterritoriality" provides that "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application."[306] This presumption, which "reflects the . . . commonsense notion that Congress generally legislates with domestic concerns in mind," involves a two-step analysis.[307] First, the court must look to see "whether the statute gives a clear, affirmative indication that it applies extraterritorially."[308] If it does not, the question becomes "whether the case involves a domestic application of the statute," which is determined "by identifying the statute's focus and asking whether the conduct relevant to that focus occurred in United States territory."[309] The focus of a statute, in turn, "is the object of its solicitude, which can include the conduct it seeks to regulate, as well as the parties and interests it seeks to protect or vindicate."[310]

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[304] FRB Opp. at 34.

[305] *See id.* at 36-37.

[306] *RJR Nabisco, Inc. v. European Community*, 138 S. Ct. 2090, 2100 (2016).

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

[308] *Id.* at 2101; *see also Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none.").

[309] *WesternGeco LLC v. ION Geophysical Corp.*, 138 S. Ct. 2129, 2136 (2018) (internal quotation marks and citation omitted); *see also Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 126 (2013) (Alito, J., concurring) ("[A] cause of action . . . is not barred by the presumption[] only if the event or relationship that was 'the focus of congressional concern' under the relevant statute takes place within the United States.") (quoting *Morrison*, 561 U.S. at 266).

[310] *WesternGeco LLC*, 138 S. Ct. at 2136 (internal quotation marks, bracketing, and citation omitted).

Here, the Parties disagree as to whether the FDI Act contains a clear expression that Congress intended the reach of the Board's enforcement jurisdiction to extend beyond U.S. borders. According to Respondent, there is nothing in Section 1818 that "authorizes the Board to bring charges against foreign subsidiaries of bank holding companies, let alone foreign employees of foreign subsidiaries."[311] While the statutory language states that the Board has enforcement authority over "any subsidiary (other than a bank) of a bank holding company,"[312] Respondent rejoins that the term "any" should not be construed to encompass foreign subsidiaries, given the presumption against extraterritoriality.[313] Respondent also points to 12 U.S.C. § 1818(r), which delineates the circumstances in which enforcement actions may be brought against individuals associated with "foreign banks," as evidence that Congress could have provided language clearly conferring enforcement authority against foreign nonbank subsidiaries, had it chosen to do so.[314] The fact that it did not, Respondent says, demonstrates that the Board's authority over nonbank subsidiaries of bank holding companies stops at the water's edge.[315]

Enforcement Counsel, by contrast, asserts that "any" means "any," domestic or foreign, contending that the plain language of the statute is buttressed by the Board's historical exercise of "broad enforcement authority over foreign subsidiaries of bank holding companies," including its action against JPMC based on conduct by JPMSAP, its own foreign nonbank subsidiary, regarding the Client Referral Program.[316] Enforcement Counsel also argues that Respondent misinterprets the import of Section 1818(r)'s focus on foreign banks, seeing the intentional limitation of authority by Congress in this instance to suggest correspondingly broad authority over institutions

[311] Resp. Mot. at 7 (emphasis omitted).
[312] 12 U.S.C. § 1818(b)(3).
[313] *See* Resp. Mot. at 7.
[314] *See id.* at 7-8.
[315] *See id.*
[316] *See* FRB Opp. at 34-35 & n.105 (citing cases).

within the Board's purview that are *not* foreign banks—for example, foreign nonbank subsidiaries of U.S. bank holding companies.[317] To Enforcement Counsel's way of thinking, "it would make little sense for Congress to grant the Board enforcement jurisdiction over certain foreign misconduct by foreign banks, yet not to grant the Board any enforcement jurisdiction over foreign misconduct by U.S. bank holding companies' foreign nonbank subsidiaries."[318] Finally, Enforcement Counsel observes that the "sole purpose" of the Edge Act corporations over which the Board has been granted undeniable enforcement authority is "to engage in international or foreign banking or other international foreign financial relations."[319] Congress could not have given the Board broad jurisdiction to initiate enforcement actions against Edge Act corporations, in Enforcement Counsel's view, without intending that this jurisdiction encompass the foreign operations of those corporations and their subsidiaries.[320]

The undersigned finds that—if nothing else—the conferral of enforcement jurisdiction over Edge Act corporations, which intrinsically operate outside of the United States, in 12 U.S.C. § 1818(b)(3), constitutes a clear expression by Congress that it intended for the Board's authority to initiate Section 1818 actions in connection with those corporations and their subsidiaries to reach extraterritorially.[321] Put another way, the Board of Governors unquestionably has jurisdiction to bring enforcement actions related to Edge Act corporations, which conduct foreign operations through subsidiaries such as JPMSAP. It also has jurisdiction to bring enforcement

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[317] *See id.* at 37-38.

[318] *Id.* at 38.

[319] *Id.* at 37 (internal quotation marks and citation omitted).

[320] *See id.* at 36-37.

[321] Enforcement Counsel argues that the plenary supervisory authority conferred upon the Board of Governors "over the conduct and operation of Edge Act corporations" extends to those corporations' "foreign branches or subsidiaries." FRB Opp. at 37 n.11. The undersigned need not determine the precise boundaries of the Board's authority over foreign subsidiaries of Edge Act corporations to conclude that there is an extraterritorial component to the scope of its jurisdiction over the operations of Edge Act corporations as conducted through those subsidiaries.

actions related to "any [nonbank] subsidiary . . . of a bank holding company." To hold that, despite this, the Board lacks authority to bring enforcement actions based on the foreign operations of Edge Act corporations that are themselves nonbank subsidiaries of bank holding companies, as conducted through the foreign nonbank subsidiaries of those corporations, would frustrate congressional purpose and carry the presumption of extraterritoriality beyond its straining point.[322]

C. The Timeliness of the Board's Claims

Respondent argues that this action was not timely filed under 28 U.S.C. § 2462, which is the five-year statute of limitations governing Board enforcement actions.[323] In support of this argument, Respondent points to the "discrete" dates on which various referral candidates—including several discussed *supra*—were hired by JPMSAP, asserting that this, being "the date of the alleged violation," is the date on which the limitations period began to run for each candidate and that any claims relating to that candidate would be time-barred if not filed within the following five years.[324] He therefore concludes, based on this logic, that only two of the twelve listed candidates "have claims that are not time barred," and that allegations relating to the remaining candidates should be dismissed.[325] Respondent's argument fails in several respects.

First, the date of a referral candidate's hire bears little relation to the date of Respondent's alleged misconduct concerning that candidate.[326] JPMC's Anti-Corruption Policy and Code of

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[322] The undersigned also agrees with Enforcement Counsel that the limitation on the Board's authority to bring enforcement actions related to foreign banks, as described in 12 U.S.C. § 1818(r), is not indicative of whether Congress intended the Board's broader enforcement authority over any nonbank subsidiaries of U.S. bank holding companies as set forth in 12 U.S.C. § 1818(b)(3) to include both foreign and domestic subsidiaries within its ambit.

[323] *See* Resp. Mot. at 9-12.

[324] *See id.* at 10-12.

[325] *Id.* at 12.

[326] The hire dates indicated by Respondent are in any case a subject of potential dispute. For most of the candidates listed, Respondent does not cite to any record evidence in support of the specific date of hire attributed to each candidate, nor does he note those candidates for whom the *renewal* of their contracts with JPMSAP form the basis for allegations against Respondent. *Compare*, *e.g.*, *id.* at 11 (stating only that Candidate C's hire date was July 12, 2010 and arguing that the limitations period accordingly ended on July 12, 2015) *with* pp. 33-34 *supra* (Respondent

Conduct made it clear that any steps taken to offer a benefit to state officials or commercial clients "with the intent to influence improperly the recipient's conduct in relation to their employer's business affairs"—including the promise of that benefit, the agreement to offer that benefit, or the authorization of that benefit—are improper whether or not "the payment or benefit is actually made or received, or if anything is actually done by the recipient."[327] The same is true for the FCPA.[328] The duties of JPMC employees and supervisors to report violations of the Firm's anti-bribery provisions likewise were not contingent on a candidate being hired: an individual copied on an email chain in which JPMSAP bankers were proposing to offer a position to a referral candidate in exchange for a business advantage had a duty to report this regardless whether the offer was ultimately made and the individual ultimately employed.[329] In simple terms, and as discussed further *infra*, it is possible for Respondent to have committed actionable misconduct even in connection with referral candidates who were never hired at all.[330]

Second, Respondent's argument rests upon a fundamental misinterpretation of the applicable limitations period. Under 28 U.S.C. § 2462, the agency has "five years from the date

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alleged to have violated Firm policy in connection with discussions of contract renewals for Candidate C in March 2011 and May 2012).

[327] FRB-MSD-5 (2011 Anti-Corruption Policy) at 7; *see also id.* at 2-3.

[328] *See*, *e.g.*, 15 U.S.C. § 78dd-1(a) (prohibiting, *inter alia*, "the authorization of the giving of anything of value to[] any foreign official for purposes of . . . securing any improper advantage"); *see also* FRB-MSD-3 (2007 Anti-Corruption Policy) at 2 ("It does not matter if . . . the intended benefit is ever received, or if the official ever does anything to misuse his or her position as a result of the offer.").

[329] *See* FRB-MSD-7 (2011 Code of Conduct) at 8 (stating that individuals "must promptly report any known or suspected violation of the Code, any internal firm policy, or any law or regulation applicable to the firm's business"); FRB-MSD-5 (2011 Anti-Corruption Policy) (stating that JPMC employees must "immediately" report "any activity prohibited by this Policy" as soon as they become aware of it); *see also*, *e.g.*, FRB-MSD-42 (email chain including September 21, 2011 email from T. Xu to O de Grivel and F. Gong, forwarded to Respondent that day) (relaying an executive's expectation that his niece be offered "a permanent position" in exchange for ensuring JPMC "a senior role (leading JGC) when the deal come out").

[330] For a straightforward example, see Candidate B, who was not offered a place in the Firm's summer training program after Respondent directed his team to ask for a specific mandate from Candidate B's father in exchange. *See* FRB-MSD-29 (email chain including April 15, 2010 email from Fang to L. Chen and P. Zhai) ("Is there any mandate currently we are pitching to [Company B] that we can 'exchange' for? As you know, we are in the business of doing deals not doing charity school work."); *see also supra* at 28-31.

when the claim first accrued" in which to commence proceedings.[331] Because this action was filed on March 9, 2017, then, any claim asserted in the Notice that "first accrued" on or after March 9, 2012—five years before filing—has been timely brought.[332] The Supreme Court has held, in turn, that "the 'standard rule' is that a claim accrues when the plaintiff has a complete and present cause of action"—that is, when all of the elements of an actionable claim have been met and can be pled.[333] It therefore necessarily follows that if not all of the elements of a cause of action have been met, then a claim has not accrued for purposes of a limitations period. This means that Section 2462's five-year limitations period only begins to run once an agency is capable of bringing an enforcement action against a given respondent—which, in the case of statutes with "effect" elements or other multi-pronged prerequisites, such as Sections 1818(e) and 1818(i), may well be later than the date of the alleged misconduct.

Thus, while Respondent states categorically that "[t]he five-year limitations period begins to run on the date of the underlying violation," that is not the law. It is true that, for many statutes, the essential elements of a cause of action are "complete and present" at the point of misconduct. In *Gabelli v. Securities and Exchange Commission*, for instance, the Supreme Court addressed the accrual of claims under Section 2462 in the context of the Investment Advisers Act of 1940,[334] which authorizes the enforcing agency to bring an action "against investment advisers who violate the Act, or individuals who aid and abet such violations."[335] Violation of the Act, in turn, requires

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[331] The full relevant text of Section 2462 is as follows: "Except as otherwise provided by Act of Congress, an action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462.

[332] *See Blanton*, 909 F.3d at 1171 (discussing 28 U.S.C. § 2462 in enforcement context).

[333] *Gabelli v. SEC*, 568 U.S. 442, 448 (2013); *see also*, *e.g.*, *FERC v. Powhatan Energy Fund*, 949 F.3d 891, 898 (4th Cir. 2020) (claim accrues "when the plaintiff can file suit and obtain relief") (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)); *Savory v. Cannon*, 947 F.3d 409, 427 (7th Cir. 2020) (all "essential element[s] of [a] claim" necessary for accrual); *Blanton*, 909 F.3d at 1171 ("A claim normally accrues when the factual and legal prerequisites for filing suit are in place.") (internal quotation marks and citation omitted).

[334] 15 U.S.C. §§ 80b-6 and 80b-9.

[335] *Gabelli*, 568 U.S. at 445.

only an act of misconduct.[336] If the agency determines that an individual has engaged in misconduct under the Act on a given date—for example, by engaging in a "transaction . . . which operates as a fraud or deceit upon any client or prospective client"[337]—then all elements are met, the agency's claim has accrued, and it may initiate an enforcement action on that date and for five years hence. Nothing more is needed.

By contrast, and as discussed, Section 1818 enforcement actions have multiple independent elements that must be satisfied to constitute a "complete and present" cause of action.[338] One such distinct element is "effect," and the Board of Governors is not empowered to institute enforcement proceedings pleading a given statutory effect until after that effect can be alleged.[339] In a case where an alleged effect does not manifest itself immediately, the Board's cause of action might not become "complete and present," and its claim thus not yet accrued, until some time after the misconduct has occurred.[340] That is, the "effect" prongs of Sections 1818(e) and 1818(i) serve as a threshold condition *that must be met* before any enforcement action can commence. If this condition is not met until some later point, and the agency has no complete cause of action prior to that point, then Section 2462's limitations period should not begin to run until that point is

[336] *See Powhatan Energy Fund*, 949 F.3d at 899 (noting that in *Gabelli*, "the SEC had a complete and present cause of action at the time of the disputed conduct").

[337] 15 U.S.C. § 80b-6(2).

[338] *See* Part III *supra*.

[339] *Cf. Powhatan Energy Fund*, 949 F.3d at 898 (finding that when Congress has "plainly conditioned" an agency's right to action on the satisfaction of certain statutory prerequisites, Section 2462's five-year limitations period does not commence until those prerequisites have been satisfied).

[340] *See Proffitt v. FDIC*, 200 F.3d 855, 863 (D.C. Cir. 2000) (noting that "the question of accrual becomes complex when considerable time intervenes between the underlying conduct and the harmful effect").

reached.[341] To hold otherwise is to risk the absurd situation where an agency's time to bring its action has expired before its ability to do so has even reached the starting gate.[342]

In this case, Enforcement Counsel alleges that JPMC suffered financial loss through its payment of the November 2016 settlements[343] and the legal fees it incurred in connection with investigations into Respondent's misconduct, as well as reputational damage.[344] Separately, Enforcement Counsel alleges that Respondent benefited financially from his misconduct in the form of performance incentive awards.[345] And with respect to a civil money penalty, Enforcement Counsel alleges that Respondent's conduct constituted "a pattern of misconduct."[346] Any of these standing alone would satisfy the applicable statutory effect prong and thus meet that element of the agency's cause of action.

Moreover, it is unnecessary here to determine precisely when the other elements of the agency's claims were satisfied, because there is no doubt that Respondent's allegedly improper involvement in the Client Referral Program—*i.e.*, the misconduct itself—extended well into the limitations period. As both this Tribunal and the Board of Governors have already concluded, the Notice alleges specific instances of misconduct after March 9, 2012[347] as well as making the broader allegation that Respondent "managed" the CRP from 2008 through its end in 2013.[348]

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[341] *See Powhatan Energy Fund*, 949 F.3d at 898 ("That the[] circumstances [according a party the right to bring action] often occur at the moment of the violation does not imply that they invariably will or that every claim must accrue at that time.").

[342] *See id.* at 897 (claim accrual under Section 2462 should be determined "with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought") (quoting *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967)).

[343] *See supra* at 44-46.

[344] *See* FRB Mot. at 33-34; Notice ¶¶ 55, 61.

[345] *See* FRB Mot. at 34-35.

[346] *See id.* at 39; Notice ¶ 61.

[347] *See*, *e.g.*, Notice ¶ 41; FRB-MSD-117 (email chain including July 11, 2012 email from Fang to P. Zhai et al.) (stating that he had agreed to place an executive's daughter into the CRP summer training program "as part of the 'swap'" for a business deal with the executive's company).

[348] Notice ¶ 7; *see* Board Order at 6-7; April 17, 2020 Order at 7-8.

While the factual record as now adduced may not support the proposition that Respondent managed or bore special responsibility for the CRP *per se*,[349] given the stated roles of the JRM and L&C, the evidence certainly reflects a significant and continuous involvement by Respondent in the CRP's implementation and administration, including exerting an influence on the selection of referral candidates, throughout that program's life, including into 2012 and 2013.[350]

Moreover, Enforcement Counsel has adduced evidence that Respondent knew or should have known that others were violating the Firm's Anti-Corruption Policy in connection with the CRP, yet did not report this, take any action, or express any concern at any point before or after the applicable limitations period, despite being required to do so under that Policy and the Code of Conduct.[351] Respondent also was obliged to report his *own* conduct to the extent he came to believe that it might violate Firm policy, but did not do so.[352] This lack of action alone would be sufficient to render the agency's claims timely as to alleged misconduct occurring more than five years prior to the commencement of this action.[353] It is for these reasons that the undersigned rejects Respondent's newly packaged statute of limitations argument, which bears in any case a

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[349] *See* FRB Opp. at 28 (asserting without citation to evidence that "Fang was responsible for the referral hiring program from 2008 through 2013"). The undersigned notes that Enforcement Counsel elides the distinction made by the Board Order and this Tribunal's previous order, when this action was not yet at the summary disposition stage, that the Notice had *alleged* Respondent's management of the CRP into 2013, which was at that time sufficient to defeat Respondent's arguments that the action was time-barred as a matter of law. Now that the evidentiary record is more fully before this Tribunal, Enforcement Counsel's statement of undisputed facts does not represent, and the evidence does not support, the notion that Respondent himself managed or was "responsible for" the CRP. *See* FRB SOF ¶ 66 (stating that "[a]s head of the JRM, Fletcher was responsible for approving hires through the CRP") (citing FRB-MSD-4 (Fletcher Dep.) at 128:15-22).

[350] *See*, *e.g.*, *supra* at 11-17, 33-37.

[351] *See supra* at 20-21. The same is true for the agency's claims that Respondent failed to adequately supervise his subordinates and ensure compliance with Firm policy in connection with the CRP during the pendency of the program. *See* FRB Mot. at 27-29.

[352] *See* FRB-MSD-7 (2011 Code of Conduct) at 8 (stating that individuals have obligations to report known or suspected violations of Firm policy "whether the violation involves [that individual] or another person subject to the code").

[353] *Cf. Earle v. Dist. of Colum.*, 707 F.3d 299, 306 (D.C. Cir. 2012) ("Where a statute imposes a continuing obligation to act, a party can continue to violate it until the obligation is satisfied and the statute of limitations will not begin to run until it does.").

strong resemblance to the argument already rejected by this Tribunal and the Board of Governors and thus preserved for appeal.

D. Due Process

Respondent contends that "[t]his proceeding has been repeatedly shaped by due-process violations that: (i) prevented Fang from sufficiently understanding the facts on which the Board relies; (ii) blocked him from securing witness testimony critical to his defense; (iii) and precluded him from mounting an adequate defense."[354] In support of this assertion, Respondent raises—or, as Enforcement Counsel notes, *reraises*—a variety of due process arguments, which he groups into three broad categories: lack of access to evidence in his defense, unreasonable delay, and denial of the right to confront witnesses against him.[355] To the extent that these arguments have not already been considered and rejected by this Tribunal, they are unpersuasive. Moreover, and as discussed below, in arguing that he has been denied due process, Respondent conspicuously fails to acknowledge the several attempts the undersigned has made to ensure that Respondent had ample time and opportunity to secure discovery materials in this matter even after the initial discovery deadline had closed.

1. Respondent Was Not Unfairly Deprived of Access to Relevant and Exculpatory Evidence

Respondent argues that Enforcement Counsel failed to disclose exculpatory evidence as required to do under the Due Process Clause and the Supreme Court's *Brady* decision.[356]

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[354] Resp. Mot. at 13.

[355] *See id.* at 13-21; FRB Opp. at 28 (noting that Respondent "devotes a substantial portion of his motion . . . to arguments the [Tribunal] has already considered and addressed" earlier in these proceedings). In addition to the three categories of putative due process violations discussed in the body of Respondent's motion, Respondent perfunctorily recites another *sixteen* such arguments in a dense, multi-page footnote. *See* Resp. Mot. at 13 n.42. Because Respondent spends no time developing these additional arguments (and because many have already been litigated), the undersigned will likewise spend no time considering them, and they are preserved for appeal.

[356] *Brady v. Maryland*, 373 U.S. 83 (1963); *see* Resp. Mot. at 14-16.

According to Respondent, multiple agencies interviewed many individuals about the Client Referral Program, and the FBI prepared FD-302 forms ("302s") summarizing the interviews that were provided to Enforcement Counsel prior to its commencement of this action, but Respondent was never permitted to see the 302s or Enforcement Counsel's notes regarding the forms.[357] Respondent also asserts that Enforcement Counsel "deliberately" returned the 302s to the agencies before filing the Notice "so that they would not be subject to discovery," thus violating Respondent's due process rights.[358] As a result, Respondent claims that he has had "no ability to obtain the testimony . . . [of] critical witnesses, many of whom gave interviews to DOJ and SEC," and he has therefore "been wholly unable to prepare a defense to this matter."[359]

The undersigned agrees with Enforcement Counsel that Respondent's *Brady* arguments have been raised and rejected again and again during these proceedings,[360] as summarized at length in this Tribunal's orders on this topic in April 2020, April 2021, and February 2022.[361] For example, in denying Respondent's motion for reconsideration of this Tribunal's order denying the issuance of non-party subpoenas to the agencies for the 302s and related materials in September 2017, Judge McNeil stated:

> Substantively, Respondents' reliance on *Brady* is misplaced, because . . . courts have consistently held that the Due Process protections articulated in *Brady* and provided for in criminal proceedings are not applicable in proceedings conducted pursuant to the Administrative Procedure Act. . . . Because the present proceedings are administrative and not criminal, the targeted

[357] *See* Resp. Mot. at 14.

[358] *Id.* at 13 (emphases omitted).

[359] *Id.* at 14.

[360] *See* FRB Opp. at 29.

[361] *See* April 17, 2020 Order Regarding Objections to Orders Quashing Subpoenas Issued to Various Government Agencies ("April 17, 2020 Discovery Order") at 2-6; *See* April 8, 2021 Order Denying Respondent's Renewed Motion to Compel Production of Documents ("April 8, 2021 Order") at 1-3; February 15, 2022 Order Denying Respondent's Application for Third-Party Subpoenas ("February 15, 2022 Order") at 2-6.

> discovery sought by Respondent "is not exculpatory evidence in a criminal proceeding," and as such *Brady* has no application here.[362]

Judge McNeil also noted that a court cited by Respondent that had previously required that *Brady* material be produced in an administrative enforcement action did so only because the respondent in that action was also defending "a parallel criminal proceeding" for which preparation was needed, which is not the case here.[363] The undersigned agreed with this reasoning in her April 17, 2020 Order reviewing Judge McNeil's orders regarding Respondent's non-party subpoena requests,[364] and she agrees again now. Respondent is free, however, to raise his *Brady* argument once more upon Board review.

Turning to a different topic, Respondent argues that Enforcement Counsel denied his due process rights through "the improper concealment of the existence of an agreement between the government and its witness Angela Hu."[365] Respondent contends that during Hu's Hong Kong deposition in July 2017, Enforcement Counsel objected to a question regarding whether such an agreement existed, and Hu's counsel subsequently instructed her not to answer.[366] A review of the deposition transcript supports Enforcement Counsel's rejoinder that it did not, in fact, object to Respondent's question.[367] Furthermore, the undersigned agrees with Enforcement Counsel that such an objection, even had it occurred, would not amount to a "refusal to turn over the agreement Hu had with the government," as Respondent asserts.[368] Respondent offers no additional evidence of a due process violation here, nor does he detail any efforts that he made at the time to confirm

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[362] September 26, 2017 Order Regarding Respondents' Second Motion for Reconsideration of Order Regarding Non-Party Subpoenas (SEC and FRBNY) at 23 (quoting *Underwood Livestock, Inc. v. United States*, 417 Fed. App'x 934, 939 (Fed. Cir. 2011)).

[363] *See id.* at 23-24 (citing *SEC v. Gupta*, 848 F. Supp. 2d 491, 496 (S.D.N.Y. 2012)).

[364] *See* April 17, 2020 Discovery Order at 9.

[365] Resp. Mot. at 16.

[366] *Id.*

[367] *See* FRB Opp. at 29 n.83; FRB-MSD-19 (Hu Dep.) at 191:22-193:10.

[368] Resp. Mot. at 16; *see* FRB Opp. at 29 n.83.

the existence of an agreement, to request that Enforcement Counsel produce an agreement if it existed, or to compel further testimony from Hu.[369] This argument therefore lacks merit.

2. Respondent Has Not Been Prejudiced by an Unreasonable Delay in this Proceeding

Next, Respondent argues that he has been denied due process due to "the impermissible delay in the proceedings of this matter," given the appointment of a new ALJ after the Supreme Court's decision in *Lucia*; the stay that resulted from the subsequent retirement of that ALJ; and the restrictions thereafter imposed on travel and court proceedings as a result of the COVID-19 global pandemic.[370] In particular, Respondent contends that lockdowns in Hong Kong and China "materially affected Fang's ability to gather evidence and testimony in this matter" and that this Tribunal then "disallowed various discovery pursuits by Fang despite previously finding that the subjects of those pursuits were relevant and material to Fang's case."[371] It is Respondent's position that his ability to mount his defense and "take discovery from overseas witnesses" has been prejudiced by "the delay caused by the Board as a result of its unconstitutional ALJ appointment procedure, ALJ retirement, and the lengthy delay in the selection of a new ALJ," all of which has been compounded by the pandemic to produce "a situation whereby [Respondent has been] unable to obtain testimony or evidence from key witnesses."[372] Enforcement Counsel, on the other hand, argues that the delays in this case have not been "caused or prolonged" by this Tribunal or Enforcement Counsel itself, and that Respondent has been given "ample opportunity" to take the depositions "that he now presents as crucial to his defense," but he did not do so.[373] Enforcement

[369] *See* FRB Opp. at 29 n.83 (representing that "[n]either Fang nor his then-co-respondent Timothy Fletcher moved to compel Hu's testimony on that issue or otherwise challenged her decision not to answer the question").
[370] Resp. Mot. at 16; *see id.* at 16-18.
[371] *Id.* at 16-17.
[372] *Id.* at 17, 18.
[373] FRB Opp. at 29-30.

Counsel also contends that Respondent has not demonstrated clear prejudice, especially in light of Respondent's own inaction and the voluminous record evidence.[374] The undersigned agrees with Enforcement Counsel.

To begin with, Respondent's actions during this case have not been those of someone gripped by an urgency to resolve matters. On April 27, 2017, less than two months after the commencement of this action, Respondent moved to stay proceedings indefinitely pending resolution of then-ongoing criminal investigations against him.[375] When this motion was denied, Respondent moved to dismiss the case on May 2, 2017, despite the Uniform Rules containing no specific provision permitting the filing of dispositive motions other than motions for summary disposition.[376] Respondent then sent an *ex parte* communication to this Tribunal on May 22, 2017, in which he advocated for "a longer discovery process" than the October 31, 2017 date initially proposed by Judge McNeil.[377] Respondent stated that "even under an expanded schedule, we may need to revisit and extend the schedule once we have received and analyzed the investigative file and undertaken the process of requesting documents and depositions in foreign countries."[378]

Notwithstanding Respondent's preference for "an expanded schedule," Judge McNeil issued a scheduling order setting the close of discovery at October 31, 2017 and establishing a hearing date of February 13, 2018.[379] On July 6, 2017, Judge McNeil denied Respondent's motion for an extension of time for non-party JPMC to respond to a document subpoena, on the grounds

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[374] *See id.* at 30.

[375] *See* April 27, 2017 Motion of Respondent Fang Fang to Stay Proceedings Pending Resolution of Parallel Criminal Investigation.

[376] *See* May 2, 2017 Memorandum in Support of Respondent Fang Fang's Motion to Dismiss.

[377] May 23, 2017 Scheduling Order and Order Regarding Respondent's Letter of May 22, 2017 ("May 2017 Scheduling Order") at 2 (quoting Respondent's letter); *see also* May 3, 2017 Order to Attend Scheduling Conference and Initial Prehearing Orders at 2 (noting that "[a]bsent sufficient cause shown warranting a contrary result, the discovery schedule shall reflect the closing of discovery effective October 31, 2017").

[378] May 2017 Scheduling Order at 2 (quoting Respondent's letter).

[379] *See id.* at 5, 7.

that granting the motion could delay proceedings and "unduly threaten the timely presentation of evidence at the hearing requested by Respondent."[380]

On November 7, 2017, following consolidation of his case with that of then-co-respondent Fletcher—and after filing a motion for summary disposition, two motions for reconsideration, and two motions for interlocutory review[381]—Respondent and Fletcher ("Respondents") moved to stay this case indefinitely or, in the alternative, to extend all applicable dates by four months, to permit Respondents to utilize the Hague Convention process for letters of request "to conduct the discovery depositions of these overseas fact witnesses to which Respondents are entitled."[382] In support of this motion, Respondents estimated that the issuance of "the appropriate notices of deposition" in Hong Kong and mainland China could take anywhere from several months to "upwards of two years," but that the depositions of most witnesses could be completed in "approximately four months, though it could take longer if the witnesses object to the local court's ruling."[383]

In denying Respondents' motion to stay the case or extend the discovery period, Judge McNeil noted that "[t]he factual premises relied upon by Respondents in support of their motion have . . . been known to Respondents for several weeks," but that Respondents needlessly and "without apparent cause" waited until "the final days of the agreed-upon discovery period" to raise

[380] July 6, 2017 Order Regarding Joint Motion of Non-Party JP Morgan Chase & Co. and Respondent Fang Fang for and Extension of Time to Move to Quash or Modify Subpoena at 2.

[381] *See* June 30, 2017 Memorandum in Support of Respondent Fang Fang's Motion for Summary Disposition; August 7, 2017 Respondent Fang Fang's Request for Interlocutory Review of Administrative Law Judge's Order Denying Summary Disposition; August 7, 2017 Motion for Reconsideration and Evidentiary Hearing; August 30, 2017 Respondents' Motion for Reconsideration; October 11, 2017 Respondents' Request for Interlocutory Review of Administrative Law Judge's Order Granting Motions by Non-Parties to Quash Non-Party Subpoenas.

[382] *See* November 7, 2017 Motion to Stay This Proceeding or, in the Alternative, to Modify the Scheduling Order ("November 7, 2017 Motion to Stay").

[383] *Id.* at 3.

these issues.[384] Judge McNeil further stated that Respondents had been aware of the need to depose these witnesses since at least July 3, 2017, and that "[t]here is no accounting for the delay between [that date] and October 11, 2017, when [Respondents] made their requests for subpoenas."[385]

On December 6, 2017, Respondents joined with Enforcement Counsel in moving that the proceedings be stayed for 60 days in light of the newly held position of the Solicitor General of the United States regarding the constitutionality of the appointment process of SEC ALJs, as set forth in the petitions for certiorari in *Lucia v. SEC* then pending before the Supreme Court.[386] When Judge McNeil granted this motion as to the upcoming hearing date but left the dispositive motion deadlines in place due to the public interest inherent in a "speedy resolution" of the case and the likelihood that the case could be "resolved without reference to issues to be addressed in *Lucia*,"[387] Respondents again joined with Enforcement Counsel in asking that the matter as a whole be stayed for 60 days, which request was denied.[388] On December 27, 2017, upon motion of the Parties, a revised hearing date was set for April 24, 2018, with depositions of witnesses unavailable for hearing to be completed by April 18, 2018.[389]

On February 13, 2018, Judge McNeil granted the Parties' request to vacate the April 24, 2018 hearing date and to stay the matter until at least August 31, 2018 given the Supreme Court's grant of certiorari in the *Lucia* case.[390] Over the opposition of Enforcement Counsel, however, Judge McNeil ruled that Respondents could continue to pursue depositions of overseas witnesses

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[384] December 1, 2017 Order Regarding Respondents' Motion to Compel Walsh Deposition and Motion to Stay the Proceeding ("December 1, 2017 Order") at 3.

[385] *Id.* at 4.

[386] *See* December 6, 2017 Joint Emergency Motion to Stay Proceedings at 1-2.

[387] December 6, 2017 Order Regarding Joint Emergency Motion to Stay Proceedings at 2.

[388] *See* December 7, 2017 Joint Emergency Motion for Reconsideration of Court's Order to Partially Stay Proceedings; December 7, 2017 Order Regarding Joint Emergency Motion for Reconsideration of Court's Order to Partially Stay Proceeding.

[389] *See* December 27, 2017 Order Granting Joint Motion for Scheduling Order and Amendment to Scheduling Order.

[390] *See* February 13, 2018 Order Regarding the Parties' Separate Motions to Stay.

while the rest of the matter was stayed, pursuant to the discovery schedule that had already been set—that is, with an April 18, 2018 deadline for the completion of depositions.[391]

On February 16, 2018, Respondents finally applied to this Tribunal for the issuance of Letters of Request for International Judicial Assistance Pursuant to the March 18, 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters ("Letters of Request"), seeking to obtain the deposition testimony of nine witnesses living in Australia, England, and Hong Kong.[392] The convoluted procedural path that these applications then took has been detailed in prior orders.[393] Suffice to say that (1) Respondent could, and likely should, have applied to a U.S. district court for these Letters of Request rather than this Tribunal, *at any point* following his identification of the need to pursue the depositions through the Hague Convention process,[394] but he did not do so; (2) Judge McNeil ultimately granted the issuance of a Letter of Request for two of the witnesses sought by Respondent, Isabella Kwan and Todd Marin, on March 6, 2018;[395] and (3) a Hong Kong court approved Respondents' request for the depositions of Kwan and Marin on April 13, 2018, at which point it was too late to conduct those depositions within the previously established discovery deadline.[396]

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[391] *See id.* at 3-4; *see also* January 26, 2018 Motion of Respondents for a Stay of Proceedings ("January 26, 2018 Motion to Stay") at 2 & n.1 (characterizing "Respondents' efforts to collect deposition testimony of foreign witnesses" as being "already underway" and "well underway").

[392] *See* February 16, 2018 Application for Subpoenas to Depose Witnesses Unavailable for Hearing and Associated Letters of Request.

[393] *See* February 15, 2022 Order at 6 n.9; April 17, 2020 Order Granting Respondent's Motion for Additional Time to Depose Marin and Kwan ("April 17, 2020 Marin and Kwan Order") at 2-6; April 17, 2020 Order Regarding Objections to the Prior ALJ's Orders Denying Respondents' Applications for Subpoenas to Depose Witnesses Unavailable for Hearing ("April 17, 2020 Deposition Order") at 3-5.

[394] *See* November 7, 2017 Motion to Stay at 3 (identifying the Hague Convention process as "the ***only avenue available*** to Respondents to take these discovery depositions") (emphasis added); January 26, 2018 Motion to Stay at 1-2 (stating that application could be made to "a United States District Court" for issuance of the Letters of Request).

[395] *See* February 27, 2018 Order Regarding Respondents' Application for Subpoenas to Depose Witnesses Unavailable for Hearing and Associated Letters of Request; March 6, 2018 Letter of Request.

[396] *See* February 17, 2020 Marin and Kwan Order at 6.

The Supreme Court issued its *Lucia* decision on June 21, 2018. On July 16, 2018, Judge McNeil granted the Parties' joint motion to vacate the hearing, then set for October 2, 2018, and to stay the proceeding for 60 days in light of *Lucia*.[397] On September 6, 2018, the Board reappointed Judge McNeil and Judge Miserendino as Board ALJs pursuant to its appointment authority under Article II of the United States Constitution and 5 U.S.C. § 3105.[398] The Board then reassigned this case from Judge McNeil to Judge Miserendino in conformance with the remedy for potential Appointments Clause violations set forth in *Lucia*.[399]

Judge Miserendino retired shortly after this case was assigned to him. Because Judge McNeil was the only other ALJ empowered to hear Board enforcement actions at that time, and because he could not preside over the case again by the terms of the Board's order,[400] this matter was for all intents and purposes, albeit not formally, stayed again in January 2019 until another ALJ could be appointed.[401] On November 19, 2019, the Board appointed the undersigned as an OFIA ALJ with delegated authority to conduct hearings on behalf of the Board.[402] On January 13, 2020, the Board issued an order reassigning this matter to the undersigned, who then promptly notified the parties of this reassignment and directed them to file, by February 28, 2020, a list of pending motions and objections.[403] Between the time of Judge Miserendino's retirement and the

[397] *See* July 16, 2018 Order Granting Joint Motion to Vacate the Prehearing Schedule and Stay Proceedings Before the ALJ.

[398] *See* September 6, 2018 Board Resolution.

[399] *See* September 11, 2018 Order at 1-2; *see also Lucia*, 138 S. Ct. at 2055 (holding that parties in pending adjudicatory matters "tainted with an appointments violation" must be afforded "a new hearing before a properly appointed official" other than the presiding ALJ, be that "another ALJ" or "[the agency] itself").

[400] *See* September 11, 2018 Order at 2.

[401] On February 25, 2019, the Parties filed a Joint Notice of Settlement and Voluntary Dismissal as to JRM Head Timothy Fletcher, leaving Respondent Fang as the only respondent in the case.

[402] *See* November 19, 2019 Board Resolution.

[403] *See* January 14, 2020 Notice of Reassignment and Order Requiring Joint Status Report.

undersigned's assignment to this case, Respondent did not make any substantive filings in this case or ***in any way*** seek to expedite proceedings before this Tribunal or the Board itself.

Contrary to Respondent's assertion, the undersigned finds that the delay between Judge Miserendino's retirement and the undersigned's appointment was not unreasonable and did not prejudice Respondent's "ability to assemble his defense."[404] The process of finding and appointing an ALJ to replace Judge Miserendino took approximately one year—and the undersigned notes that a month and a half of that period, between the undersigned's appointment in mid-November 2019 and her assignment to this matter in early January 2020, spanned the holiday season, a time when some sluggishness in the gears of government is both inevitable and understandable. Moreover, the appointment process for OFIA ALJs requires the coordination and agreement of four agencies,[405] with all the potential for delay that this entails, and it is unclear that the Board could have sped up the appointment significantly even had it sought to do so. The undersigned will not penalize the Board for the sometimes halting nature of the federal appointment process.

Furthermore, there was no reason why Respondent himself could not have petitioned the Board to restart proceedings, if the delay was leading to violations of his due process rights or if he had concerns about the impact of fading witness memories on the preparation of his defense, as he now professes.[406] He did not do so. To the contrary, much of the delay Respondent now complains of was caused by his own inaction and lack of urgency, including regularly filing motions to stay, motions for reconsideration, and motions for interlocutory review that foreseeably

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[404] Resp. Mot. at 17.

[405] *See* Financial Institution Reform, Recovery, and Enforcement Act of 1989, Pub. L. 101-73, title IX, § 916, 103 Stat. 486, 12 U.S.C. § 1818 note (1989) (Improved Administrative Hearings and Procedures) (directing that "appropriate Federal banking agencies . . . jointly establish their own pool of administrative law judges"); *see also* 12 C.F.R. § 263.43 (Board enforcement proceedings to be conducted by ALJs "[u]nless otherwise ordered by the Board").

[406] *See* Resp. Mot. at 17.

acted to prolong matters—including when Respondent waited until the end of the discovery period to file requests for subpoenas that could have been filed much earlier, and then asked for a stay or extension to facilitate them.[407]

If nothing else, to prompt things along, Respondent could have asked the Board to resolve his outstanding requests for interlocutory review of various of Judge McNeil's evidentiary rulings, which were transmitted to the Board on October 30, 2017,[408] April 11, 2018,[409] May 9, 2018,[410] and June 6, 2018[411] and to all appearances not acted upon. Indeed, Respondent doing this would have been particularly helpful to the speedy progress of the instant action, because it might have resolved issues raised in Respondent's objections that, instead, the undersigned had to rule upon in April 2020 (and that are still the subject of Respondent's contention).[412] Yet, Respondent filed nothing at all in this case from Judge Miserendino's retirement in early January 2019 until the February 28, 2020 joint status report ordered by the undersigned, save for a handful of notices of appearance and withdrawal of appearance by members of his legal team. This is not to say that

[407] *See* December 1, 2017 Order at 3-4.

[408] *See* October 11, 2017 Respondents' Request for Interlocutory Review of ALJ's Order Granting Motions by Non-Parties to Quash Non-Party Subpoenas; October 30, 2017 Order Transmitting Respondents' Motion for Interlocutory Review.

[409] *See* March 14, 2018 Respondents' Request for Interlocutory Review of ALJ's Order Denying Respondents' Applications for Subpoenas to Depose Witnesses Unavailable for Hearing and Associated Letters of Request; April 11, 2018 Order Transmitting Respondents' Motion for Interlocutory Review.

[410] *See* April 20, 2018 Respondents' Request for Interlocutory Review of ALJ's April 6, 2018 Order Denying Respondents' March 19, 2018 Applications for Subpoenas to Depose Witnesses Unavailable for Hearing; May 9, 2018 Order Transmitting Respondents' Motion for Interlocutory Review.

[411] *See* May 18, 2018 Respondents' Request for Interlocutory Review of ALJ's May 4, 2018 Order Denying Respondents' April 18, 2018 Motion to Extend Time to Depose Witnesses Unavailable for Hearing; June 6, 2018 Order Transmitting Respondents' Motion for Interlocutory Review.

[412] The requests for interlocutory review in question concerned his document subpoenas to non-party agencies for the production of 302s and his desire to take the depositions of many overseas witnesses, both of which topics were subsequently the subject of much further briefing before this Tribunal as described in the instant order. Had Respondent petitioned the Board to resolve his requests for interlocutory review during the interregnum while a replacement ALJ for Judge Miserendino was being found, a Board ruling—or even a denial of interlocutory review on the grounds that there was no substantial basis for disagreement with the ALJ's conclusions, as previously occurred—could have saved the Parties and the undersigned a great deal of time and effort and hastened Respondent's "ability to assemble his defense" that he now says was jeopardized by the delay. Resp. Mot. at 17.

some further action was required of Respondent during this time, only that the decision not to speak out or seek to rouse the matter at any point *then* renders speculative assertions of prejudice and claims of unreasonable delay *now* considerably less persuasive.

Respondent also fails to acknowledge that when this case was reassigned to the undersigned, the discovery period was closed, but the undersigned reopened discovery so that Respondent could obtain the depositions that he now still has not taken. On April 17, 2020, shortly after her reassignment to this matter, the undersigned reversed Judge McNeil's ruling denying Respondent an extension of time to take the hearing depositions of Isabella Kwan and Todd Marin.[413] In doing so, the undersigned credited Respondent's representation that "the local court in Hong Kong has paused the local action, rather than dismissed it," and that these depositions could therefore be arranged and taken "without restarting the Hague Convention process again."[414] Also on April 17, 2020, the undersigned issued an order regarding twenty-one other assertedly material witnesses, all living abroad, whose deposition subpoenas Respondent had unsuccessfully sought before Judge McNeil.[415] Finding that some of the witness testimony was likely to be material but mindful of the potential for undue burden to Enforcement Counsel and undue delay to the proceedings, the undersigned directed that Respondent identify three of the twenty-one witnesses as individuals whose depositions should now be permitted.[416]

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[413] *See* April 17, 2020 Kwan and Marin Order at 7-8.

[414] *Id.*

[415] *See* April 17, 2020 Deposition Order.

[416] Apropos of Respondent's current argument that he has been prejudiced by the "lengthy delay" of these proceedings, Resp. Mot. at 17, the undersigned notes that Respondent was seemingly unbothered by how long it would inevitably take to arrange the depositions of twenty-one foreign witnesses through the Hague Convention process, offering no estimate of his own and stating only that this Tribunal "should take a reasonable time to create a more complete record . . . instead of pushing forward on an incomplete factual record." April 17, 2020 Deposition Order at 4 (quoting Respondent's November 2, 2018 Objection to Order Denying March 19, 2018 Applications for Supboenas to Depose Fifteen Witnesses Unavailable for Hearing ("November 2, 2018 Objection") at 29).

In issuing these orders, the undersigned noted Respondent's stated willingness to conduct depositions remotely "if in-person depositions are not feasible,"[417] and cautioned that in choosing the subjects of the renewed applications for deposition subpoenas,

> Respondent is strongly advised to be mindful of balancing the probative value of the anticipated testimony with the expected time and effort necessary to effectuate the deposition, particularly with respect to: (1) potential redundancy or duplication among the testimony of the three proposed witnesses and between that testimony and the existing and anticipated record in the case; (2) the likelihood that the resident country of each proposed witness will accept and execute, in a timely fashion, a Letter of Request or Letter Rogatory issued by this tribunal; and (3) the ease with which such depositions can be timely conducted, whether remotely or in person, especially given the uncertainties surrounding the current COVID-19 pandemic and the resultant travel restrictions.[418]

The undersigned further made clear that she would "not approve subpoena requests that do not propose a method and timeframe for conducting the depositions that is reasonably acceptable to both parties and the deponent," and required Respondent to "give details regarding the specific anticipated timeframes for executing Letters of Request or Letters Rogatory" with respect to each of the overseas witnesses whose deposition testimony he sought to take.[419] The undersigned emphasized that the Parties should work together in good faith "to maximize the chances of speedy and successful depositions" and that Respondent should "be flexible and prepared with alternative deposition candidates should it prove that agreement regarding the logistics of one or more of the proposed depositions will not be possible in a timely manner."[420] Finally, the undersigned directed the Parties to file a joint status report by May 18, 2020 regarding their discussions in arranging these depositions, and provided that Respondent should submit renewed applications for the

[417] *Id.* at 8; *see also id.* at 4 (noting that "Respondent also raises the prospect of conducting depositions remotely to ease the logistical burden.") (citing November 2, 2018 Objection at 28.).

[418] April 17, 2020 Deposition Order at 8.

[419] *Id.* at 8-9.

[420] *Id.* at 8.

deposition subpoenas of the three witnesses he had chosen "no later than seven days after the joint status report has been filed."[421]

Despite this Tribunal's order, Respondent did not identify any potential deponents in that May 18, 2020 status report, citing logistical complications that had arisen due to the COVID-19 global pandemic.[422] Nearly a year later, however, Respondent *still* had not indicated which additional three witnesses he was seeking to depose.[423] In her April 8, 2021 Order, the undersigned directed Respondent to identify the additional deponents within ten days and to then begin "the process for securing those depositions . . . without delay."[424] The order emphasized the need to make prompt arrangements for timely depositions, stating that

> While international travel may currently be off limits due to the COVID-19 pandemic, the use of remote depositions, either telephonically or by video, is highly encouraged. If the depositions cannot be completed within the time frames set forth in the procedural schedule, *then the case will need to proceed without the benefit of such additional depositions*. As stated previously, Respondent should take these factors into consideration when choosing their deponents.[425]

Even then, Respondent did not identify the three additional deponents until June 2021, well past the ten-day deadline established by the April 8, 2021 Order.[426]

In sum, the undersigned provided Respondent, more than two years ago, with the opportunity to arrange depositions for five witnesses whose testimony he claimed was material and integral to his defense—Kwan, Marin, and three more of Respondent's choice—outside of the already-closed discovery period. Despite multiple extensions of the deadline for conducting the

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[421] *Id.* at 9.

[422] *See* May 18, 2020 Joint Status Report at 2-3.

[423] *See* April 8, 2021 Order at 4.

[424] *Id.*

[425] *Id.* at 4-5 (emphasis added).

[426] *See* June 1, 2021 Application for Subpoenas to Depose Witnesses Unavailable for Hearing and Associated Letter of Request at 5.

depositions, Respondent failed to depose any of the witnesses before the final deadline of February 18, 2022.[427] Certainly, there were many things out of Respondent's control that made arranging these depositions more difficult, not least the continuing impact of the COVID-19 pandemic.[428] These things, however, were likewise out of the control of Enforcement Counsel and this Tribunal, and the undersigned has made every effort over the last two years to prompt Respondent to act constructively, quickly, and with necessary flexibility in consideration of the circumstances while taking concrete steps to depose these witnesses.[429] Not only has Respondent not done so, to all appearances, but he has in fact become *less* flexible, insisting in recent months that only in-person depositions would suffice while previously expressing a willingness to conduct depositions remotely as needed.[430] Accordingly, and for all of the reasons above, the undersigned concludes that Respondent has not been prejudiced by an unreasonable delay in these proceedings.

3. Respondent Has Not Been Improperly Denied the Right to Confront Witnesses Against Him

Respondent maintains that he has been deprived of his "basic constitutional right" to confront through in-person examination "the authors of the emails that Enforcement Counsel seeks to use here against Fang."[431] He argues that this Tribunal "fail[ed] to permit Fang depositions of these witnesses by setting arbitrary deadlines that have precluded Fang's ability to obtain evidence

[427] *See* May 27, 2021 Order Regarding Telephone Conference on May 20, 2021 and Setting Procedural Schedule (depositions to be completed by January 21, 2022); November 15, 2021 Order Granting in Part Motion to Extend Discovery Deadline ("November 15, 2021 Order") (depositions to be completed by February 18, 2022).

[428] *See* November 15, 2021 Order at 3 ("While it is unfortunate that Respondent is facing obstacles in taking these depositions due to continued COVID-19 restrictions, Respondent was already put on notice that if [he] did not proceed with the depositions within the time frames set forth in the procedural schedule, [he] would forego the benefit of such depositions.").

[429] *See*, *e.g.*, February 17, 2020 Deposition Order at 8-9; April 8, 2021 Order at 3-4; November 15, 2021 Order at 3.

[430] *Compare* November 2, 2018 Objection at 28 (suggesting remote depositions of overseas witnesses if necessary) *with* October 28, 2021 Motion to Extend Discovery Deadline ("October 28, 2021 Motion to Extend Discovery") at 2 (asserting that in-person depositions are a "necessity").

[431] Resp. Mot. at 18.

from foreign citizens in China and Hong Kong."[432] He further asserts that this Tribunal's suggestion that the depositions be conducted via video conference technology is "inadequate," "entirely impractical," and violative of his due process rights.[433] And Respondent contends that this Tribunal "has unnecessarily and inappropriately limited the number of depositions that Fang was permitted and arbitrarily restricted the time that Fang had to complete the depositions."[434] These arguments are unpersuasive and counterfactual in every particular.

First, the Tribunal did not set "arbitrary deadlines" to preclude Respondent from obtaining testimony from foreign citizens in this case. On the contrary, despite the fact that the discovery period had closed when this case was reassigned to her, the undersigned reopened discovery for the limited purpose of allowing Respondent to take that testimony.[435] In order to enable Respondent to act timely in what was understood to be a potentially lengthy process, the undersigned then set multiple deadlines for Respondent to identify his additional desired deponents, which Respondent ignored.[436] Throughout, the undersigned made it clear to Respondent that he would need to proceed without the depositions if they could not be conducted within the bounds of the prehearing schedule, and emphasized that Respondent should be willing to take the depositions remotely if necessary, to complete them within that timeframe.[437]

Ultimately, as Enforcement Counsel notes, the Parties "jointly agreed to all prehearing deadlines in this matter, including the discovery and deposition deadlines."[438] When Respondent

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[432] *Id.*

[433] *Id.* at 18, 19.

[434] *Id.* at 19.

[435] *See supra*.

[436] *See* April 17, 2020 Deposition Order at 9; April 8, 2021 Order at 4.

[437] *See* April 8, 2021 Order at 4-5; November 15, 2021 Order at 3 ("If Respondent chooses to make the best of a difficult situation and decided to pursue taking the depositions remotely, he should do so without delay.").

[438] FRB Opp. at 31; *see*, *e.g.*, May 24, 2021 Joint Proposed Prehearing Schedule (proposing January 21, 2022 as the date by which Respondent would complete the depositions "permitted by the court in its April 17, 2020 orders").

sought to extend the deposition deadline beyond the date jointly proposed by the Parties, the undersigned granted an extension "to facilitate Respondent's taking of these depositions," over the objection of Enforcement Counsel.[439] Respondent then tried to extend the deadline *again*, one week before the new date, asking for an additional four months—well past the agreed-upon filing dates for dispositive motions and to the doorstep of the hearing itself, which would have demanded rescheduling—in order to petition the undersigned "to make a recommendation to a United States District Court Judge" for the issuance of a letter of request to compel the testimony of the Hong Kong witnesses.[440] This time, the undersigned drew the line.[441] The undersigned has been flexible with deadlines during these proceedings in light of the likelihood of logistical delay and the difficult global circumstances, and it is unfortunate that Respondent's path to securing these depositions has been obstacle-laden, but Respondent has been seeking extensions of time to depose overseas witnesses for four years,[442] and in that time has deposed none. Enough is enough.

The undersigned also rejects Respondent's contention that she "has unnecessarily and inappropriately limited the number of depositions that Fang was permitted" and the time in which to complete them.[443] As discussed, the undersigned afforded Respondent the opportunity to take five more depositions than were previously permitted, and did so in April 2020 after the close of the established discovery period. Inexplicably, it was not until June 1, 2021, more than one year later, that Respondent took concrete steps to seek these depositions, applying to the undersigned

[439] November 15, 2021 Order at 3.

[440] February 11, 2022 Motion for Extension of Time to Appeal and for Issuance of Recommendation for Letter of Request at 13.

[441] *See* February 23, 2022 Order Denying Motion for Extension of Time at 4 (noting that "Respondent should have made a request for assistance from the U.S. District Court years ago when the undersigned reversed Judge McNeil's ruling on the Marin and Kwan depositions" and emphasizing that Respondent had been on notice for "approximately 10 months" that case would proceed if depositions were not taken by the deadline).

[442] *See* November 7, 2017 Motion to Stay at 3 (seeking four-month extension to take overseas depositions).

[443] Resp. Mot. at 19.

for letters of request for judicial assistance to subpoena the foreign witnesses that the undersigned duly and promptly issued.[444] On January 10, 2022, a Hong Kong court issued a decision concluding that this Tribunal was not a "judicial authority," or "court or tribunal," capable of issuing letters of request seeking judicial assistance from a foreign court under the Hague Convention.[445] Irrespective of the correctness of this decision, its impact on these proceedings is a foreseeable product of Respondent's delay, not any action by the undersigned. Respondent was aware at least as early as March 2018 of the possibility that letters of request should more properly come through U.S. district courts rather than administrative tribunals.[446] Respondent also knew, and was reminded by the undersigned in her April 17, 2020 Order, that the need to obtain a letter of request "is not a mere 'technical obstacle,'" but something that could potentially cause significant delay.[447] Yet rather than begin the process of obtaining letters of request as soon as discovery was reopened, Respondent dithered and dallied, heedless of the risk that the depositions might not be arranged before his clock again ran out. There is no due process violation here.

Finally, Respondent's implacable resistance to the prospect of remote depositions aside, there is nothing about conducting depositions by teleconference or videoconference where necessary that is *per se* violative of Respondent's due process. As the ample authority gathered by Enforcement Counsel demonstrates, "[r]emote proceedings have become commonplace during the pandemic, and the vast majority of courts have held that COVID-19 pandemic restrictions

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[444] *See* June 1, 2021 Application for Subpoenas to Depose Witnesses Unavailable for Hearing and Associated Letter of Request; June 4, 2021 Letter of Request.

[445] *See* January 20, 2022 Application for Third-Party Subpoenas, Ex. C ("Hong Kong Decision") at 4-9, 41; *see also* Enforcement Counsel's February 4, 2022 Opposition to Respondent's Application for Third-Party Subpoenas at 3-5 for more discussion of the Hong Kong court's decision.

[446] *See* March 30, 2018 Opposition to Respondents' Applications for Subpoenas to Depose Witnesses Unavailable for Hearing and Associated Letters of Request at 30 (stating that the "standard practice is to issue a recommendation to a United States District Court requesting that . . . [it] issue a Letter of Request"; January 26, 2018 Respondents' Motion to Stay at 1-2 (stating that application could be made to "a United States District Court" for issuance of the Letters of Request).

[447] April 17, 2020 Deposition Order at 7.

constitute good cause and compelling circumstances to hold proceedings remotely."[448] Administrative tribunals, including OFIA, have likewise utilized technological platforms for remote testimony as needed during the global pandemic while taking care to be mindful of the parties' due process.[449] If anything, during the COVID-19 pandemic, video depositions "may allow counsel to better assess a deponent's demeanor than they could in person," considering the health mandates required by almost every country, including China and Hong Kong, which include mask requirements.[450]

Here, Respondent has insisted on taking depositions in person in Hong Kong, which he represents that he has been unable to do as a result of continued COVID-19 restrictions.[451] He has rejected video depositions as "inadequate" and "entirely impractical" due to the time difference between Hong Kong and the United States and the challenges inherent in "confronting witnesses with voluminous exhibits" by video.[452] Yet he has also maintained that these depositions are

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[448] November 15, 2021 Opposition to Respondent's Motion to Extend Discovery Deadline at 5 (gathering cases).

[449] *See*, *e.g.*, *In the Matter of Louisiana Real Estate Appraisers Bd.*, 2021 WL 719650 (F.T.C. Feb. 12, 2021) (noting that "courts and agencies have found that current video conferencing technology, properly used, can meet the requirements of fairness and due process for a trial and hearing"); *In the Matter of Oxarc, Inc. et al.*, 2020 WL 5735979, at *1 (N.L.R.B. Sep. 23, 2020) (stating that "[a] video hearing can also provide for the observation of witnesses for the purpose of credibility, as well as other due process concerns"); *In the Matter of MPLX Ozark Pipe Line LLC*, 2020 WL 2119359, at *4 (F.E.R.C. May 4, 2020) (holding that "virtual hearings protect the procedural due process rights of participants" if those hearings are conducted under "the safeguards and protocols" of in-person hearings and offer participants "a meaningful opportunity to be heard"). This Tribunal has conducted several hearings on a fully or partially virtual basis over the course of the pandemic, and the undersigned is satisfied that those hearings permitted "a fair and expeditious presentation of the relevant disputed issues" and offered each party the unfettered ability "to present its case or defense by oral and documentary evidence and to conduct cross examination as may be required for full disclosure of the facts"). 12 C.F.R. § 263.35(a)(1).

[450] *Macias v. Monterrey Concrete LLC*, Civ. No. 19-830, 2020 WL 6386861, at *6 (E.D. Va. Oct. 30, 2020) (noting that "[d]uring a remote deposition, the deponent need not wear a mask to prevent the spread of COVID-19 among in-person participants.").

[451] *See* Resp. Mot. at 18; October 28, 2021 Motion to Extend Discovery at 2-3.

[452] Resp. Mot. at 19. *See also*, *e.g.*, *Sonrai Sys., LLC v. Romano*, Civ. No. 16-3371, 2020 WL 3960441, at *4 (N.D. Ill. July 13, 2020) ("[C]ourts have held that voluminous and highly detailed exhibits are not a bar to remote video conference depositions. . . . Thus, notwithstanding the potential challenges that lie ahead, the Court finds that the health risks in this case outweigh the practical problems of making effective use of exhibits."); *Macias*, 2020 WL 6386861, at *5 (stating that "courts have approved document-intensive remote depositions while recognizing the challenges that they present for parties"). Again, the undersigned notes that several hearings before this Tribunal have been conducted remotely with extensive use of lengthy and detailed exhibits during testimony, and the electronic presentation of those exhibits was remarkably smooth and almost entirely without issue, to the

crucial to his ability to put on a defense.[453] It was, and had been, incumbent on Respondent to square this circle, whether by "choos[ing] to make the best of a difficult situation" and finding a way to overcome his logistical concerns with remote depositions, or electing to forgo the depositions and mount his defense without them.[454] What Respondent cannot do, however, is refuse all solutions to his self-imposed dilemma and then argue that he has been deprived of due process. As a different tribunal addressing similar issues has noted, potential "technological and logistical problems and inconveniences do not outweigh the prejudice caused by indefinitely delaying proceedings ripe for adjudication."[455]

4. The Settlement Agreements Will Not Be Used as Evidence of Respondent's Misconduct

Respondent argues that "consideration of the non-prosecution agreement between DOJ and JPM violates Fang's confrontation and due process rights" to the extent that it prevents him from adequately defending himself against "out-of-court accusers."[456] Enforcement Counsel, on the other hand, takes the position that admissions of wrongdoing by JPMC under the NPA and the other settlement agreements in connection with the Client Referral Program can be offered as proof that Respondent himself engaged in actionable misconduct through his participation in that program.[457]

The undersigned agrees with Respondent that, notwithstanding JPMC's admissions, the NPA and the agreements between JPMC and the Board and SEC are not, and cannot be, any proof that Respondent himself committed actionable misconduct. As discussed further in Part V.B *infra*,

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satisfaction of all parties. *See* Order Adopting Joint Virtual Hearing Protocol, *In the Matter of Ortega and Rogers*, OCC Nos. AA-EC-2017-44 & -45 (Jan. 19, 2022).

[453] *See* Resp. Mot. at 18.

[454] November 15, 2021 Order at 3.

[455] *MPLX Ozark Pipe Line LLC*, 2020 WL 2119359, at *4.

[456] Resp. Mot. at 20.

[457] *See* FRB Mot. at 19-21; FRB Opp. at 2-4.

the settlement payments may be used as evidence of loss to fulfill the effect elements of Section 1818, if the Board can show that the settlements occurred, wholly or in part, "by reason of" Respondent's misconduct.[458] Evidence of causation, however, is not evidence of liability for the underlying violations of law, and Enforcement Counsel must demonstrate separately that Respondent's actions *constituted* misconduct—that is, that he violated the FCPA, breached his fiduciary duties to JPMC, or engaged in unsafe or unsound practices—without adverting to the merits of any allegations or admissions made by JPMC in the settlement agreements. In other words, the undersigned will not rely on the settlement agreements as evidence of Respondent's misconduct or for the truth of any facts or admissions stated therein. Enforcement Counsel is obliged to prove that Respondent himself committed misconduct, and it cannot use JPMC's admission of liability in those agreements as any link in that inferential chain. Further, with respect to Respondent's instant argument, the undersigned finds that no confrontation or due process concerns arise from consideration of the agreements solely as evidence of statutory "effect."

V. Argument and Analysis of the Merits

Having addressed Respondent's threshold arguments, the undersigned turns to the merits of the Board's claims. Enforcement Counsel contends that the undisputed facts of Respondent's conduct over the course of the Client Referral Program entitle the Board to summary disposition on each applicable element of Sections 1818(e) and 1818(i).[459] Respondent, by contrast, asserts that he is entitled to summary disposition on all claims against him because the undisputed material facts show that he did not engage in misconduct; that the actions alleged in the Notice did not cause some detrimental effect to JPMC or result in his own personal gain; and that he did not act

[458] 12 U.S.C. § 1818(e)(1)(B).
[459] *See* FRB Mot. at 18-37.

with the requisite culpability.[460] For the reasons and to the extent described below, the undersigned agrees with Enforcement Counsel and concludes that each of the statutory elements necessary for an order of prohibition and the assessment of a civil money penalty have been met.

A. The Undisputed Evidence Shows That Respondent Committed Misconduct

The factual record as developed establishes that Respondent improperly and consistently viewed the Client Referral Program, throughout that program's lifespan and in violation of JPMC policies and procedures, as a way to effectuate *quid pro quo* exchanges of internships or temporary positions to the relatives of clients or prospective clients in return for concrete advantages in securing business for the Firm. Furthermore, there is no evidence to indicate that Respondent ever expressed, reported, or escalated concerns that his subordinates or others were utilizing the CRP in ways that he knew or suspected might violate JPMC's Anti-Corruption Policy, despite having a duty to promptly do so in such circumstances. Because Respondent's actions and lack of action in this regard, as reflected in the undisputed material facts of this case, constituted actionably unsafe or unsound practices and a breach of the fiduciary duty of care that Respondent owed to JPMC, the undersigned finds that it is unnecessary to also determine whether and to what extent Respondent's conduct also amounted to a violation of the FCPA.

1. Breach of Fiduciary Duty

Because it most straightforwardly follows from Respondent's alleged misconduct, we begin with fiduciary duty. Enforcement Counsel argues that Respondent breached his fiduciary duty of care to JPMC by violating the Firm's anti-corruption policies, by failing to adequately supervise his subordinates to ensure that they did not violate these policies, and by failing to report, or take steps to remedy, violations of these policies that became known to him.[461] In response,

[460] *See* Resp. Mot. at 21-47.
[461] *See* FRB Mot. at 31-32.

Respondent asserts that he acted prudently at all times in connection with the Client Referral Program, because he "believed in good faith that his actions and those of his direct reports complied with the Firm's policies, procedures, and relevant anti-bribery laws."[462] On the strength of the undisputed material facts adduced by the Parties, the undersigned concludes that Enforcement Counsel's position is clearly the correct one.

It is undisputed that, as a Managing Director and head of its China Investment Banking line of business, Respondent owed JPMC a fiduciary duty of care.[463] Respondent contends that the boundaries and contours of this duty should be determined by reference to Hong Kong law rather than Board precedent,[464] but this proposition is unsupported. Although the Board has not specifically decided this issue,[465] the Federal Deposit Insurance Corporation ("FDIC") Board of Directors has held that "[t]he fiduciary duties of institution-affiliated parties . . . for the purposes of section 8(e) of the FDI Act are established by Federal law."[466] The Eighth Circuit, moreover, has concluded that because the relevant provisions of the FDI Act do not define fiduciary duty, the enforcement agencies should be accorded "substantial deference" in determining its scope.[467] In support of this conclusion, that court further noted that "[t]he concept of fiduciary duty may, in differing circumstances, require fiduciaries to exercise varying degrees of vigilance and care. The

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[462] Resp. Mot. at 41-42.

[463] *See* FRB Mot. at 31; Resp. Mot. at 39 (discussing Respondent's "fiduciary duty to the Firm").

[464] *See* Resp. Mot. at 39-40.

[465] *See Smith and Kiolbasa*, 2021 WL 1590337, at **15-16 (finding that respondents had breached their fiduciary duties under both federal and state law).

[466] *In the Matter of Michael D. Landry and Alton B. Lewis*, No. 95-65e, 1999 WL 440608, at *15 (May 25, 1999) (FDIC final decision), *aff'd on other grounds sub nom*. *Landry v. FDIC*, 204 F.3d 1125 (D.C. Cir. 2000); *see also*, *e.g.*, *In the Matter of Neil M. Bush*, No. AP 91-16, 1991 WL 540753, at *5 (Apr. 18, 1991) (OTS final decision) ("The federal government as regulator and insurer . . . may establish a regulatory and common law of fiduciary duties that does not depend on the location of the institution."). Respondent's citations to the contrary, *see* Resp. Mot. at 39, do not address the issue at hand—for example, the Supreme Court's *Atherton* decision concerned, in relevant part, whether a particular federal statutory scheme "displaces federal common law," *Atherton v. FDIC*, 519 U.S. 213, 230 (1997), not whether state-law standards should apply to fiduciary duty claims in Section 1818 enforcement actions—and are therefore wholly inapposite.

[467] *Brickner v. FDIC*, 747 F.2d 1198, 1202 (8th Cir. 1984).

FDIC has special expertise in the banking area, and extensive experience with the duties and responsibilities of bank officers and directors."[468] The undersigned agrees. In the absence of some determination by the Board that Hong Kong law applies here, then, there is no basis to find that the scope of Respondent's fiduciary duties in this case is governed by anything other than the relevant body of law as developed by the applicable agencies in the bank enforcement context.

Respondent's duty of care to JPMC required him at all times "to act in good faith and in a manner reasonably believed to be in the [institution's] best interest."[469] In furtherance of this duty, Respondent also was obliged to "act diligently, prudently, honestly, and carefully in carrying out [his] responsibilities and [to] ensure [JPMC's] compliance with state and federal banking laws and regulations."[470] The duty of care further demanded "the proper supervision of subordinates" and "constant concern of the safety and soundness of the bank" on Respondent's part.[471]

As part of this fiduciary duty of care, Respondent was indisputably required to understand and comply with Firm policies and procedures centered around Firm compliance with laws and regulations, to take steps to ensure that his subordinates were not violating those policies and procedures, and to report misconduct as and when it occurred.[472] As described in Part II *supra*, JPMC's Anti-Corruption Policy made it clear that employees were not permitted to offer positions

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[468] *Id.*

[469] *In the Matter of Steven J. Ellsworth*, Nos. AA-EC-11-41 & -42, 2016 WL 11597958, at *15 (Mar. 23, 2016) (OCC final decision). Respondent also owed JPMC a fiduciary duty of loyalty, *see Smith and Kiolbasa*, 2021 WL 1590337, at *15, but the Notice does not allege that Respondent breached this duty, *see* Notice ¶¶ 53-54, and the undersigned therefore need not address it further here. *See also* FRB Mot. at 30-32 (arguing only that Respondent breached his duty of care).

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

[471] *In the Matter of Douglas V. Conover*, Nos. 13-214e & -217k, 2016 WL 10822038, at *19 (Dec. 14, 2016) (FDIC final decision) (internal quotation marks and citation omitted).

[472] *See* Resp. Mot. at 40 (acknowledging that his duty of care included "[t]he duty to supervise and duty to report misconduct"), 41 ("[T]he duty to report misconduct falls under the duty of care.").

to the relatives of clients or potential clients to increase the prospects of securing business.[473] Under that policy, Respondent was expressly prohibited from making any offer that "could reasonably be understood as an effort to influence improperly a representative of a non-government-owned commercial entity to grant [JPMC] a business advantage."[474] The policy termed these practices "commercial bribery" and stated that they were a crime in various U.S. and foreign jurisdictions, including New York and China.[475] The policy also emphasized that "[t]hese offenses are extremely serious and involve high risk not only to JPMorgan Chase, but also carry serious criminal penalties for individuals."[476]

In addition, both the Anti-Corruption Policy and JPMC's Code of Conduct indisputably imposed upon Respondent the duty to promptly report others who he knew, suspected, or had reason to suspect were utilizing the Client Referral Program for improper purposes.[477] It was also incumbent upon Respondent as a supervisor of bankers in the China Investment Banking line of business to ensure that his subordinates were "meeting the firm's policies and procedures, and acting within their authority and in accordance with the law and regulatory requirements."[478] And

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[473] *See*, *e.g.*, FRB-MSD-5 (2011 Anti-Corruption Policy) at 3-4, 7; *see also* FRB-MSD-16 (March 31, 2006 email from N. Chan to G. Tan) (relaying message sent to all Asia-Pacific investment bankers, including Fang, that "the Firm does not condone the hiring of the children or other relatives of clients or potential clients . . . for the purpose of securing or potentially securing business. In fact, the Firm's policies expressly forbid this. There are no exceptions.").

[474] FRB-MSD-5 (2011 Anti-Corruption Policy) at 7.

[475] *Id.*

[476] FRB-MSD-160 (2012 Anti-Corruption Policy) at 4; *see also*, *e.g.*, FRB-MSD-5 (2011 Anti-Corruption Policy) at 2-3 (stating that "[t]he potential criminal penalties" of engaging in commercial bribery are "severe" for both JPMC and for individuals); FRB-MSD-162 (Revised 2013 Anti-Corruption Policy) at 2 ("We must never compromise our reputation by engaging in, or appearing to engage in, bribery or any form of corruption. Bribery and corruption are crimes with potentially severe penalties to JPMorgan Chase & Co [] and its employees and directors.").

[477] *See* Resp. SOF ¶ 14 (noting that "[t]he Codes required employees to report violations or suspected violations of any JPM policy"); *see also*, *e.g.*, FRB-MSD-5 (2011 Anti-Corruption Policy) at 11; FRB-MSD-7 (2011 Code of Conduct) at 8.

[478] FRB-MSD-9 (2010 Asia Pacific Compliance Manual) at 15-16; *see also*, *e.g.*, FRB-MSD-169 (2010 Asia Pacific IB Corporate Finance Policies and Procedures Manual) § 2.6 (where compliance issues arise, supervisory duty to "ensure that the problem is reviewed and resolved promptly, and that appropriate steps are taken to prevent a recurrence").

the Code of Conduct warned that "[v]iolating the law . . . may weaken customer confidence and put our reputation at risk, and can result in regulator criticism, legal action, fines and penalties, and other negative repercussions."[479]

Moreover, Respondent himself understood, and communicated to colleagues and subordinates, the wide range of potential damage that violating the Anti-Corruption Policy could cause to the Firm.[480] Passing along information regarding an investigation into Morgan Stanley's business practices in China, including its relationship hires, Respondent wrote that the risks posed by the perception of corruption when hiring referral candidates extended "beyond financial losses to potential significant damage to reputation and substantial liability including criminal exposure."[481] He then underscored that a failure to adhere to high professional standards in referral hiring would expose both the Firm and the bankers themselves to "significant reputation risk and liability."[482]

Yet notwithstanding these risks, Respondent's communications over the course of the Client Referral Program demonstrate a flagrant disregard for JPMC's Anti-Corruption Policy and his own duties to report and supervise. There is simply no fair reading of the emails adverted to in Part II above, particularly when seen in aggregate, other than that Respondent consistently and expressly acted as if the purpose of the CRP was the trading of internships and junior banker positions for the relatives of well-placed client representatives in exchange for concrete business advantages with those clients. Not only did Respondent himself make numerous statements to this

[479] FRB-MSD-155 (2012 Code of Conduct) at 8 (also stating that "it is important to comply with not just the letter, but also the spirit and intent, of the law").

[480] *See* FRB-MSD-17 (November 14, 2009 email from Fang to T. Marin et al.).

[481] *Id.*

[482] *Id.*

effect,[483] but he was party to many such discussions by others within his group and JPMSAP generally that expressly drew a link between referral hiring and potential business—such as banker Michelle Wang stating that Candidate A's employment was "our ticket to this mandate,"[484] or banker Tiger Xu relaying his understanding that offering a permanent position to Candidate E would "ensure us a senior role (leading JGC) when the deal come out."[485] But there is no evidence that Respondent ever raised concerns, reported these communications, or sought to guide his subordinates regarding the impropriety of trading CRP hires for client business. The undersigned agrees with Enforcement Counsel that "[w]hen Fang saw subordinates request hires based on business linkages, he was in a position to identify and seek to correct the misconduct. Instead, Fang took *no* remedial action regarding the misconduct, and failed to conduct himself as would an ordinarily prudent individual in similar circumstances."[486]

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[483] *See*, *e.g.*, FRB-MSD-27 (email chain including September 3, 2008 email from Fang to T. Fletcher et al.) (referencing the need to "keep pressure on [Company A] until we get some revenue from them to 'compensate' [Candidate A's hiring]"); FRB-MSD-29 (email chain including April 15, 2010 email from Fang to L. Chen and P. Zhai) ("Is there any mandate currently we are pitching to [Company B] that we can 'exchange' [Candidate B's hiring] for? As you know, we are in the business of doing deals not doing charity school work."); FRB-MSD-56 (email chain including May 14, 2012 email from Fang to Y. Liu) (seeking contract extension for Candidate C "given where we are on [Enterprise C]"); FRB-MSD-117 (email chain including July 11, 2012 email from Fang to Y. Liu and P. Zhai) (agreeing to put Candidate D in summer training program "as part of the 'swap'" for business with Company D); FRB-MSD-92 (email chain including June 8, 2008 email from Fang to G. Abdelnour) ("The father indicated to me repeatedly that he is willing to go extra miles to help JPM in whatever way we think he can [in exchange for his son's placement]. And I do have a few cases where I think we can leverage the father's connection."); FRB-MSD-30 (email chain including November 9, 2011 email from Fang to Y. Liu) ("This is a senior client referral for a full time position. . . . We won't hire her until the major deal materializes."); FRB-MSD-133 (email chain including December 14, 2011 email from Fang to D. Suen et al.) ("[G]iven the deal potentials with both [the CEO's companies], we will extend the daughter for another six months."); FRB-MSD-49 (email chain including March 1, 2012 email from Fang to F. Gong) ("[W]e need to make sure the father recognize the goodwill."); FRB-MSD-31 (email chain including March 4, 2013 email from Fang to D. Wang) (regarding a request to arrange a summer internship for an executive's son, "The key is if she has real business for us.").

[484] FRB-MSD-27 (email chain including September 2, 2008 email from M. Wang to Fang).

[485] FRB-MSD-42 (email chain including September 21, 2011 email from F. Gong to Fang et al. forwarding email from T. Xu to O. de Grivel and F. Gong); *see also*, *e.g.*, FRB-MSD-33 (email chain including February 28, 2011 email from J. Liang to Fang, A. Hu, and I. Kwan) ("Considering the size and the role (we are asking for sole book), after discussing with Fang this morning, would like to offer him the position in return for securing our role [in the IPO].").

[486] FRB Mot. at 31; *see also* FRB Opp. at 18 ("[B]ankers routinely sought Fang's approval of a referral candidate by pitching an exchange for improper business advantage. But instead of withholding approval and reprimanding the banker for seeking to violate Firm policies, Fang often approved the candidate and supported the improper hiring.") (providing examples).

Thus, it is undisputed that Respondent was required to comply with the Firm policies and procedures described above. It is also undisputed that he understood, or should have understood, that failure to comply could result in severe consequences for himself and the Firm. The factual record compels the conclusion that, over the course of the Client Referral Program, Respondent acted in a manner that violated the Anti-Corruption Policy and failed to report or to adequately supervise conduct that he knew or should have known violated that policy.[487] In so doing, he acted contrary to JPMC's best interests in failing to ensure the institution's compliance with banking laws and regulations and exposing the institution to reasonably foreseeable undue risk. All in all, Respondent failed to "act diligently, prudently, honestly, and carefully in carrying out [his] responsibilities," thereby breaching his fiduciary duties to the Firm.[488]

There can be no dispute, for example, that Respondent violated Firm policy in July 2012, when he relayed to colleagues that he had agreed to place Candidate D, the high school aged daughter of Executive D, into the last eleven days of JPMC's summer training program "as part of the 'swap'" for a $20 million business commitment from Executive D's insurance company.[489] There can also be no dispute that in February 2011, JPMSAP banker Jianhong Liang emailed Respondent and others, recounting a discussion with Respondent in which the two reached an agreement to offer the son-in-law of the Chairman of a Chinese ceramics company a junior banker position "in return for securing our role" as sole bookrunner for that company's upcoming IPO.[490]

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[487] With respect to Respondent's duty to supervise, Respondent argues that "[t]he Board's allegations mistakenly include Firm employees who were not directly supervised by Fang and in other banking groups." Resp. Opp. at 30; *see also* Resp. Mot. at 40-41. Even assuming that there is some factual dispute as to which specific bankers were Respondent's subordinates and thus subject to his supervisory duties, there can be no debate that at least some of the individuals whose correspondence is quoted in Part II *supra* were under Respondent's supervision, nor that those individuals made statements linking referral hires to business opportunities, on email chains involving Respondent, with no evidence that Respondent ever advised those individuals that their statements violated Firm policy or otherwise took action.

[488] *Williams*, 2015 WL 3644010, at *9 (internal quotation marks and citation omitted).

[489] FRB-MSD-117 (email chain including July 11, 2012 email from Fang to Y. Liu and P. Zhai).

[490] FRB-MSD-33 (email chain including February 28, 2011 email from J. Liang to Fang, A. Hu, and I. Kwan).

Fang was required to report this communication to the extent that it represented the hiring of a client relative "for the purpose of securing or potentially securing business for the Firm."[491] As Liang's supervisor, he was also required to escalate this conduct as a compliance issue.[492] To all appearances, he did neither. The undersigned finds that these examples, and the numerous similar instances set out in Part II *supra*, constitute a breach of Respondent's fiduciary duty of care.

It is no defense to argue, as Respondent does, that he remained faithful to his fiduciary duty because his actions merely "followed an established and legally-approved firm-wide program, which he believed in good faith . . . aligned with Firm policy and controlling law."[493] Such an assertion is unsupported by the undisputed record evidence. First, the undersigned agrees with Enforcement Counsel that Respondent is not entitled to any presumption of good faith, given his repeated invocation of the Fifth Amendment in response to any questions regarding his conduct or his state of mind.[494] Second, Respondent's assertion that he believed that he was complying with Firm policy is wholly controverted by the record. As discussed above, Respondent understood that it was improper to offer short-term positions to the relatives of clients or potential clients in exchange for some concrete business advantage, and yet the factual record is replete with email after email in which Respondent discussed doing just that.[495] Respondent repeatedly couched his decision-making as to the CRP in terms of a specific link between referral hires and client business,

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[491] FRB-MSD-16 (March 31, 2006 email from N. Chan to G. Tan) (relaying message sent to all Asia-Pacific investment bankers, including Fang, prohibiting such exchanges without exception); *see also*, *e.g.*, FRB-MSD-7 (2011 Code of Conduct) at 8.

[492] *See*, *e.g.*, FRB-MSD-9 (2010 Asia Pacific Compliance Manual) at 15-16; FRB-MSD-169 (2010 Asia Pacific IB Corporate Finance Policies and Procedures Manual) § 2.6 at 101.

[493] Resp. Mot. at 39.

[494] *See supra* at 49-51; FRB Opp. at 20-21. Furthermore, to the extent that Respondent relies on the business judgment rule for the proposition that this Tribunal should presume that Respondent was acting in the best interests of JPMC, *see id.* at 42, that rule is inapplicable in these proceedings. *See In the Matter of Steven D. Haynes*, Nos. 11-370e & -371k, 2014 WL 4640797, at *11 n.19 (July 15, 2014) (FDIC final decision) (no application of state law business judgment rule in Section 1818 enforcement actions), *aff'd on other grounds sub nom. Haynes v. FDIC*, 664 Fed. App'x 635 (9th Cir. 2016).

[495] *See generally* Part II at 26-42.

and participated in email discussions in which others did the same.[496] Particularly given Respondent's own expressed understanding that such a link raised serious corruption concerns,[497] as well as the training he undertook on the impropriety of *quid pro quo* exchanges with corporate clients,[498] there is no credible way for Respondent to claim that he believed his actions were in conformance with Firm policy.

More broadly, it is immaterial to the question of Respondent's prudence, diligence, and care for the Firm's best interests to assert that others at JPMSAP may have also acted imprudently or recklessly.[499] Respondent contends that he was "a non-lawyer and foreign citizen who was unfamiliar with U.S. law and who relied on legal counsel and supervisors to give guidance on law and Firm policy,"[500] but this characterization ignores his position as a senior bank executive who had an independent obligation to understand and comply with the policies of the Firm—including the Firm's clearly stated prohibition on the offering of things of value, such as internships, to government officials or corporate representatives "to win or keep business or influence a business

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[496] *See*, *e.g.*, FRB-MSD-29 (email chain including April 15, 2010 email from Fang to L. Chen and P. Zhai) ("Is there any mandate currently we are pitching to [Company B] that we can exchange for?"); FRB-MSD-117 (email chain including July 11, 2012 email from Fang to Y. Liu and P. Zhai) ("As part of the 'swap,' [Executive D] wants his daughter . . . to spend sometime [*sic*] with us this summer."); FRB-MSD-33 (email chain including February 28, 2011 email from J. Liang to Fang, A. Hu, and I. Kwan) ("Considering the size and the role (we are asking for sole book), after discussing with Fang this morning, would like to offer him the position in return for securing our role [in the IPO]."); FRB-MSD-42 (email chain including September 21, 2011 email from T. Xu to O. de Grivel and F. Gong, on which Fang was added as recipient) ("She repeated the same expectation that Frank provided from [Executive E] last week for a permanent position. And this is [*sic*] should be somehow check point to ensure us a senior role (leading JGC) when the deal come out.").

[497] *See* FRB-MSD-17 (November 14, 2009 email from Fang to T. Marin et al.).

[498] *See* FRB-MSD-14 (PowerPoint Presentation entitled "J.P. Morgan: Anti-Corruption Training" and dated July 26, 2011) at 12; FRB-MSD-12 (indicating Fang's completion of this training); *see also*, *e.g.*, FRB-MSD-7 (2011 Code of Conduct) at 1 ("We are all accountable for our actions, and for knowing and abiding by the policies that apply to us. Managers have a special responsibility, through example and communication, to ensure that employees under their supervision understand and comply with the Code and other relevant policies.").

[499] *See* Resp. Mot. at 42 (asserting that "Fang relied on . . . approvals from legal counsel, as well as instructions, approvals and support from his superiors and JRM, when participating in the CRP"), 44 (stating that "the institutionalization and administration of the CRP was driven by the Firm's senior management, JRM, HR, and L&C"); Resp. Opp. at 31 (maintaining that "[t]he Firm did not suffer from a comprehensive lack of internal controls; rather it had necessary controls in place for the CRP, it is just in hindsight, those procedures were later found legally deficient by Firm lawyers and regulators").

[500] Resp. Mot. at 44.

decision."[501] Respondent cannot pretend that it was impossible without a law degree for him to know that he should not be offering positions in JPMC's summer training program in exchange for business commitments, when he received repeated training that such exchanges were inappropriate and communicated the same thing to his subordinates.[502]

Nor can Respondent contend that he was simply following the guidance of L&C and its approval of his referral hires. To begin with, it is unclear that complete information was always provided to L&C through the form questionnaire intended to capture instances of improper expected benefit.[503] In addition, and contrary to Respondent's representation that he "escalated any questions regarding CRP hires to his superiors and L&C,"[504] there is no evidence that Respondent ever solicited L&C's opinion, or expressed any uncertainty or doubt, regarding the propriety of the Client Referral Program as it was being used by him and others in the China Investment Banking group. At the very least, someone acting prudently and in good faith would check that arranging a "swap" of a summer trainee position for a $20 million business commitment did not go beyond the stated boundaries of the Firm's Anti-Corruption Policy—yet Respondent did not. To the contrary, it is evident from Respondent's email communications that, at minimum, he was willfully blind to the prospect that the CRP as it was being operated was contrary to Firm policy and was putting JPMC in danger of exposure to investigations, reputational harm, and

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[501] FRB-MSD-155 (2012 Code of Conduct) at 29 (stating that "[i]n general, you should *never* give a gift that[] is (or could reasonably be perceived to be) an inducement to do business with our Company") (emphasis in original).

[502] In addition to the training cited above in note 498, the undersigned observes that the Anti-Corruption Policy required that relevant employees be trained at least every two years regarding "the risks facing the relevant line of business or corporate group as well as the nature of the employee's responsibilities" under the Policy. FRB-MSD-3 (2007 Anti-Corruption Policy) at 6; *see also*, *e.g.*, FRB-MSD-5 (2011 Anti-Corruption Policy) at 11 (stating that "[a]ll employees should be reminded of the importance of adherence to the policy annually via awareness bulletins or comparable communications"). Enforcement Counsel adduces undisputed evidence that Respondent completed training on the Anti-Corruption Policy, including "a case study involving a summer internship program [that] highlighted the reputational risks to the Firm of failing to comply with anti-bribery laws," FRB SOF ¶ 25, in 2007 and 2009 as well as 2011. *See* FRB-MSD-12 (Fang training record); FRB SOF ¶¶ 23-28.

[503] *See supra* at 14 n.57 (no questionnaires required for summer training program candidates), 28 n.130, 32-33.

[504] Resp. Opp. at 30.

potential regulatory and criminal liability. Indeed, even after L&C attorney Matthew George concluded that the CRP as designed was not consistent with the Anti-Corruption Policy and that no further referral hires could be made under its auspices,[505] Respondent to all appearances did not take this to heart, instead expressing support for the program and seeking ways to keep it alive.[506]

At bottom, it does not matter if misconduct related to the Client Referral Program was limited to Respondent or widespread throughout JPMSAP. Neither is it particularly relevant that it may have been difficult to thread the needle of making referral hires through a Firm-approved program for employing the close relatives of clients—a program that Respondent championed from before its inception[507]—without any expectation, forbidden by the Anti-Corruption Policy, that doing so would lead to a tangible business advantage. The Client Referral Program ended when one individual in L&C recognized that it could not fairly be administered under the applicable laws and policies. Respondent likewise had a duty to recognize and report misconduct, and he could have been the one who did the appropriate thing and brought attention to the problematic nature of the CRP. Instead, he acted at all times consistently with his repeatedly stated belief that referral hires and business mandates had "an almost linear relationship" in China,[508]

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[505] *See* FRB-MSD-137 (email chain including April 12, 2013 email from M. George to Y. Liu et al.); R-MSD-111 (email chain including April 16, 2013 email from M. George to V. Walkley et al.) ("Our plan for [the Asia Pacific region] going forward is as follows: we will be discontinuing any programs designed to accommodate client referred clients only, and the creation of roles at the request of clients."); *see also supra* at 42-44.

[506] *See* FRB-MSD-137 (email chain including April 16, 2013 email from Fang to C. Leung).

[507] *See* FRB-MSD-21 (email chain including June 17, 2009 email exchange between Fang and T. Marin) (Marin: "I recently spoke at a summer program that [Private Banking] has launched for the sons and daughters of their highest net worth clients. . . . was thinking if we might want to consider the same for the IB." Fang: "In fact, it was me who brought this idea (learned from [Goldman Sachs]) to Mike Fung late last year and proposed to jointly sponsor a similar program. . . . You all know I have always been a big believer of the sons and daughters program. . . . We lost a deal to DB today because they got chairman's daughter [to] work for them this summer."); FRB-MSD-22 (email chain including September 5, 2009 email from Fang to G. Abdelnour) ("One specific item that we may need your help is how to run a better sons and daughters program, which has an almost linear relationship with mandates in China. . . . We have more [lines of business] in China therefore in theory we can accommodate more 'powerful' sons and daughters that could benefit the entire platform.").

[508] *See* FRB-MSD-21 (email chain including June 17, 2009 email from Fang to T. Marin, T. Fletcher, and J. Lu); FRB-MSD-22 (email chain including September 5, 2009 email from Fang to G. Abdelnour); FRB-MSD-137 (email

utilizing the program to its fullest to pursue business advantages from clients or potential clients whose children or family friends he was happily employing for that purpose. This, again, does not evince prudence, diligence, or care in carrying out his responsibilities for JPMC, and is reflective of a disregard of Respondent's fiduciary duty throughout the life of the program.

2. Unsafe or Unsound Practices

The undersigned also concludes that Respondent engaged in actionably unsafe or unsound practices in connection with an "insured depository institution or business institution,"[509] a separate and independently sufficient method of satisfying the statutory misconduct prongs.[510] To recall, unsafe or unsound practices are those that are "contrary to generally accepted standards of prudent operation, the possible consequence of which, if continued, would be abnormal risk or loss or damage to the institution, its shareholders, or the insurance fund."[511] The Board of Governors has further held that imprudent practices are actionably "unsafe or unsound if they could be expected to create a risk of harm or damage" to a covered institution,[512] a holding in harmony with the District of Columbia Circuit's formulation that "[a] banking practice is unsafe or unsound if it poses a reasonably foreseeable undue risk" of some kind.[513] According to the Board, moreover, "[f]iduciary duties define standards of prudent operation[,] and thus an act in violation of such duties is by its nature imprudent and unsafe."[514]

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chain including April 16, 2013 email from Fang to C. Leung) ("I agree with you that we must have [a referral hire program] in some form for this summer.").

[509] As stated in Part IV.B.1 *supra*, JPMSAP and JPMC are treated as "insured depository institutions" for the purpose of the Board's authority to institute Section 1818 enforcement actions. *See* 12 U.S.C. § 1818(b)(3).

[510] With respect to an assessment of a second-tier civil money penalty under Section 1818(i), unsafe or unsound practices are only actionable if they are done "recklessly," a determination that the undersigned addresses in Part V.D.1 *infra*. *See* 12 U.S.C. § 1818(i)(2)(B)(i).

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

[512] *Id.* at *21.

[513] *Blanton*, 909 F.3d at 1172 (internal quotation marks and citation omitted).

[514] *Smith and Kiolbasa*, 2021 WL 1590337, at *24; *cf. In the Matter of Donald V. Watkins, Sr.*, Nos. 17-154e & -155k, 2019 WL 6700075, at *7 (Oct. 15, 2019) (FDIC final decision) (observing that "[t]he standard of conduct for

Here, the undisputed factual record establishes that Respondent's actions, and lack thereof, over the course of the Client Referral Program were imprudent and risky—and therefore actionably unsafe or unsound—for the same reasons that they constituted a breach of his fiduciary duty of care: namely, that Respondent routinely participated in, encouraged, and took no steps to address or remediate referral hiring practices that linked hiring and employment decisions for referral candidates to the expectation of concrete business opportunities for JPMC in violation of the Firm's Anti-Corruption Policy and Code of Conduct.[515] The undersigned agrees with Enforcement Counsel that, as demonstrated by the record, Respondent "was party to numerous communications in which he and other bankers discussed specific benefits expected in exchange for hiring referred candidates, and in many cases Fang himself solicited assurances about such improper exchanges."[516] Respondent's conduct also foreseeably increased JPMC's potential legal and regulatory exposure, in that Respondent knew or should have known that trading internships and junior banker positions for business advantages contravened Firm policy, implicated anti-bribery statutes, and could subject the Firm to supervisory action, criminal liability, and reputational harm. In these ways, at least with respect to the candidates discussed in Part II *supra*, Respondent acted contrary to generally accepted standards of prudent operation in a manner that could reasonably be expected to create a risk of harm or damage for the institution.[517]

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determining whether someone has breached their fiduciary duty is the level of care that ordinary prudent and diligent [persons] would exercise under similar circumstances").

[515] *See* FRB Mot. at 23-27.

[516] *Id.* at 28-29 (providing examples); *see supra* at 26-42.

[517] Enforcement Counsel proffers the August 28, 2017 Expert Report of Michael Walsh, former Deputy Head of Compliance Risk, Supervision at the Federal Reserve Bank of New York ("Walsh Report"), in broad support of its claims, including the claim that Respondent engaged in unsafe or unsound practices. *See*, *e.g.*, FRB Mot. at 30; FRB SOF ¶ 111. Enforcement Counsel, however, does not identify the exhibit number under which the Walsh Report can be found and referenced, *see* FRB Mot. at 11 n.11 (introducing Walsh Report without exhibit number); FRB SOF ¶ 32 (same), and the undersigned declines to rely on the report's conclusions in any event, as it is unnecessary to do so.

Respondent's arguments otherwise are unavailing. First, Respondent argues that the scope of the Board's authority over unsafe or unsound practices extends only to *banking* practices, which he says the operation of the Client Referral Program was not.[518] Even assuming for the sake of argument that Respondent's "personnel-related decisions"[519] regarding the CRP had nothing to do with banking—which is itself dubious—such a proposition is unsupported by the statutory text, which contains no such limitation.[520] There can be no doubt that Respondent acted "in connection with" and "in conducting the affairs of" JPMSAP and JPMC when participating in the CRP, as the statutes require.[521] Respondent agrees that JPMSAP "principally carries out investment banking for [JPMC] in the Asia Pacific region,"[522] and that the Client Referral Program was an avenue through which aspiring junior investment bankers, referred by bank clients to sponsoring bankers, could gain banking experience in various of JPMC's worldwide offices in order to begin their investment banking careers.[523] That is more than sufficient.

Next, Respondent contends that he did not act contrary to generally accepted standards of prudent operation because (1) client referral programs were commonly accepted methods of

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[518] *See* Resp. Mot. at 22 (asserting that "before examining the prudence or impact of alleged actions at issue, [the] ALJ must first determine whether the actions constitute a 'banking practice'").

[519] *Id.*

[520] *See* 12 U.S.C. §§ 1818(e)(1)(A)(ii) (misconduct prong satisfied if IAP has "engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution"), 1818(i)(2)(B)(II) (misconduct prong satisfied if IAP "recklessly engages in an unsafe or unsound practice in conducting the affairs of such insured depository institution"); *cf. Cousin v. OTS*, 73 F.3d 1242, 1251 (2d Cir. 1996) (interpreting similar enforcement statute and holding that "[h]ad Congress intended for only banking-related violations to trigger [the statute], it could have limited the language of the misconduct prong accordingly").

[521] Respondent's citation to *Grant Thornton LLP v. OCC*, 514 F.3d 1328, 1332 (D.C. Cir. 2008), does not change this conclusion, as that case concerned a bank's external auditor performing external auditing functions that were entirely distinct and separate from operations of the bank by bank personnel. Here, by contrast, Respondent was a senior investment banker and head of JPMC's China Investment Bank group, arranging and implementing the hire of relatives of bank clients or potential bank clients into junior banking positions or banking internships with the expectation of securing increased business for the investment bank.

[522] Resp. SOF ¶ 1.

[523] *See id.* ¶¶ 17 (describing structure of CRP), 19 (stating that referral candidates were placed in "JPM's offices all over Asia" as well as in London and New York); Resp. Opp. at 24 ("JP Morgan's offices in Beijing, Hong Kong, India, Taiwan, Singapore, Malaysia, Korea, Thailand, London, New York, and Chicago all took part in the CRP.").

relationship building, particularly within Asia;[524] (2) Firm policy permitted the hiring of client relatives if certain pre-clearance procedures were followed;[525] (3) Respondent complied with Firm policy and "took steps to ensure compliance with the Firm's anti-corruption pre-clearance procedures" at all times;[526] and (4) Respondent reasonably relied on the advice, review, and approval of counsel in L&C when implementing the CRP.[527] All of these arguments fall at the same hurdle. Firm policy and applicable anti-corruption laws prohibited trading referral hires for business. Knowing this, Respondent nevertheless personally and consistently sought to trade referral hires for business. There is nothing about accepted standards of prudent operation that would allow for the repeated violation of Firm policies and procedures aimed at effectuating the Firm's "zero tolerance for bribery" and limiting the Firm's exposure to foreseeable liability and harm in the jurisdictions in which it was operating.[528] JPMC's Code of Conduct emphasized the importance of complying "not just with the letter, but also the spirit and intent, of the law."[529] Here, Respondent disregarded the letter of the law as well as the rest, and there is nothing that can be seen to be prudent about his actions.

Finally, Respondent maintains that there should be no finding of unsafe or unsound practices because his conduct in connection with the Client Referral Program "did not pose an abnormal risk to the financial stability of the Firm."[530] As the undersigned has already explained,

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[524] *See* Resp. Mot. at 23-24.

[525] *See id.* at 24-26.

[526] *Id.* at 26.

[527] *See id.* at 27-29.

[528] FRB-MSD-5 (2011 Anti-Corruption Policy) at 1 (also stating that "[w]e will carefully consider corruption-related risk wherever we engage in business, and we will not be a partner to corruption in any of its forms").

[529] FRB-MSD-155 (2012 Code of Conduct) at 8.

[530] Resp. Mot. at 29 (further asserting that "it was not reasonably foreseeable that [Respondent's] actions in sponsoring candidates would threaten the Firm's financial integrity"); *see also* Resp. Opp. at 25-26.

that is not the standard,[531] and Respondent's argument must fail in this regard as well. The Horne Standard, as interpreted by the Board of Governors, requires only that the imprudent practices "could be expected to create a risk of harm or damage" to JPMC, a threshold that is easily cleared for the reasons detailed above.[532]

3. The Foreign Corrupt Practices Act

Enforcement Counsel argues that "the undisputed facts and evidence prove that Fang participated in JPMC's admitted violations of the FCPA," thereby violating that statute himself for purposes of this enforcement action.[533] As discussed above, any admissions of liability made by JPMC in connection with the DOJ and SEC agreements may not be used as evidence that Respondent himself violated, or participated in the violation of, the FCPA.[534] Thus, to the extent that Enforcement Counsel's FCPA argument in the instant motion is largely premised on JPMC's admissions rather than addressing how each statutory element of the FCPA has been satisfied by Respondent's own conduct, it is not sufficient.[535] The undersigned agrees with Respondent that "the Board cannot avoid its burden of required elements of an FCPA violation by referencing negotiated settlements the Firm entered into with the DOJ and SEC, in which Fang had no involvement."[536] Regardless, however, the undersigned concludes that it is unnecessary to decide

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[531] *See* Part III *supra* at 54-55; *see also Smith and Kiolbasa*, 2021 WL 1590337, at *22 (finding that "[a] construction of 'unsafe or unsound' conduct that focuses on the nature of the act rather than any 'direct effect' of such act on the institution's financial stability is consistent with the structure of Section 1818"), *23 ("The Horne definition contains a number of elements that are inconsistent with a requirement that a particular act directly impact an institution's overall financial stability.").

[532] *Smith and Kiolbasa*, 2021 WL 1590337, at *21.

[533] FRB Mot. at 18; *see also id.* at 19 ("That Fang played a central role in the CRP, and participated in or aided and abetted the Firm's violations of the FCPA and other laws . . . , is sufficient to establish a 'violation' for purposes of section 8(e) of the FDI Act.").

[534] *See* Part IV.D.4 *supra*; *see also* Resp. Opp. at 11-12.

[535] *See* FRB Mot. at 19 (asserting that "Enforcement Counsel need not prove that Fang himself violated the FCPA's civil or criminal provisions through his involvement or leadership role in the CRP"); *see also id.* at 19-21 (relying on JPMC's acknowledgment "that its conduct in implementing and administering the CRP violated the FCPA and the anti-bribery provisions of the federal securities laws" as determinative of Respondent's misconduct).

[536] Resp. Opp. at 14.

the FCPA issue, because the misconduct prongs of Section 1818(e) and 1818(i) have already been met as set forth in Parts V.A.1 and V.A.2 *supra*. Accordingly, and in the interests of judicial efficiency, the undersigned will not address the Parties' arguments regarding alleged FCPA violations any further at this stage of the proceeding. Should Enforcement Counsel desire to resolve the question of Respondent's potential violation of the FCPA with a more robust and particularized offer of proof, it may do so if the Parties determine in their forthcoming joint status report[537] that a hearing remains necessary in light of the conclusions of this Order.

B. Respondent's Misconduct Indisputably Caused Loss to the Firm

The effect elements of 12 U.S.C. §§ 1818(e) and 1818(i) may be satisfied, among other ways, with a showing that the financial institution suffered "financial loss or other damage" as a result of an IAP's misconduct and that the misconduct caused "more than a minimal loss" to the institution, respectively.[538] Enforcement Counsel contends that Respondent caused loss or damage to the Firm through (1) the penalty payments made by JPMC under the terms of the November 2016 agency settlements;[539] (2) the legal fees that JPMC incurred as part of the "internal and regulatory investigations of Fang's misconduct";[540] and (3) reputational harm suffered by JPMC.[541] The undersigned agrees that Enforcement Counsel has demonstrated that Respondent's misconduct caused loss to the Firm in connection with the settlement payments.[542]

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[537] *See infra* at 118.

[538] 12 U.S.C. §§ 1818(e)(1)(B), 1818(i)(2)(B)(ii).

[539] *See* FRB Mot. at 33.

[540] *Id.* at 34.

[541] *See id.*

[542] Enforcement Counsel also argues that the statutory effect elements are satisfied because "Fang received an actual benefit [as a result of his misconduct] in the form of the incentive awards he was paid from 2008 to 2012." *Id.* (citing FRB SOF ¶ 313). While financial gain or other benefit to the IAP is an independently actionable effect under Sections 1818(e) and 1818(i), *see* Part III *supra*, the undersigned concludes that Enforcement Counsel has not made a sufficient showing that Respondent's misconduct resulted in such benefit here, at least on the present factual record. Enforcement Counsel asserts that "Fang's incentive awards were tied to the overall performance of his region, which was in turn tied to the amount of deals that JPMC won," FRB Mot. at 34, but its only citations in support of this are to a chart purporting to reflect that Fang received around $9.6 million in incentive

As an initial matter, the undersigned concludes here, as she has previously in a different Board enforcement action,[543] that payments made by a financial institution in furtherance of a settlement or plea agreement may be used as evidence of bank loss to fulfill the effect prongs of Section 1818, if the enforcement agency can show that the settlement occurred "by reason of" a respondent's actionable misconduct.[544] Moreover, it should be without question that Respondent can "cause" the Bank to incur loss through the entry of a consent order even if Respondent was not a party to that prosecution and his conduct not adjudicated to rise to the level of the particular legal violations being asserted here. To hold otherwise would effectively immunize IAPs from any liability for unsafe or unsound practices, breaches of fiduciary duty, or violations or law that exposed their institutions to significant legal or regulatory risk unless the IAP's institution chose to take its chances by contesting an enforcement action or prosecution until a final judgment is assessed against it. A bank's decision to settle an enforcement action or investigation for some certain loss now rather than risking a much greater loss and more severe consequences later should not absolve from liability any individual on whose conduct such claims are at least partly based. No such restriction is apparent from the text of Section 1818, and the undersigned will not impose one. An IAP who transfers $100,000 of an institution's money into his personal account has caused

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compensation from 2007 to 2012 and a 2011 employment review stating that Fang was "directly responsible for winning many mandates." *See* FRB SOF ¶ 313 (citing FRB-MSD-142 (Fang Compensation Table) and FRB-MSD-173 (June 10, 2011 Fang Team Review Assessment). Nothing here establishes that Fang received a specific benefit as the result of a specific deal that would not have occurred without specific CRP-related misconduct, or even generally attempts to show how Fang's incentive compensation increased based on the number of deals won. In the absence of more, the undersigned cannot find that the effect prongs have been satisfied in this way. *See also* Resp. Opp. at 37 (observing that "the Board's evidence provides absolutely no connection between unnamed mandates, the CRP, and Fang's compensation").

[543] *See* Order Regarding Cross Motions For Summary Disposition, *In the Matter of Joseph Jiampietro*, FRB Nos. 16-012-E-I & -CMP-I, 2021 WL 7906101 (Dec. 7, 2021), *available at* https://www.ofia.gov/decisions/2021-12-07-frb-16-012-e-i.pdf.

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

loss to the bank; an IAP whose conduct is the impetus for a $500,000 penalty paid by the institution following the settlement of an enforcement action should be no less liable, if that conduct is actionable under Section 1818.

Nor does it present a barrier to proof of causation that the settlement agreements also resolved JPMC's exposure related to the misconduct of other individuals in connection with the CRP, or that Respondent's misconduct may have arisen in the context of a program for which the built-in compliance mechanisms and procedures ultimately proved inadequate to guard against widespread violations of the Firm's Anti-Corruption Program. As the FDIC Board of Directors has held, a respondent in an enforcement action under Sections 1818(e) and 1818(i) "cannot escape liability simply because others have contributed to the bank's loss as well."[545] Similarly, interpreting a related statutory provision in *In the Matter of Grant Thornton LLP*, the Comptroller of the Currency ("Comptroller") concluded that an independent auditor had caused actionable loss to a bank through its issuance of an unqualified audit opinion, even though it was the bank's actions in response to the opinion that arguably were more directly responsible for any loss suffered.[546] Likewise here, it is immaterial that other misconduct related to the Client Referral Program may have played a part in the agency investigations and ultimate penalty payments assessed against JPMC, as long as some of that loss is fairly attributable to Respondent as well.

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

[546] *In the Matter of Grant Thornton LLP*, Nos. AA-EC-04-02 & -03, 2006 WL 5432171, at *25 (Dec. 29, 2006) (OCC final decision) (noting that under the auditor's theory of causation, "conduct of independent contractors could never be the cause of a loss or other adverse effect for purposes of [the applicable statute], because it would always be the financial institution's acts or omissions that led to the loss to, or adverse effect on, the bank"), *vacated on other grounds sub nom. Grant Thornton LLP v. OCC*, 514 F.3d 1328 (D.C. Cir. 2008).

In this case, there can be no doubt that Respondent's conduct formed a central basis for the investigations by, at minimum, the DOJ and SEC that led to those agencies' settlement agreements with JPMC. The DOJ NPA referred to Respondent as "JPMorgan-APAC Employee 1" and quoted numerous emails from him, also referenced in the instant Order, as examples of the misconduct upon which the DOJ's assessment of a $72 million penalty was based.[547] The SEC settlement agreement and cease-and-desist order likewise repeatedly references and quotes Respondent in this manner.[548] The undersigned therefore concludes that the penalties assessed under these agreements arose, at least in part, from Respondent's misconduct, constituting actionable loss—and thus a triggering "effect"—under 12 U.S.C. §§ 1818(e) and 1818(i).[549]

By contrast, the undersigned finds that Enforcement Counsel has not sufficiently demonstrated, at the summary disposition stage, that Respondent's misconduct also caused JPMC to suffer reputational damage; Enforcement Counsel's assertions to this effect, and in particular its reference to "considerable press coverage" that damaged the Firm's reputation and caused "diminished public confidence in JPMC's legal compliance"—appear largely conclusory and supported only by the bare assertions of its expert.[550] The undersigned also does not find it necessary to determine whether Enforcement Counsel has adduced sufficient evidence that Respondent's individual conduct caused JPMSAP or JPMC to incur legal fees, or whether such fees can constitute a standalone ground for satisfying the statutory effect prongs, given the conclusion that those prongs have been satisfied by the agencies' penalty assessments.

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[547] *See* FRB-MSD-86 (DOJ NPA) Attachment A ¶¶ 19, 46, 56-58, 63-66.

[548] *See* FRB-MSD-138 (SEC Order) ¶¶ 34, 65, 67, 70.

[549] While the cease-and-desist order issued against JPMC by the Board does not specifically reference Respondent or any other individual JPMC employee, it does state, as one ground for that order and its $62 million civil money penalty, that "senior management in JPMC's [Asia Pacific] investment banking group was aware that the Firm offered internships, training, and other employment opportunities to [referral] candidates . . . in order to obtain or retain business for the Firm," a cohort that indisputably includes Respondent. R-MSD-374 (FRB Order) at 3.

[550] FRB Mot. at 34; *see also* FRB SOF ¶¶ 289, 293, 295; Resp. Opp. at 35.

C. Respondent Has Demonstrated Continuing and Willful Disregard for the Safety and Soundness of the Firm

The final prong of a Section 1818(e) enforcement action for a prohibition order, the "culpability" element, is satisfied by a showing of either personal dishonesty[551] or an IAP's continuing or willful disregard for the safety and soundness of an institution.[552] It is typically, although not exclusively, appropriate to resolve questions of culpability at the hearing stage rather than on summary disposition.[553] Here, however, the undisputed facts regarding Respondent's conduct make his continuing and willful disregard for the Firm's safety and soundness over the course of the CRP sufficiently evident, without "making credibility determinations, weighing evidence, and drawing [impermissible] inferences from facts," to find that Respondent has acted with the requisite culpability for purposes of Section 1818(e).[554]

Consistent with the other banking agencies, the Board has held that willful disregard is "deliberate conduct which exposed the bank to abnormal risk of loss or harm contrary to prudent banking practices," while "[c]ontinuing disregard is conduct which has been voluntarily engaged

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[551] As noted, Enforcement Counsel does not here contend that it is entitled to summary disposition on its allegation that Respondent acted with personal dishonesty, *see* FRB Mot. at 35 n.76, and the undersigned does not decide the issue. *See also* Resp. Mot. at 45 (arguing that "[t]he Board has no evidence that Fang engaged in the type of deliberate dishonesty [that would satisfy this standard]").

[552] 12 U.S.C. § 1818(e)(1)(C).

[553] *See*, *e.g.*, *Miller v. FDIC*, 906 F.2d 972, 974 (4th Cir. 1990) (noting "the general rule that summary judgment is seldom appropriate in cases wherein particular states of mind are decisive elements of a claim or defense"); *Gomez v. Trustees of Harvard Univ.*, 677 F. Supp. 23, 24 (D.D.C. 1988) (noting that "intent and state of mind [are] areas that are particularly ill-suited for summary disposition"); *but see In the Matter of Carl V. Thomas et al.*, Nos. 99-027-B-I, -CMP-I, & E-I, 2005 WL 1520020, at *7 (June 7, 2005) (FRB final decision) (finding Section 1818(e) culpability elements satisfied on summary disposition); *In the Matter of Charles F. Watts*, Nos. 98-046e & -044k, 2002 WL 31259465, at *6 (Aug. 6, 2002) (FDIC final decision) (same).

[554] *Blanton*, 2017 WL 4510840, at *6 (internal quotation marks and citation omitted) (noting that "there is no genuine issue [of fact] if the evidence presented [by the non-moving party] is of insufficient caliber or quantity to allow a rational finder of fact to find for the non-movant"); *cf. Brodie v. Dep't of HHS*, 715 F. Supp. 2d 74, 81-82 (D.D.C. 2010) (affirming ALJ's summary disposition against respondent where "the record . . . supported only one reasonable inference regarding [respondent's] state of mind: [that he] had been either knowing or reckless with regard to the falsification of information," and where respondent "had failed to offer any specific facts or evidence at the summary disposition stage that would support his claims of blamelessness or counter [the agency's] evidence").

over a period of time with heedless indifference to the prospective consequences."[555] Both of these criteria "require some showing of scienter"—that is, evidence of an intentionality or recklessness to the charged conduct that goes beyond mere negligence.[556] For conduct to constitute willful disregard, however, it is not necessary to find that an IAP "deliberately exposed the Bank to abnormal risk of loss or harm,"[557] only that the unsafe or unsound banking practice engaged in by the individual was done intentionally and was not "technical or inadvertent."[558] Continuing disregard, in turn, requires evidence of "a mental state akin to recklessness"[559] that has manifested through, for example, the "voluntary and repeated inattention to" unsafe and unsound practices, or the "knowledge of and failure to correct clearly imprudent and abnormal practices that have been ongoing."[560]

As already discussed at length in Part V.A.1 *supra*, the only fair reading of Respondent's many emails—even resolving all justifiable inferences in Respondent's favor—is that Respondent sought to use the CRP, and did not prevent others from using the CRP, as a vehicle to trade referral hires for business advantages, despite knowing that doing so was contrary to JPMC policies and procedures. The undersigned has concluded that this conduct exposed the Firm to abnormal risk of loss or harm and was not consistent with prudent banking practices; it may also be said that the conduct was intentional, not accidental or inadvertent. That is, Respondent was not merely a silent,

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[555] *Smith and Kiolbasa*, 2021 WL 1590337, at *29 (internal quotation marks and citations omitted); *see also*, *e.g.*, *Ellsworth*, 2016 WL 11597958, at *17.

[556] *Dodge v. OCC*, 744 F.3d 148, 160 (D.C. Cir. 2014) (internal quotation marks and citation omitted).

[557] *In the Matter of Charles R. Vickery, Jr.*, No. AA-EC-96-95, 1997 WL 269106, at *8 (Apr. 14, 1997) (OCC final decision); *see also Smith and Kiolbasa*, 2021 WL 1590337, at *29 (noting that "[a]n officer acts willfully when he is aware of his conduct; willfulness does not require a showing that Respondent was aware of the law") (internal quotation marks and citation omitted).

[558] *Conover*, 2016 WL 10822038, at *28 (internal quotation marks and citation omitted).

[559] *Smith and Kiolbasa*, 2021 WL 1590337, at *29 (internal quotation marks and citation omitted).

[560] *In the Matter of Lawrence A. Swanson, Jr.*, No. AP-ATL-93-7, 1995 WL 329616, at *5 (Apr. 4, 1995) (OTS final decision on reconsideration); *see also Watts*, 2002 WL 31259465, at *8 (continuing disregard is "conduct which is voluntarily engaged in over time").

passive participant in email chains in which others discussed referral candidates in arguably improper ways—although even this would implicate his duty to report and to supervise, depending on how many ways the propriety of those discussions could be reasonably construed—but was himself active in repeatedly framing the Client Referral Program in transactional terms.[561] Such conscious purposefulness is ample evidence of willful disregard.

Similarly, Respondent's "heedless indifference for the prospective consequences" of his actions continued over a sufficiently extended period to constitute continuing disregard.[562] In *In the Matter of Vickery*, for example, the Comptroller found that "conduct reflecting recklessness or indifference with respect to an institution's safety" was continuing disregard when "made over a period of some months."[563] And in *Dodge v. Comptroller of the Currency*, the D.C. Circuit affirmed a finding of continuing disregard when the respondent "exposed the Bank and its depositors to substantial risk . . . on multiple occasions over six reporting periods."[564] Here, Respondent's misconduct spanned the life of the CRP, during which time he indisputably displayed "voluntary and repeated inattention" to violations of JPMC's Anti-Corruption Policy, ongoing practices that—for the reasons described previously—were imprudent and exposed JPMC to abnormal risk of liability and harm. Although there is no programmatic minimum length of time that an individual must voluntarily engage in the complained-of conduct in order for their

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[561] *See*, *e.g.*, FRB-MSD-29 (email chain including April 15, 2010 email from Fang to L. Chen and P. Zhai) ("Is there any mandate currently we are pitching to [Company B] that we can 'exchange' for?"); FRB-MSD-56 (email chain including May 14, 2012 email from Fang to Y. Liu) ("Given where we are on [Enterprise C], I think we may need another contract for [Candidate C]."); FRB-MSD-117 (email chain including July 11, 2012 email from Fang to Y. Liu and P. Zhai) ("As part of the 'swap,' [Executive D] wants his daughter . . . to spend sometime [*sic*] with us this summer. I agreed to put her into our training program and told him that it will end July 27. He is happy.").

[562] *Smith and Kiolbasa*, 2021 WL 1590337, at *29 (internal quotation marks and citation omitted).

[563] *Vickery*, 1997 WL 269105, at *9.

[564] 744 F.3d at 161; *see also*, *e.g.*, *Ellsworth*, 2016 WL 11597958, at *17 (continuing disregard where misconduct "involved repeated acts over more than a year"); *Watkins*, 2019 WL 6700075, at *9 (continuing disregard where misconduct took place "repeatedly . . . between July 2010 and November 2012"); *Watts*, 2002 WL 31259465, at *8 (continuing disregard where misconduct amounted to "at least 80 incidents occurring over a period of nearly two years").

demonstrated disregard for an institution's safety and soundness to be "continuing" for purposes of culpability, the time period at issue here surely qualifies.

Respondent's arguments regarding culpability are familiar ones. First, Respondent argues that his conduct does not meet the level of willful disregard because he was "honestly following the advice of counsel," which he believed in good faith to be correct.[565] Second, he asserts that there was no continuing disregard because he "repeatedly demonstrated his commitment to acting in the best interests of the Firm and in accordance with its policies."[566] As detailed above, both of these arguments are controverted by the factual record.[567] Furthermore, and with respect to Respondent's assertion of good faith in particular, the undersigned draws adverse inferences as to, among other things, (1) whether Respondent supported certain referral hires with the expectation that they would generate or be in exchange for future business for JPMC, and (2) his knowledge that such an exchange would be contrary to Firm policies and procedures, given Respondent's assertion of his Fifth Amendment rights in response to all questions on these and similar topics during his October 2017 deposition.[568]

D. Respondent's Conduct Satisfies the Elements of a Second-Tier Civil Money Penalty

12 U.S.C. § 1818(i) provides that the Board of Governors may assess a civil money penalty against Respondent if the statutory elements discussed in Part III *supra* are met. It further provides that, in determining the appropriate amount of such penalty, the agency must consider certain potentially mitigating factors that are enumerated in the statute.[569] Enforcement Counsel argues

[565] Resp. Mot. at 46 (internal quotation marks and citation omitted).
[566] *Id.* at 47.
[567] *See* Part V.A.1 *supra*.
[568] *See supra* at 49-51; *see also* FRB SOF ¶¶ 110, 136, 158, 251, 279; FRB-MSD-35 (Fang Dep.) at 30:4-31:6, 34:5-15, 54:23-55:19, 60:13-63:25, 68:14-76:18, 79:13-80:4, 88:7-90:14, 92:8-93:2, 93:14-95:17, 98:6-100:25.
[569] *See* 12 U.S.C. § 1818(i)(2)(G).

that the undisputed material facts establish the basis for the assessment of a second-tier civil money penalty, and offers its own analysis of the mitigating factors in support of its requested $1,000,000 penalty amount.[570] Respondent, on the other hand, contends that the assessment of a second-tier civil money penalty is not appropriate and that "numerous mitigating factors counsel for a reduction of the Board's million-dollar penalty" in any event.[571] The undersigned agrees with Enforcement Counsel that the elements of a second-tier civil money penalty have been met but finds that a fuller showing regarding the statutory mitigating factors should be made by both parties at the next stage in this matter.

1. Section 1818(i)'s Misconduct Element

As with a prohibition order under Section 1818(e), second-tier civil money penalties under Section 1818(i) require proof of some form of actionable misconduct, including the breach of an IAP's fiduciary duty to their institution.[572] Because the undersigned has concluded that Respondent breached the fiduciary duty of care that he owed to JPMC,[573] the misconduct element for a second-tier civil money penalty has been satisfied here.[574]

2. Section 1818(i)'s Effect Element

Enforcement Counsel argues that Respondent's misconduct has caused "more than a minimal loss" to the Firm and "is part of a pattern of misconduct," either one of which, if true,

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[570] *See* FRB Mot. at 38-40. The Federal Financial Institutions Examination Council has also promulgated interagency guidance outlining thirteen factors to be considered when determining the assessment of civil money penalties. *See* Resp. Mot. at 48-49 (arguing that application of these factors "does not support the full million dollar penalty").

[571] *Id.* at 48.

[572] *See* 12 U.S.C. § 1818(i)(2)(B)(i)(I).

[573] *See* Part V.A.1 *supra*.

[574] Enforcement Counsel argues that a second-tier penalty is appropriate for the additional reason that Respondent has recklessly engaged in unsafe or unsound practices in conducting the Firm's affairs, *see* FRB Mot. at 38-39; *see also* 12 U.S.C. § 1818(i)(2)(B)(i)(II), but it is unnecessary to make this determination given the clear evidence of Respondent's breach of his fiduciary duty, and the undersigned declines to do so. *See Blanton*, 2017 WL 4510840, at *13 (holding that conduct is "reckless" for purposes of this statute if "it is done in disregard of, and evidencing conscious indifference to, a known or obvious risk of a substantial harm") (internal quotation marks and citation omitted).

would be sufficient to satisfy the remaining statutory prong for the assessment of a second-tier civil money penalty.[575] Because the undisputed material facts demonstrate conclusively that Respondent caused the Firm loss for the reasons stated in Part V.B *supra*, it is unnecessary to determine at this time whether Respondent's misconduct over the course of the Client Referral Program was "part of a pattern of misconduct" within the meaning of the statute.[576]

3. Statutory Mitigating Factors

Before assessing a civil money penalty, the agency is bound to consider the appropriateness of the amount being assessed in light of four mitigating factors: (1) "the size of financial resources and good faith of the insured depository institution or other person charged"; (2) "the gravity of the violation"; (3) "the history of previous violations"; and (4) "such other matters as justice may require."[577] Enforcement Counsel now seeks to justify the $1,000,000 civil money penalty it seeks in this matter by adverting to these factors and to the thirteen interagency factors that the Board should also take into account in its assessment, albeit in quite perfunctory fashion.[578] For his part, Respondent also devotes only one paragraph of argumentation in his motion to his position that the mitigating factors merit a reduction of the million-dollar penalty sought.[579] Given the size of the penalty being assessed, and in light of the page limitations imposed on the summary disposition briefing, the undersigned finds that the Parties would benefit from a fuller opportunity to be heard regarding the statutory and interagency factors. Accordingly, the undersigned will defer any

[575] FRB Mot. at 38-39; *see* 12 U.S.C. § 1818(i)(2)(B)(ii).

[576] Enforcement Counsel also argues that this statutory prong has been satisfied because Respondent's misconduct resulted in "pecuniary gain or other benefit" for Respondent. FRB Mot. at 38-39. The undersigned has already concluded that the factual record as developed does not establish that Respondent benefited from the complained-of conduct, *see supra* at 107 n.542, and she repeats that conclusion here.

[577] 12 U.S.C. § 1818(i)(2)(G).

[578] *See* FRB Mot. at 40.

[579] *See* Resp. Mot. at 49. Respondent then repeats the same paragraph, nearly word for word, as his treatment of the mitigating factors in his opposition to Enforcement Counsel's motion. *See* Resp. Opp. at 48-49.

determination regarding the appropriateness of the civil money penalty amount until after the Parties make further submissions on that topic as set forth below.

VI. Conclusion

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

(1) Respondent breached the fiduciary duty of care that he owed to the Firm, thereby satisfying the misconduct prongs of 12 U.S.C. §§ 1818(e) and 1818(i);

(2) Respondent engaged in unsafe or unsound practices in connection with the Firm, thereby additionally satisfying the misconduct prong of 12 U.S.C. § 1818(e);

(3) Respondent exhibited continuing and willful disregard for the Firm's safety and soundness, thereby satisfying the culpability prong of 12 U.S.C. § 1818(e); and

(4) Respondent's misconduct caused loss to the Firm, thereby satisfying the effect prongs of 12 U.S.C. §§ 1818(e) and 1818(i).

In addition to the facts identified in this Order as being the subject of material dispute, the undersigned further concludes that resolution of the following issues is either not possible or unnecessary as the facts are presently developed: (a) whether Respondent's misconduct constituted a violation of the FCPA; (b) whether the Firm suffered reputational harm as a result of Respondent's misconduct; (c) whether Respondent personally benefited, financially or otherwise, as a result of his misconduct; (d) whether Respondent recklessly engaged in unsafe or unsound practices for purposes of 12 U.S.C. § 1818(i)(2)(B)(i)(II); (e) whether Respondent's misconduct constitutes a pattern of misconduct; and (f) the appropriateness of the amount of the civil money penalty sought by the Board.

The Parties are directed to confer and determine whether and to what extent a hearing remains necessary to resolve the outstanding issues, in light of the undersigned's conclusion that at least one aspect of each of the statutory elements for a Section 1818(e) prohibition order and Section 1818(i) second-tier civil money penalty has been met. Should the Parties conclude that the only remaining issue that requires resolution is the appropriateness of the civil money penalty amount, the Parties should consider whether submissions on this topic should be made on paper or in the form of a hearing.[580] The Parties shall file a joint status report by June 17, 2022 reflecting the results of the Parties' deliberations. Should one or both of the Parties prefer to continue with the currently scheduled in-person hearing to resolve some or all of the remaining issues, the joint status report shall also include the Parties' joint conclusions regarding the expected length of such hearing given the conclusions of this Order.[581] Furthermore, the joint status report shall contain the Parties' joint representation as to whether any portion of the order should remain under seal in furtherance of the public interest pursuant to Enforcement Counsel's authority in this regard.[582]

SO ORDERED.

Dated: June 9, 2022

Jennifer Whang
Administrative Law Judge
Office of Financial Institution Adjudication

[580] Should the Parties determine that a hearing is necessary, the deadline to request hearing subpoenas is hereby moved from June 20, 2022, which is a federal holiday, to June 21, 2022.

[581] The Parties also should come to an agreement regarding a prospective alternate location for the hearing (such as at a Board field office, or in another judicial district) if facilities cannot be secured in the first instance, and should consider the prospect of a virtual hearing in the event that COVID restrictions tighten again in the coming months.

[582] *See* note 1 *supra*.

PUBLIC VERSION

CERTIFICATE OF SERVICE

On June 24, 2022, I served a copy of the foregoing **Order (PUBLIC VERSION[*])** upon the following individuals by email:

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[*] This order was initially issued under temporary seal on June 9, 2022.