UNITED STATES OF AMERICA
BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM
WASHINGTON, D.C.

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

RECOMMENDED DECISON

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication
(October 28, 2022)

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RECOMMENDED DECISION

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. The Notice also alleged that JPMC entered into settlement agreements with three U.S. government entities in November 2016 related to the CRP and Respondent's misconduct, including an agreement with the Department of Justice under which the Firm paid a $72 million penalty.

Following the reassignment of this matter in the wake of the Supreme Court's decision in *Lucia v. SEC*,[1] Enforcement Counsel for the Board of Governors ("Enforcement Counsel") and Respondent (collectively "the Parties") filed cross-motions for summary disposition on March 18, 2022, each contending that there were no material facts in dispute that would preclude a resolution of this matter in their favor as a matter of law. On June 9, 2022, the undersigned issued an "Order Regarding Cross Motions for Summary Disposition (Under Seal)" ("SD Order")—subsequently issued in redacted, public form on June 24, 2022—which concluded that the misconduct, effect, and culpability elements of Sections 1818(e) and 1818(i) had each been satisfied in at least one

[1] 138 S. Ct. 2044 (2018).

respect by the undisputed material facts.[2] Specifically, the undersigned found in the SD Order that the factual record established 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.[3] The undersigned also found that Respondent's misconduct caused loss to the Firm in connection with the settlement agreements,[4] and that it was sufficiently evident that Respondent's conduct over the course of the CRP showed his continuing and willful disregard for the Firm's safety and soundness.[5]

That is, based on the undisputed material facts of the case, the undersigned found 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).[6]

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[2] The SD Order also addressed and rejected various threshold arguments asserted by Respondent, 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* SD Order at 56-90.

[3] *See id.* at 91-102 (breach of fiduciary duty of care), 102-106 (unsafe or unsound practices).

[4] *See id.* at 107-110.

[5] *See id.* at 111-114.

[6] *See id.* at 117 (summarizing conclusions).

The SD Order further found that disposition of other issues on which Enforcement Counsel sought summary disposition was either not possible or unnecessary on the factual record as developed. In particular, the undersigned did not resolve

(a) whether Respondent's misconduct constituted a violation of the Foreign Corrupt Practices Act;

(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); and

(e) whether Respondent's misconduct constituted a pattern of misconduct.[7]

The undersigned also did not resolve at that time the appropriateness of the amount of the civil money penalty sought by the Board.

On June 17, 2022, the Parties filed a Joint Status Report recognizing that the SD Order had found that at least one aspect of each element for a 12 U.S.C. § 1818(e) prohibition order and 12 U.S.C. § 1818(i) first- and second-tier civil money penalty had been met, and stating the Parties' agreement that, while contested issues remained, the only remaining issue that required resolution for purposes of a recommended decision was the appropriateness of the civil money penalty amount. The Parties were in disagreement whether the civil money penalty issue required an in-person hearing.[8]

On June 29, 2022, the undersigned held an informal telephonic conference with the Parties, during which it was agreed that an in-person hearing to resolve the issue regarding the civil money penalty was not necessary.[9] Accordingly, pursuant to the Parties' agreement, the undersigned

[7] *See id.* at 117.

[8] *See* June 17, 2022 Joint Status Report at 2-5.

[9] See July 6, 2022 Order Regarding Telephone Conference on June 29, 2022 and Setting Briefing Dates.

cancelled the scheduled hearing and set dates for the Parties to make written submissions on that topic.[10] On July 22, 2022, the Parties filed their initial briefs on the appropriateness of the proposed civil money penalty, and on August 29, 2022, the Parties filed their responsive briefs.[11]

Now, on the strength of the full record in this case, based on the weight of the evidence adduced and arguments in connection with the SD Order, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole, and after considering the Parties' respective submissions on the civil money penalty, the undersigned makes the following findings of fact, conclusions of law, and recommended orders. In so doing, this Recommended Decision adopts and incorporates by reference as appropriate all findings, conclusions, and recommendations as set forth in further detail in the SD Order.

I. JURISDICTION

The issue of jurisdiction was addressed in the SD Order, which found that the Board is the appropriate federal banking agency to supervise and regulate both JPMC and JPMSAP, and that Respondent was an institution-affiliated party ("IAP") as that term is defined in 12 U.S.C. § 1818(u).[12]

II. APPLICABLE STANDARD

The burden of proof in an administrative proceeding, unless otherwise provided by statute, is on the administrative agency to establish its charges by a preponderance of the evidence.[13] Under

[10] *Id.*

[11] Enforcement Counsel's initial brief will be referred to as "EIB," while their responsive brief will be referred to as "ERB." Respondent's initial brief will be referred to as "RIB," while his responsive brief will be referred to as "RRB." Corresponding exhibits were filed with the initial briefs. The undersigned notes that much of Respondent's initial and responsive briefs contain arguments that the undersigned already ruled upon in the SD Order and are not directly relevant to determining the appropriateness of the civil money penalty. To the extent that Respondent raises arguments already decided, he may raise those arguments to the Board, but the undersigned does not further address them here.

[12] *See* SD Order at 58-60.

[13] *See* 5 U.S.C. § 556(d); *Steadman v. SEC*, 450 U.S. 91, 102 (1981).

the preponderance-of-the-evidence standard, the party with the burden of proof must adduce evidence making it more likely than not that the facts it seeks to prove are true.[14] Here, the Board has the burden to prove that the statutory elements for the entry of a prohibition order and the assessment of a second-tier civil money penalty have been satisfied.[15] This Tribunal is then tasked with making "a comparative judgment" to determine whether the agency has presented "the greater weight of the evidence" as to the satisfaction of the statutory elements.[16]

III. ELEMENTS OF SECTIONS 1818(e) AND 1818(i)

To merit the entry of a prohibition order against an IAP under 12 U.S.C. § 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) "violated any law or regulation," (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."[17] 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."[18] And the culpability element may be satisfied when the alleged violation, practice, or breach either "involves personal dishonesty" by the IAP or "demonstrates willful or

[14] *See In the Matter of Patrick Adams*, No. AA-EC-11-50, 2014 WL 8735096, at *23 (Sep. 30, 2014) (OCC final decision) (applying preponderance standard in OCC enforcement action); *Concrete Pipe & Prods. of Calif. v. Constr. Laborers Pension Tr.*, 508 U.S. 602, 622 (1993) ("The burden of showing something by a preponderance of the evidence . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence.") (internal quotation marks and citation omitted).

[15] *See* 12 U.S.C. §§ 1818(e), 1818(i).

[16] *Almerfedi v. Obama*, 654 F.3d 1, 5 (D.C. Cir. 2011) (internal quotation marks and citations omitted).

[17] 12 U.S.C. § 1818(e)(1)(A).

[18] *Id.* § 1818(e)(1)(B).

continuing disregard by such party for the safety or soundness of such insured depository institution."[19]

The imposition of a second-tier civil money penalty under 12 U.S.C. § 1818(i) also requires the satisfaction of multiple elements. First, the agency must show misconduct, which can take the form of a violation of "any law or regulation," the breach of "any fiduciary duty," or the reckless engagement "in an unsafe or unsound practice in conducting the affairs" of the institution in question.[20] Second, the agency must show some external consequence or characteristic of the IAP's alleged misconduct, likewise generally termed "effect": (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."[21] Moreover, before any civil money penalty can be assessed upon satisfaction of these elements, the agency must take into account the appropriateness of the amount of penalty sought when considered in light of certain potentially mitigating factors, including the "good faith of the . . . person charged," "the gravity of the violation," and "such other matters as justice may require."[22]

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 Act or its subsequent amendments. John Horne, Chairman of the Federal Home Loan Bank Board ("FHLBB") during the passage of the Financial Institutions Supervisory Act of 1966,

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[19] *Id.* § 1818(e)(1)(C).

[20] *Id.* § 1818(i)(2)(B)(i).

[21] *Id.* § 1818(i)(2)(B)(ii). *See In the Matter of William R. Blanton*, No. AA-EC-2015-24, 2017 WL 4510840, at *16 (July 10, 2017) (OCC final decision), *aff'd on other grounds*, *Blanton v. OCC*, 909 F.3d 1162 (D.C. Cir. 2018) (referring to this as the statute's "effect" prong).

[22] 12 U.S.C. § 1818(i)(2)(G); *see also In re Sealed Case (Admin. Subpoena)*, 42 F.3d 1412, 1416 (D.C. Cir. 1994) ("In assessing money penalties, Congress requires [banking] agencies to consider several mitigating factors."); *accord*, *e.g.*, *Blanton*, 2017 WL 4510840, at *27.

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."[23] This so-called Horne Standard has long guided federal banking agencies, including the Board of Governors, in bringing and resolving enforcement actions.[24] It has also been recognized as "the authoritative definition of an unsafe or unsound practice" by federal appellate courts.[25] The undersigned accordingly adopts the Horne Standard when evaluating charges of unsafe or unsound banking practices under the relevant statutes.

It is a central aspect of this statutory scheme that *only one* of the potential triggering conditions is necessary for the satisfaction of each element of Sections 1818(e) and 1818(i). That is, the "misconduct" element of Section 1818(e) is fulfilled if an IAP has breached a fiduciary duty to the institution, regardless of whether the IAP has also violated any laws or engaged in unsafe or unsound practices, and vice versa. Likewise, a second-tier civil money penalty may be assessed (assuming misconduct can be shown) if the misconduct has resulted in pecuniary gain to the IAP, even if it has not caused loss to the institution and is not part of an actionable pattern. Each component of the "misconduct" element is an independent and sufficient basis on which to ground an enforcement action if the other elements have also been shown. The same is true of the "effect"

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[23] *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), 112 Cong. Rec. 26,474 (1966).

[24] *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); *Patrick Adams*, 2014 WL 8735096, at **8-24 (discussing Horne Standard in detail).

[25] *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).

element and the "culpability" element. Enforcement Counsel need only prove one component of each.

In this case, the Board has charged that Respondent engaged in actionable misconduct in connection with his participation in and management of JPMC's CRP in the Asia Pacific region from 2008 through the program's cessation in 2013. Having concluded in the SD Order that each of these elements had been satisfied by the undisputed facts of the case,[26] the undersigned finds that the entry of a prohibition order and assessment of a second-tier civil money penalty are both therefore appropriate for the reasons stated in that Order.

IV. FINDINGS OF FACT

The undersigned's findings of fact, except with respect to the civil money penalty, are contained within the SD Order, which is incorporated by reference and will not be repeated here.[27]

V. CIVIL MONEY PENALTY

12 U.S.C. § 1818(i) provides that the Board of Governors may assess a civil money penalty against Respondent if certain statutory elements are met. It further provides that, in determining the appropriate amount of such a penalty, the agency must consider certain potentially mitigating factors: (1) the size of the respondent's financial resources; (2) the respondent's good faith; (3) the gravity of the respondent's violation; (4) the history of any previous violations; and (5) "such other matters as justice may require."[28] There are also thirteen interagency factors that should be weighed by the financial institution regulatory agencies in conjunction with the statutory factors

[26] *See* SD Order at 91-107, 115 (misconduct), 107-110, 115-116 (effect), 111-114 (culpability).
[27] *See id.* at 8-51.
[28] 12 U.S.C. § 1818(i)(2)(G).

when determining what a civil money penalty amount should be assessed upon the initiation of an administrative enforcement action under Section 1818(i).[29]

Enforcement Counsel argues that the undisputed material facts establish the basis for the assessment of a second-tier civil money penalty in support of its requested $1,000,000 penalty amount.[30] Enforcement Counsel asserts that neither the statutory mitigating factors nor the thirteen interagency factors warrant any mitigation.[31] Respondent, on the other hand, contends that the assessment of a second-tier civil money penalty is not appropriate and requests a civil money penalty of no more than $7,500, if one must be assessed at all.[32]

In the SD Order, the undersigned found that Section 1818(i)'s misconduct and effect elements necessary for a second-tier civil money penalty had been satisfied and that the only remaining determination that needed to be made was the appropriateness of the civil money penalty.[33] Considering the Parties' submissions, assessing the relevant factors, and for the reasons given below, this Tribunal recommends to the Board that $1 million is an appropriate monetary penalty under the statute for Respondent's misconduct in this case and that no mitigation is warranted.

Enforcement Counsel asserts that the $1 million penalty is reasonable because the agency is empowered to impose a maximum second-tier civil money penalty amount of $37,500 *per day*

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[29] *See* Federal Financial Institutions Examination Council's Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies, 1998 WL 280287, 63 Fed. Reg. 30226-02 (June 3, 1998) ("Interagency CMP Policy").

[30] *See* EIB at 1-3.

[31] *See id.* at 7.

[32] *See* RIB at 1; RRB at 1.

[33] *See* SD Order at 115-117. The undersigned recognizes that Respondent disputes that the effect element has been met (*see* RIB at 11-12; RRB at 12); however, the undersigned has already ruled upon this matter, and Respondent is free to raise this issue with the Board.

"for each day during which a violation, practice, or breach continues."[34] Under this rubric, a $1 million penalty could be assessed for misconduct that lasted for just 27 days—a much shorter span than Respondent's misconduct, which took place over a number of years.[35] According to Enforcement Counsel, the maximum daily penalty amount as applied to Respondent's misconduct would be in the tens of millions of dollars; it therefore contends that the assessment of a $1 million penalty, which is only a small fraction of the maximum penalty, is justified.[36]

Respondent asserts that the penalty is not reasonable based on a number of factors, such as the Board's own civil money penalty matrix ("CMP Matrix"),[37] the fact that no one else involved in the CRP was assessed a civil money penalty (including Timothy Fletcher, an individual who, like Respondent, played a significant role in the implementation and administration of the CRP),[38] and the fact that Respondent's penalty is higher than assessed in other enforcement cases before the Board and before the undersigned.[39] Furthermore, Respondent asserts that using Enforcement Counsel's $37,500 daily penalty amount as a baseline would lead to an absurd, astronomical result that would be a violation of the Eighth Amendment.[40]

In response, Enforcement Counsel asserts that the CMP Matrix is only applicable to tier one penalties in Board enforcement actions, as acknowledged by Respondent,[41] and is therefore

[34] EIB at 2 (quoting 12 U.S.C. § 1818(i)(2)) (internal bracketing omitted).
[35] *See id.*
[36] *See* ERB at 2.
[37] *See* RIB at 25-33; RRB at 3.
[38] *See* RIB at 7-9 (citing *Univ. of Tex. M.D. Anderson Cancer Ctr. v. United States HHS*, 985 F.3d 472 (5th Cir. 2021)); RRB at 5, 7-9, 18-19; *see also* SD Order at 9-42 (describing aspects of Mr. Fletcher's involvement with the CRP).
[39] *See* RIB at 21; RRB at 18, 20, 21.
[40] *See* RIB at 15-20; RRB at 9-10.
[41] *See* ERB at 12 n.25 (citing RIB at 27 n.44).

not relevant here.[42] While Respondent "acknowledges that the use of the CMP matrix is voluntary,"[43] he argues that the Board's sister agencies, including the Office of the Comptroller of the Currency ("OCC"), use the CMP Matrix in tier two penalty cases, and encourages the use of the CMP Matrix in this case as well.[44]

As to Respondent's argument that there was no penalty assessed against Timothy Fletcher, Enforcement Counsel counters that there simply is no comparison because Mr. Fletcher entered into a settlement and that the decision to "settle is a matter particularly within the discretion of the agency."[45] And with respect to Respondent's argument that other enforcement cases before the Board, and other enforcement cases before the undersigned, had much lower penalties, Enforcement Counsel counters that the undersigned is not obliged "to compare the penalty in this case to those imposed by the Board in previous cases [because] such comparisons would be irrelevant given the particularized facts and circumstances of each case."[46] While asserting that Respondent's attempt to compare his penalty to the penalties of other individuals before the Board or the OCC is not an apples to apples comparison, Enforcement Counsel cites to cases where penalties of more than $1 million were assessed.[47]

The undersigned agrees with Enforcement Counsel that the Board is not required to use the matrix for second-tier penalties; therefore, Respondent's arguments as to the matrix are hereby

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[42] ERB at 12 (citing SR 91-13, https://federalreserve.gov/boarddocs/srletters/1991/SR9113.htm) (last visited October 18, 2022) (stating that "all second and third-tier civil money penalties . . . are calculated without reference to the CMP Matrix").

[43] RRB at 4.

[44] *See* RIB at 27-28; RRB at 4. Specifically, Respondent suggests that this Tribunal utilize the "far more comprehensive" CMP Matrix published by the OCC in 2018, rather than the Board's 1991 version which, after all, "does not address Tier 2 violations, appearing to only be geared towards Tier 1 violations." RIB at 27.

[45] ERB at 14-15 (citing *Ferguson v. U.S. Postal Serv*., 792 Fed. Appx. 911, 915 (Fed. Cir. 2019); *Dick v. U.S. Postal Serv*., 975 F.2d 869 (Fed. Cir. 1992) (table)).

[46] *Id.* at 19-20 (citing *Long v. Bd. of Governors of the Fed. Res. Sys*., 117 F.3d 1145, 1152 (10th Cir. 1997)).

[47] *See id.* at 20.

rejected. Under the statute, Enforcement Counsel's proposed $1 million penalty is within the amount permissible, based on the duration of Respondent's misconduct.

The undersigned also agrees with Enforcement Counsel that it is inappropriate to compare Respondent's penalty with that of his former co-Respondent, Mr. Fletcher, as Mr. Fletcher settled this matter with the Board. In addition, the undersigned does not find it relevant that the Board declined to initiate enforcement actions against others who were involved in the CRP. While Respondent asserts that he was being unfairly "targeted," the undersigned disagrees, as it does not matter if misconduct related to the CRP was limited to Respondent or was widespread.[48] The undersigned also agrees with Enforcement Counsel that it is wholly inappropriate to compare Respondent's penalty with other individuals before the Board, or other banking agencies such as the OCC, as each individual case has unique facts and circumstances.

Respondent also argues that the penalty violates the Eighth Amendment, citing the Seventh Circuit's decision in *Monieson v. Commodity Futures Trading Commission*.[49] Enforcement Counsel responds that the *Monieson* case is clearly distinguishable, as the CFTC found that the conduct in that matter did not rise to the level of malfeasance.[50] Furthermore, Enforcement Counsel asserts that the penalty is reasonable and that the D.C. Circuit has rejected the Eighth Amendment excessive fines argument where a penalty is proportional to a violation and well below the statutory maximum.[51] The undersigned agrees with Enforcement Counsel that *Monieson* is distinguishable and that the penalty does not violate the Eighth Amendment.

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[48] *See* SD Order at 101.
[49] 996 F.2d 852, 854 (7th Cir. 1993); *see* RIB at 15-20; RRB at 19-20.
[50] *See* ERB at 18-19.
[51] *See id.* at 18 (citing *Pharaon v. Bd. of Governors of the Fed. Res. Sys*., 135 F.3d 148 (D.C. Cir 1998)).

Finally, Respondent asserts that his good character, including positive performance reviews and awards including the "JP Morgan Asia Partnership award", should factor in his favor.[52] Enforcement Counsel counters that there is no authority that "good character" is relevant when assessing the appropriate amount of a civil money penalty.[53] The undersigned agrees with Enforcement Counsel that such character evidence does not factor into the appropriate amount of a civil money penalty except as it bears on the statutory mitigating factors, which are hereby examined below.

Application of the Statutory Mitigating Factors

The purpose of a civil money penalty "is to deprive the violators of any financial benefit derived as a result of the violations, provide a sufficient degree of punishment, and [act as] an adequate deterrent to the respondents and others from future violations of banking laws and regulations."[54] The interagency guidance regarding the assessment of civil money penalties further states that "in cases where the violation, practice, or breach causes quantifiable, economic benefit or loss," a civil money penalty amount that merely recompenses the loss or strips the violator of their benefit will be insufficient "to promote compliance with statutory and regulatory requirements."[55] Rather, "[t]he penalty amount should reflect a remedial purpose and should provide a deterrent to future misconduct."[56] The undersigned will address each of the five statutory

[52] *See* RIB at 2; RRB at 1-2, 17-18.

[53] *See* ERB at 13.

[54] *In the Matter of Richard D. Donohoo and Craig R. Mathies*, Nos. 92-249c & b *et seq.*, 1995 WL 618673, at *27 (FDIC final decision); *see also Long*, 117 F.3d at 1154 (civil money penalties provide banking agencies with "the flexibility [they] need[] to secure compliance" with the relevant banking laws and to "serve as deterrents to violations of laws, rules, regulations, and orders of the agencies") (internal quotation marks and citation omitted).

[55] Interagency CMP Policy at *2.

[56] *Id.*

mitigating factors in turn, bearing in mind the punitive, deterrent, and remedial goals that civil money penalties are intended to achieve.

1. Respondent's Financial Resources

Respondent declined to submit a personal financial statement when asked to do so as part of his response to the FRB's initial letter regarding its investigation. While Respondent has argued that he has "not been employed by any banking institution" in the past eight years and has had a "loss of income that well exceeds the fine sought to be imposed by [the] Board,"[57] Respondent does not dispute that he has the financial resources to pay Enforcement Counsel's recommended $1 million civil money penalty. According to Enforcement Counsel, Respondent has stipulated that he is able to pay the $1 million penalty.[58] The undersigned finds that the size of Respondent's financial resources is not a mitigating factor to the appropriateness of the penalty amount Enforcement Counsel seeks to assess.

2. Respondent's Good Faith

The mitigating factor of good faith, in the undersigned's view, encompasses both good faith shown (or not shown) in the course of a respondent's misconduct as well as any showing of good faith made by a respondent, for example through willing cooperation or genuinely expressed regret and responsibility for their actions, during the agency's investigation and the enforcement proceedings themselves. Such an interpretation provides an incentive for respondents to be forthcoming and cooperative through the investigative and enforcement process. That interpretation also lessens the duplicative effect that a finding of personal dishonesty or willfulness or a conscious engagement in misconduct might otherwise have on this mitigating factor—

[57] RIB at 1.

[58] *See* EIB at 3 (citing EIB Ex. A ("Stipulation Regarding Financial Resources of Respondent Fang Fang") (June 21, 2017)).

otherwise, no showing of good faith sufficient to mitigate an assessed penalty could ever be made in most cases before this Tribunal.

Here there is ample evidence of Respondent's lack of good faith, based on his breach of fiduciary duty, including the duty of care, which required him to act in good faith in a manner reasonably believed to be in JPMC's best interest.[59] There is therefore no question of any good faith in the misconduct itself that might mitigate the assessed amount. As for good faith during the enforcement process, Respondent's repeated invocation of the Fifth Amendment in response to any questions regarding his conduct or state of mind does not support Respondent's assertion that he acted in good faith.[60] The undersigned accordingly finds that Respondent's good faith is not a basis for mitigating the assessed penalty amount.

3. Gravity of the Violation

While there is no indication that Respondent's conduct directly harmed JPMC consumers or threatened the overall safety or soundness of the Firm, he nevertheless engaged in a years-long participation in the CRP which caused the Firm losses in the form of hundreds of millions of dollars in penalties, as well as significant legal fees related to the investigation of his misconduct.[61] There is nothing about the gravity of Respondent's violation that would therefore mitigate the amount of civil money penalty that Enforcement Counsel seeks to assess.

[59] *See* SD Order at 93, 100 (concluding that "[a]t 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").

[60] SD Order at 98.

[61] As noted in the SD Order, Enforcement Counsel also argued that Fang received a financial benefit, but the undersigned found that based on the factual record before the undersigned, Enforcement Counsel had not made a sufficient showing as to the statutory effect element on that basis. SD Order at 107-108 n. 542.

4. History of Violations

Enforcement Counsel fails to present evidence that Respondent had a history of violations. Consequently, the history of violations by Respondent as a potential mitigating factor weighs neither for nor against Enforcement Counsel's desired civil money penalty assessment amount.

5. Such Other Matters as Justice May Require

In their submissions, the Parties address the thirteen interagency factors that the banking agencies "have identified . . . as relevant" to the consideration of the statutory mitigating factors and the assessment of an appropriate civil money penalty amount.[62] The undersigned finds that while certain of the interagency factors may conceivably weigh in Respondent's favor—specifically, factors 7 (lack of financial gain to respondent)[63], 9 (lack of history of previous misconduct), 10 (no previous criticism for similar actions), and 12 (lack of tendency to engage in violations)—the factors overall provide no additional basis for mitigation beyond what has already been discussed. Indeed, the undersigned agrees with Enforcement Counsel that there are a greater number of interagency factors—specifically, factors 1 (evidence of disregard), 2 (the duration and frequency of the violations), 3 (continuation of misconduct after notification), 4 (failure to cooperate), 5 (evidence of concealment), 6 (loss to the institution), and 11 (presence of effective compliance program)—that tend to weigh against Respondent when considering the appropriate

[62] Interagency CMP Policy at *2.

[63] As noted above, in the SD Order, the undersigned declined to make a finding, based on the factual record presented, that Enforcement Counsel had shown that Fang received financial benefit. *See* n. 61. This does not necessarily mean that "there was no evidence that [Respondent] obtained any personal financial gain or benefit" as asserted by Respondent. RRB at 23. The undersigned takes issue with Respondent's characterization of the undersigned's findings in his initial and responsive briefs. For example, Respondent argues that the undersigned "did not find that [Respondent's] conduct violated the [Foreign Corrupt Practices Act "FCPA"]" and that "this ALJ specifically declined to find that [Respondent] violated the FCPA." *Id.* at 15. This is wrong. In the SD Order, the undersigned concluded "that it is unnecessary to decide the FCPA issue, because the misconduct prongs of Section 1818(e) and 1818(i) have already been met" and that "in the interests of judicial efficiency, the undersigned will not address the Parties' arguments regarding alleged FCPA violations any further," which is not the same as an affirmative finding that Respondent did not violate the FCPA. SD Order at 106-107.

penalty amount to be assessed.[64] The remaining factors, numbers 8 (lack of restitution) and 13 (existence of written agreements intended to prevent violations), are not applicable here.[65]

VI. CONCLUSIONS OF LAW AND RECOMMENDED ORDER

For all of the reasons given above and in the SD Order, the undersigned has concluded that the statutory elements of 12 U.S.C. §§ 1818(e) and 1818(i) have been met in this action. Specifically, the undersigned finds that Respondent's actions in connection with his participation in and management of JPMC's CRP in the Asia Pacific region from 2008 through the program's cessation in 2013 constituted a breach of his fiduciary duty of care to the Firm and were actionably unsafe or unsound banking practices; that Respondent's misconduct demonstrated willful or continued disregard for the safety and soundness of the Firm; and that the Firm suffered loss as a result. The undersigned also concludes that the elements of a second-tier civil money penalty have been met, that no mitigation is warranted, and that $1 million is an appropriate monetary penalty for Respondent's misconduct in this case.

In accordance with 12 C.F.R. § 19.38, the undersigned therefore recommends that the Board enter a prohibition order against Respondent and assess a second-tier civil money penalty in the amount of $1 million in consequence of Respondent's misconduct. The record of this proceeding will be transmitted to the Board in conjunction with this Recommended Decision, as well as a certified index of the administrative record.[66]

SO ORDERED.

Issued: October 28, 2022

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication

[64] *See* Interagency CMP Policy at *2; *see also* ERB at 6-10.
[65] *See* Interagency CMP Policy at *2; *see also* ERB at 11.
[66] No Certified Index of Exhibits is being transmitted as there was no hearing in this matter.

CERTIFICATE OF SERVICE

On October 28, 2022, I served a copy of the foregoing **Recommended Decision** upon the following individuals by email:

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