FEDERAL DEPOSIT INSURANCE CORPORATION
WASHINGTON, D.C.

In the Matter of	)	
G. HARRISON SCOTT, JOHNNY C. CROW, and SHARRY R. SCOTT, individually, and as institution-affiliated parties of	)	DECISION AND ORDER OF ASSESSMENT OF CIVIL MONEY PENALTIES
BANK OF LOUISIANA NEW ORLEANS, LOUISIANA	)	FDIC-12-276k FDIC-12-277k
(INSURED STATE NONMEMBER BANK)	)	FDIC-12-278k

I. INTRODUCTION

This matter is before the Board of Directors ("Board") of the Federal Deposit Insurance Corporation ("FDIC") following the issuance on July 2, 2014, of a Recommended Decision ("Recommended Decision" or "R.D.") by Administrative Law Judge C. Richard Miserendino ("ALJ"). The ALJ recommended that the respondents, G. Harrison Scott ("G. Scott"), Johnny C. Crow ("Crow"), and Sharry R. Scott ("S. Scott") (collectively "Respondents") each be assessed a civil money penalty ("CMP") pursuant to section 8(i) of the Federal Deposit Insurance Act ("FDI Act"), 12 U.S.C. § 1818(i). During the period at issue, Respondents were institution-affiliated parties of the Bank of Louisiana, New Orleans, Louisiana (the "Bank"). For the reasons discussed following, the Board adopts and affirms the Recommended Decision and issues against each Respondent an Order to Pay a CMP in the amount of $10,000.

II. PROCEDURAL HISTORY

The FDIC initiated this action on October 22, 2013, when it issued against Respondents, individually, and as institution-affiliated parties of the Bank, a Notice of Assessment of Civil Money Penalties, Findings of Fact and Conclusions of Law, Order to Pay, and Notice of Hearing ("Notice"). During the relevant time period, Respondent G. Scott was President of the Bank,

Chairman of its Board of Directors, and a member of the Executive Committee. Notice ¶¶ 3, 11; Amended Answer ("Am. Ans.") ¶¶ 3, 11; R.D. at 4.[1] Respondents Crow and S. Scott were members of the Board of Directors and the Executive Committee during the pertinent time period. Notice ¶¶ 4-5, 11; Am. Ans. ¶¶ 4-5, 11; R.D. at 4. The Notice charged that between October 2009 and November 2011, Respondents caused the Bank to engage in multiple violations of Regulation O of the Federal Reserve Board, 12 C.F.R. § 215 ("Regulation O"). These transactions involved improper loans to insiders and the failure to collect overdraft fees from insiders who overdrew their accounts at the Bank. Notice ¶¶ 16-36. The Notice included an Order to Pay requiring each Respondent to pay a CMP in the amount of $10,000. Notice ¶ 37; R.D. at 1.

Among other things, the Notice alleged that Respondents violated Regulation O by approving a new loan and renewing existing loans to a Bank insider, referred to in the record below and herein as "Director K," that involved more than the normal risk of repayment. The Notice further charged that Respondents violated Regulation O by approving a loan to a second Bank insider, referred to in the record below and herein as "Officer P," that exceeded Regulation O's limitations on loans to executive officers, and by allowing Officer P to repeatedly overdraw his checking account at the Bank without assessing the standard overdraft fee. Notice ¶¶ 16-36.

On November 7, 2013, Respondents filed a timely Answer to the Notice, denying the material allegations therein, and on December 18, 2013, Respondents filed an Amended Answer. On February 28, 2014, following discovery, the FDIC filed a motion for summary disposition or,

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[1] Citations to the factual findings of the R.D. encompass the record citations on the cited pages of that decision, and those record citations accordingly are not repeated here. The transcript of the January 2013 hearing before the ALJ is cited as "Tr." The joint exhibits at that hearing are cited as "Jt. Ex.," the FDIC's exhibits are cited as "FDIC Ex.," Respondent's exhibits are cited as "Resp. Ex.," and Respondent's opposition to the FDIC's motion for summary disposition is cited as "Resp. Opp."

in the alternative, for partial summary disposition. R.D. at 2. Respondents submitted an opposition to the FDIC's motion on March 20, 2014. R.D. at 2. On March 27, 2014, the ALJ issued a Notice of Intended Ruling advising the parties that the FDIC was entitled to partial summary disposition with respect to the question whether each Respondent violated Regulation O in connection with the insider loan and overdraft transactions identified in the Notice. R.D. at 2. On April 16, 2014, the ALJ conducted a one-day hearing in New Orleans, Louisiana, to consider evidence regarding the amount of the CMP to be imposed against each Respondent. At the hearing, the ALJ received sworn testimony from each Respondent as well as from a witness called by FDIC Enforcement Counsel ("Enforcement Counsel"). The FDIC witness testified about the seriousness of the Regulation O violations and the factors warranting the imposition of CMP assessments against Respondents.

On July 2, 2014, the ALJ issued a 29-page Recommended Decision recommending that Respondents each be ordered to pay a CMP as assessed in the Notice. Neither FDIC Enforcement Counsel nor Respondents filed exceptions within 30 days of service of the Recommended Decision. On August 20, 2014, pursuant to 12 C.F.R. § 308.40(c)(2), the FDIC Assistant Executive Secretary transmitted the record in the case to the Board for final decision. Thereafter, on October 8, 2014, Respondents filed exceptions that were untimely because they were filed after expiration of the 30 day period established under FDIC Rule 308.39(a). On October 23, 2014, Respondents submitted a supplemental memorandum to clarify the nature of the relief that they are seeking.

III. FACTUAL OVERVIEW

Because the ALJ provided a lengthy, detailed, and well-reasoned opinion with extensive citations to the record in support of his conclusions, the Board finds it unnecessary to reiterate in full the contents of the Recommended Decision. The following discussion, however, provides a

brief overview highlighting certain aspects of Respondents' misconduct as alleged in the Notice, corroborated by supporting testimonial and documentary evidence, and recounted in the Facts section of the Recommended Decision.

A. Prior Regulation O Violations Involving Insider Overdrafts

In 2006, three years before the misconduct giving rise to this proceeding, the FDIC advised Respondents that examiners had identified a host of Regulation O violations during a joint safety and soundness examination of the Bank conducted by the FDIC and the Louisiana Office of Financial Institutions ("LOFI"). Am. Ans. ¶ 12; JS ¶¶ 11, 12; R.D. at 4. Specifically, the 2006 Report of Examination ("ROE") issued jointly by the FDIC and LOFI concluded that the following violations of Regulation O, Section 215.4(e), had occurred: (i) the Bank paid 297 overdrafts to Director K without a written, preauthorized fund transfer agreement; (ii) 218 of the overdrafts were for more than $1,000; (iii) in several instances the overdrafts were outstanding for more than five business days; and (iv) the Bank waived a total of $8,875 in overdraft fees that Director K should have been required to pay under the Bank's customer agreement. Am. Ans. ¶ 13; R.D. at 4-5..

On September 26, 2006, the FDIC sent a letter to each of the Respondents directing them to ensure that the Bank's Board "adopts policies and procedures to ensure compliance with all laws and regulations." Am. Ans. ¶ 14; FDIC Ex. 1. The letters cautioned that if Respondents "fail[ed] to take the steps necessary to prevent a recurrence of this type of violation, this office will reconsider the recommendation of a civil money penalty or other appropriate action for any repeat violations." Am. Ans. ¶ 15; FDIC Ex. 1; JS ¶ 13; R.D. at 5.

B. Extensions of Credit to Director K

1. 2009 Loan

In October 2009, Director K submitted a loan application ("2009 Application") to the Bank seeking a loan of $75,000 ("2009 Loan") to be used for "working capital" and to allow Director K to bring current his arrearages on other loans from the Bank. Am. Ans. ¶ 19; JS ¶¶ 18, 19; FDIC Ex. 12; R.D. at 5-6. At the time, Director K already owed the Bank a total of approximately $500,000 on three outstanding loans that were originated in 2008 ("2008 Loans"). JS ¶ 17; FDIC Ex. 12 at 2; FDIC Ex. 2 at 7-8; FDIC Ex. 5, ¶¶ 16-18; R.D. at 5. As of the date of the 2009 Application, the 2008 Loans were each 81 days past due, and since their origination in 2008, they had been past due 30 days or more on 26 occasions. FDIC Ex. 5, ¶¶ 16-18; FDIC Exs. 3, 6, 8; R.D. at 5.

On the 2009 Application, Director K claimed to have an income of $157,788, but this figure apparently was based on the amount that Director K reported on his 2007 federal tax return. JS ¶ 20; FDIC Ex. 12 at 2; R.D. at 6. The 2009 Application indicated that Director K owed approximately $25,000 on two credit cards issued by the Bank, FDIC Ex. 12 at 2; R.D. at 6, and an accompanying personal financial statement dated April 1, 2009 stated that he owed approximately $50,000 on "various credit cards" for which he was required to make monthly payments of approximately $5,000, FDIC Ex. 13 at 2; R.D. at 6. A credit report obtained by the Bank in October 2009 ("Credit Report") revealed that Director K was required to make monthly payments of $5,770 on a mortgage loan held by another bank, and that he was more than 120 days past due and $42,412 in arrears on that loan. Am. Ans. ¶ 22; FDIC Ex. 14 at 2; FDIC Ex. 5, ¶ 31; R.D. at 6. The Credit Report also disclosed that Director K was 31 to 60 days past due on two revolving lines of credit totaling $7,841. FDIC Ex. 14 at 2; FDIC Ex. 5, ¶ 32; R.D. at 6.

After reviewing Director K's 2009 Loan Application, Respondent G. Scott wrote a memorandum to the Bank's Board of Directors stating that Director K was three months behind in loans totaling approximately $500,000 and that Director K had been "criticized by Examiners

a couple of years ago." Am. Ans. ¶ 21; JS ¶ 29; FDIC Ex. 16; R.D. at 6. The same memorandum went on to question, "[i]f [Director K] cannot pay current loan for $100,000, interest only, how can he pay interest on new loan?" FDIC Ex. 16; R.D. at 6.

As collateral for the 2009 Loan, Director K offered, and the Bank accepted, an assignment of Director K's equity in the New Orleans Community Housing Development Corporation, an assignment of legal fees in two cases being handled by Director K's law firm, and a first mortgage on a condominium that already had been pledged as collateral for the 2008 Loans which then had a total balance of approximately $500,000. JS ¶¶ 25, 26; R.D. at 7. The Bank did not obtain a current appraisal for Director K's condominium; instead, it relied on appraisals prepared in 2006 and 2007, both of which predated the 2008 downturn in the economy. JS ¶¶ 27, 28; FDIC Ex. 5, ¶ 45; R.D. at 7.

On October 20, 2009, the Bank's Board of Directors, of which Respondents were members, and the Loan Committee approved a $75,000, 8 percent interest only, six month term loan to Director K, with the principal due at maturity. JS ¶¶ 30, 33; FDIC Ex. 17, at 1; R.D. at 7. Director K used the $75,000 to pay down one of the 2008 Loans, a $100,000 line of credit. Thereafter, he promptly drew more than $72,000 in advances on the same line of credit. JS ¶¶ 35, 36; R.D. at 7.

2. 2010 Renewals

From October 21, 2009, when the 2009 Loan was approved, through July 30, 2010, Director K was, on a total of 20 occasions, more than 30 days past due on the 2008 Loans and the 2009 Loan. FDIC Ex. 5, ¶ 57; R.D. at 8. In early July 2010, Director K submitted renewal applications for the three 2008 Loans ("Renewal Applications"). FDIC Ex. 20; R.D. at 8. Director K did not report any income on the Renewal Applications. FDIC Ex. 5, ¶ 56; FDIC Ex. 20. The proposed collateral for the renewals was the same collateral securing the 2009 Loan,

specifically, an assignment of Director K's equity in New Orleans Community Housing Development Corporation, an assignment of attorney's fees in two cases, and a mortgage on Director K's condominium. FDIC Ex. 20; R.D. at 8. The Bank's files did not include evidence that an updated appraisal was obtained on Director K's condominium before the Bank renewed the 2008 Loans. FDIC Ex. 5, ¶ 59; R.D. at 8. The Bank's Board of Directors, with each Respondent in attendance, unanimously approved the renewal of Director K's 2008 Loans at a July 13, 2010 meeting ("2010 Renewals"). JS ¶¶ 37, 38, 42; R.D. at 8-9.

The FDIC and LOFI conducted a joint examination of the Bank as of September 30, 2010, which resulted in the issuance of a Report of Examination ("2010 ROE"). Am. Ans. ¶ 16; JS ¶¶ 14, 15; FDIC Ex. 2; R.D. at 9. The 2010 ROE identified the 2009 Loan and the 2010 Renewals as violations of Regulation O. FDIC Ex. 2 at 5; R.D. at 9. The 2010 ROE stated that Respondent G. Scott did not disagree with the latter conclusion. FDIC Ex. 2 at 5; R.D. at 9.

C. Extensions of Credit to Officer P

1. 2011 Loan

At a July 26, 2011 meeting attended by each of the Respondents, the Bank's Executive Committee unanimously approved a loan for $116,389.30 to Officer P and his wife. JS ¶¶ 5, 48. The stated purpose of the loan was to renew an existing Bank loan to Officer P and to provide to him an additional advance of $10,122. JS ¶ 49; R.D. at 9. The loan was secured by a second mortgage on Officer P's residence. JS ¶ 50; R.D. at 9.

2. 2010 and 2011 Overdrafts

During the period December 2010 to July 2011, Officer P, while serving as a Bank Vice-President, overdrew his checking account at the Bank on 18 occasions. JS ¶¶ 55-59; FDIC Exs. 30-34; R.D. at 10. In February 2011 and June 2011, Respondents Crow and S. Scott, as members of the Bank's Audit & Finance Committee, received Officer Overdraft Reports

showing that Officer P repeatedly had overdrawn his checking account at the Bank. JS ¶¶ 55, 57; FDIC Exs. 30, 31. In November 2011, during a joint examination of the Bank, FDIC and LOFI examiners determined that Officer P was not charged the Bank's standard overdraft fee for 11 of the 18 overdrafts, in violation of Regulation O. JS ¶ 54; FDIC Ex. 23, p. 6; R.D. at 11.

IV. ANALYSIS

A. Assessment of CMPs Pursuant to Section 8(i) is Warranted

The Board finds that based on the Bank's violations of Regulation O, an assessment of a CMP against each Respondent is appropriate. The pertinent factors are analyzed following.

1. Statutory Threshold

One of the statutory tools provided to the FDIC to make certain that bank directors comply with their fiduciary obligations is the imposition of CMPs for their violations or a bank's violations of law or regulation. *See Lowe v. FDIC*, 958 F.2d 1526 (11th Cir. 1992). Pursuant to section 8(i)(2) of the FDI Act, the FDIC has authority to impose CMPs by tiers in terms of the gravity of the offense and concomitant severity of the penalty. In this case, the FDIC sought to impose what is known as a First Tier CMP against each Respondent as a result of the Bank's violations of Regulation O.

Unlike the imposition of Second or Third Tier CMPs, which require increasingly higher elements of proof, the assessment of a First Tier CMP requires only one element of proof – that a violation occurred. 12 U.S.C. § 1818(i)(2)(A). In other words, to assess First Tier penalties, it is not necessary to demonstrate that Respondents intended for the Bank to violate Regulation O, or that they had contemporaneous knowledge of the violations. *Id.* Because no knowledge or culpability is required for the imposition of a First Tier CMP, Respondents could not avoid liability merely by asserting that they did not learn of the violations until after they occurred. As the court in *Lowe* observed, "if a director's liability is triggered by his knowledge, the incentive

is not to know too much." *Lowe*, 958 F.2d at 1536. Thus, the specter of First Tier CMPs should serve to keep directors mindful of their fiduciary obligations.

In this case, the ALJ correctly found, based on the undisputed facts, that Respondents violated Regulation O by (i) approving the issuance of the 2009 Loan and the renewal, in 2010, of the three 2008 Loans to Director K; (ii) approving the 2011 Loan to Officer P; and (iii) failing to impose the Bank's standard overdraft fees on Officer P when he overdrew his checking account.

2. Regulation O Violations Involving Director K

Evidence in the record firmly establishes that the 2009 Loan to Director K and the 2010 renewals of the three 2008 Loans violated Regulation O. Section 215.4 of Regulation O prohibits member banks from "extend[ing] credit to any insider of the bank" unless, among other conditions, the extension of credit:

> (i) Is made on substantially the same terms (including interest rates and collateral) as, and following credit underwriting procedures that are not less stringent than, those prevailing at the time for comparable transactions by the bank with other persons that are not covered by this part and who are not employed by the bank; and
>
> (ii) Does not involve more than the normal risk of repayment or present other unfavorable features.

12 C.F.R. § 215.4(a). Bank directors are "insiders" for purposes of section 215.4, and the phrase "extension of credit" includes not only new loans but also renewals of existing loans, 12 C.F.R. § 215.3(a). The ALJ determined that the 2009 Loan and the 2010 Renewals violated Regulation O because they presented more than the normal risk of repayment and presented other unfavorable features. R.D. at 15-19.

Respondents, when they voted to approve the 2009 Loan and the 2010 Renewals, had before them an abundance of evidence showing that Director K was a poor credit risk. When he applied for the 2009 Loan, Director K already had numerous outstanding debts that he was

unable to pay on time. He owed the Bank in excess of $500,000 on three existing loans. JS ¶ 17; FDIC Ex. 12 at 2; FDIC Ex. 2 at 7-8; FDIC Ex. 5, ¶¶ 16-18; R.D. at 4, 15-16. He owed $25,000 on credit cards issued by the Bank, and $50,000 on other credit cards. FDIC Ex. 12 at 2; FDIC Ex. 13 at 2; R.D. at 6, 16. He also was required to make monthly payments of $5,770 on a mortgage loan held by another bank. Am. Ans. ¶ 22; FDIC Ex. 14 at 2; FDIC Ex. 5, ¶ 31; R.D. at 6. Director K was chronically delinquent in servicing his debts; when he applied for the 2009 Loan, he was 81 days past due on his existing loans from the Bank, FDIC Ex. 5, ¶¶ 16-18; FDIC Exs. 3, 6, 8; R.D. at 5, he was more than 120 days past due and $42,412 in arrears on the mortgage from another lender, Am. Ans. ¶ 22; FDIC Ex. 14 at 2; FDIC Ex. 5, ¶ 31; R.D. at 6, and he was 31 to 60 days past due on two revolving lines of credit, FDIC Ex. 14 at 2; FDIC Ex. 5, ¶ 32; R.D. at 6.

The information available to Respondents clearly showed that Director K did not have sufficient income to cover his monthly debt service obligations, much less his total monthly expenses. On his application for the 2009 Loan, Director K reported income of $157,788 based on his 2007 tax return. JS ¶ 20; FDIC Ex. 12 at 2; R.D. at 6. Assuming that he was earning the same income in 2009—and Respondents offered no evidence to show that the Bank confirmed this fact—the ALJ observed that Director K's monthly income would have been approximately $13,149 per month, R.D. at 16 (citing FDIC Ex. 12 at 2), while his monthly debt payment obligations were approximately $14,770, resulting in a shortfall of approximately $1,600 per month, R.D. at 16, not taking into account Director K's other monthly living expenses.

The ALJ correctly concluded that the collateral pledged by Director K in connection with the 2009 Loan (and later, the 2010 Renewals), did not diminish the repayment risk of these extensions of credit. R.D. at 16-17. Specifically, the collateral consisted of (i) a first mortgage on a condominium for which the Bank did not obtain a current appraisal, JS ¶¶ 25-27; FDIC Ex.

5, ¶ 45; R.D. at 16-17, (ii) an equity interest in New Orleans Community Housing Development Corporation for which the Bank's files contain no evidence of any independent valuation of the interest, FDIC Ex. 5, ¶¶ 45, 59, and (iii) an assignment of legal fees in two cases being handled by Director K's law firm, for which the Bank had no independent valuation, FDIC Ex. 5, ¶ 59; FDIC Exs. 10, 11. The assignment of legal fees was of doubtful value as collateral in light of Director K's disclosure that he was applying for the 2009 Loan because "[m]any of [his] clients were unable to pay their [legal] bills," Resp. Ex. 1, and as a result, Director K was unable to stay current on his obligations to the Bank, *id.*; R.D. at 15.

To determine whether an extension of credit involves more than the normal risk of repayment or other unfavorable features, for purposes of Section 215.4 of Regulation O, the Board "looks to whether an objective lender at the time the loan was made would have extended the credit based on the available information at the time." *Bullion v. FDIC*, 881 F.2d 1368, 1374 (5th Cir. 1989). In *Bullion*, the U.S. Court of Appeals for the Fifth Circuit affirmed the Board's determination that the loans at issue in that case presented more than the normal risk of repayment and other unfavorable features based on, among other factors, "the lack of documentation as to the loan and also the collateral which was before the officers when they made the decision to fund the loan, the overvaluation of the assets to support the loan, [and] the borrower and the guarantor's potential inability to repay the loan based on the then available financial information. . . ." *Id.* at 1375. The court also observed that "[t]he availability of cash to pay off the loan should have been one of the primary considerations of the officers in approving the loan." *Id.*

In the present matter, given the information Director K provided on the 2009 Application, together with the information contained in a credit report obtained by the Bank, a reasonable banker would have concluded that extensions of credit to Director K presented a greater than

normal risk of repayment. Director K had a long history of being delinquent on his existing loans from the Bank and from other lenders, he also had a long and scrutinized history of overdrawing his checking account at the Bank, and his debt service obligations exceeded his income. As Respondent G. Scott asked while considering Director K's 2009 Loan Application, "[i]f [Director K] cannot pay current loan for $100,000, interest only, how can he pay interest on new loan?" FDIC Ex. 16; R.D. at 6. Respondents nevertheless voted to approve the 2009 Loan.

In July 2010, when Director K submitted renewal applications for the three 2008 Loans, he neither demonstrated that his financial condition had improved nor pledged any additional collateral for the renewals. Respondent G. Scott testified that he recalled expressing the opinion, during the discussions regarding Director K's renewal applications, that "[h]e's not creditworthy anymore." Tr. at 89:14-90:1. Respondents nevertheless voted in favor of renewing Director K's loans.

On this record, the ALJ properly concluded that the 2009 Loan and the 2010 Renewals violated Regulation O because they involved more than the normal risk of repayment and presented other unfavorable features. R.D. at 15-19. In their opposition to the FDIC's motion for summary disposition, Respondents presented three reasons why the extensions of credit to Director K purportedly did not violate Regulation O. Resp. Opp. at 6. The Board concurs with the ALJ's determination that none of these justifications has any merit. First, Respondents argued in passing that the extensions of credit to Director K "were not handled any differently at the Bank than other similar loans [to non-insiders]." *Id.* But Enforcement Counsel did not have to prove, under Section 215.4(a) of Regulation O, that Director K was offered more favorable terms than what the Bank offered to non-insiders. Instead, it was sufficient to show that the loans to Director K "involve[d] more than the normal risk of repayment or present[ed] other unfavorable features." 12 C.F.R. § 215.4(a); *see also Bullion*, 881 F.2d at 1374 (holding that

Regulation O "require[s] either a showing of preferential terms, or of more than the normal risk of repayment or other unfavorable features to prove a violation of § 215.4(a)").

For their second defense, Respondents pointed out that Director K ultimately repaid his loans from the Bank in full—a development that, in Respondents' view, "vitiates the charge that the loans involved more than the normal risk of repayment." Resp. Opp. at 6. This defense is insubstantial because whether a loan presents more than a normal risk of repayment is determined at the time the loan is made. *See Bullion*, 881 F.2d at 1374 (defining the relevant inquiry as "whether an objective lender ***at the time the loan was made*** would have extended the credit") (emphasis added); *accord Michael v. FDIC*, 687 F.3d 337, 350 (7th Cir. 2012).

Respondents also argued that "[a]t all pertinent times the loans to Director K were fully secured thereby ensuring no risk of repayment." Resp. Opp. at 6. That assertion, however, was unsupported by evidence. As discussed above, Respondents and the other directors did not have a recent appraisal for Director K's condominium when they approved the 2009 Loan and the 2010 Renewals, nor did the Bank's files contain any independent valuations of Director K's purported interest in the New Orleans Community Housing Development Corporation or his anticipated attorney fee receivables. Based on Director K's poor credit history and the limited information in the Bank's file, a reasonable lender would not have concluded that the extensions of credit to Director K presented a normal risk of repayment.

The Board concludes that the 2009 Loan and the 2010 Renewals of Director K's loans violated Section 215.4(a) of Regulation O. On that basis, as discussed further below, the Board finds that the CMP assessments recommended by the ALJ are warranted.

2. Regulation O Violations Involving Officer P

The record contains unrebutted evidence that the Bank's transactions with Officer P violated two sections of Regulation O. First, the Bank did not charge Officer P overdraft fees

when he overdrew his checking account, in violation of 12 C.F.R. § 215.5(c)(2). Second, the 2011 Loan to Officer P in the amount of $116,389.30 violated the provisions of Regulation O governing loans to executive officers. As pertinent here, Regulation O permits executive officers to obtain loans "to finance or refinance the purchase, construction, maintenance, or improvement of a residence of the executive officer" if the loan is secured by a first lien, 12 C.F.R. § 215.5(c)(2), and it permits executive officers to obtain loans for "any other purpose" as long as the amount is less than $100,000, 12 C.F.R. §§ 215.5(c)(4), 337.3(c)(2). The loan to Officer P did not fall within subsection 215.5(c)(2) because it was secured by a second mortgage, and it did not fall within subsection 215.5(c)(4) because it exceeded $100,000.

Respondents, for their part, do not dispute that the Bank issued the $116,389.30 loan to Officer P who was, at the time, a Bank Vice President. Resp. Opp. at 7-9. Instead, they assert that Officer P was not an executive officer within the meaning of 12 C.F.R. § 215.2(e)(1). Section 215.2(e)(1) defines "officer" as "every vice president" unless the officer is "excluded by resolution of the board of directors or by the bylaws of the bank or company, from participation (other than in the capacity of a director) in major policymaking functions of the bank or company, and the officer does not actually participate therein." 12 C.F.R. § 215.2(e)(1); *see* Resp. Opp. at 7-9. In a novel effort to avoid a ruling on summary disposition, Respondents submitted declarations averring that Officer P did not participate in or have the authority to participate in major policymaking functions at the Bank. Resp. Exs. 5-7, ¶ 2, Resp. Opp. at 7-9. But Respondents did not assert, nor did they offer evidence establishing, that Officer P was excluded, by board resolution or by the Bank's bylaws, from participating in major policymaking functions at the Bank. Resp. Opp. at 7-9; R.D. at 21. Thus, the ALJ properly found that Officer P was an executive officer of the Bank, and that the Bank's transactions with Officer P violated

Regulation O. R.D. at 20-21. Therefore, CMPs were properly assessed against Respondents based on the 2011 Loan to Officer P as well as on the 2010 and 2011 overdraft transactions.

B. The $10,000 CMP Amount Is Appropriate As To Each Respondent.

Because the statutory requirements authorizing the assessment of CMPs have been met, the appropriate amount of the penalty can be calculated. *In the Matter of Leuthe*, FDIC Enforcement Decisions and Orders, ¶ 5249, A-2965 (1998), 1998 WL 438323, at *16, *aff'd*, 194 F.3d 174 (D.C. Cir. 1999). Pursuant to section 8(i)(2)(A) of the FDI Act, the agency may assess a First Tier CMP against an institution or an institution-affiliated party of as much as $7,500 for each day during which the violation continued. 12 U.S.C. § 1818(i)(2)(A); 12 C.F.R. § 308.132(c)(3)(i). The Regulation O violation involving the 2009 Loan to Director K continued for nearly two years because the Bank funded the loan on October 21, 2009, and Director K did not pay it off in full until September 13, 2011. JS ¶¶ 34, 45. The record shows that the Regulation O violations involving Officer P continued for at least six months. The Board therefore has the authority to assess a CMP of at least $10,000 against each Respondent.

Before assessing a CMP, the FDIC, pursuant to section 8(i)(2)(G) of the FDI Act, 12 U.S.C. § 1818(i)(2)(G), and section 308.132(b) of the FDIC's Rules, 12 C.F.R. § 308.132(b), must consider as possible mitigating factors the financial resources and good faith of Respondents, the gravity of the violations, Respondents' history of previous violations, and other matters as justice may require. As is evident from the record in this case, the ALJ considered the appropriate statutory mitigating factors. R.D. at 23-26. Prior to the hearing before the ALJ, Respondents stipulated that they each had sufficient resources to pay a $10,000 CMP. Respondents' Motion for Reconsideration, at 1 (filed March 26, 2014); R.D. at 2 n.2; *id.* at 23. The ALJ concluded, on the basis of the documentary evidence and Respondents' testimony, that Respondents have manifested a lack of good faith in preventing, and later remediating, the

Regulation O violations at issue. R.D. at 23-24. The ALJ also considered the amount of money—more than $650,000—involved, and Respondents' history of Regulation O violations. R.D. at 24-26.

In addition to the statutory mitigating factors, the ALJ applied the 13-factor analysis found in the Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies, 63 Fed. Reg. 30,226 (May 28, 1998). R.D. at 26-28. Specifically, the ALJ cited the following factors identified in the interagency guidance as supporting augmentation of the CMPs:

> (1) Evidence that the violation or practice or breach of fiduciary duty was intentional or was committed with a disregard of the law or with a disregard of the consequences to the institution;
> (2) The duration and frequency of the violations, practices, or breaches of fiduciary duty;
> (3) The continuation of the violations, practices, or breach of fiduciary duty after the respondent was notified or, alternatively, its immediate cessation and correction;
> (4) The failure to cooperate with the agency in effecting early resolution of the problem;
> . . .
> (6) Any threat of loss, actual loss, or other harm to the institution, including harm to the public confidence in the institution, and the degree of such harm; . .
> . . .
> (9) History of prior violation, practice, or breach of fiduciary duty, particularly where they are similar to the actions under consideration;
> (10) Previous criticism of the institution or individual for similar actions;
> (11) Presence or absence of a compliance program and its effectiveness;
> (12) Tendency to engage in violations of law, unsafe or unsound banking practices, or breaches of fiduciary duty; and
> (13) The existence of agreements, commitments, orders, or conditions imposed in writing intended to prevent the violation, practice, or breach of fiduciary duty.

R.D. at 26-27. The above discussion of Respondents' misconduct fully supports the ALJ's conclusion regarding the applicability of these factors. The ALJ also cited the following factors as mitigating the CMP:

> (5) Evidence of concealment of the violation, practice, or breach of fiduciary duty or, alternatively, voluntary disclosure of the violation, practice or breach of fiduciary duty;

. . .
(7) Evidence that a participant or his or her associates received financial gain or other benefit as a result of the violation, practice, or breach of fiduciary duty; [and];
(8) Evidence of any restitution paid by a participant of losses resulting from the violation, practice, or breach of fiduciary duty.

R.D. at 27-28.

After reviewing all of the pertinent factors, the ALJ recommended that each of the Respondents pay a CMP of $10,000. R.D. at 29. The Board, after independently reviewing the entire record and considering the statutory and regulatory factors, is satisfied that the imposition of a $10,000 CMP against each Respondent is appropriate. The Board therefore adopts the ALJ's recommendation of a $10,000 CMP to be imposed on each Respondent.

C. Respondents' Untimely Exceptions Lack Merit

Respondents submitted exceptions to the Recommended Decision ("Exceptions") under cover of a letter dated October 8, 2014, and in a supplemental submission filed on October 23, 2014, Respondents clarified the nature of the relief that they are seeking in the event any of their Exceptions were found to have merit. Because the Recommended Decision was served on July 2, 2014, the exceptions are untimely. *See* 12 C.F.R. § 308.39(a). The Board rejects Respondents' suggestion that the 30-day clock was restarted on September 25, 2014, when the Assistant Executive Secretary transmitted a copy of Enforcement Counsel's summary disposition exhibits to the Board. As Respondents acknowledge, § 308.39(a) requires that exceptions be filed "within 30 days of service of the [ALJ's] recommended decision," and that deadline expired on August 1. Exceptions at 3 n.1. The Board also rejects Respondents' contention that their inadvertent failure to timely file exceptions is an "exceptional circumstance" warranting dispensation from § 308.39(a). Exceptional circumstances exclude delay caused by "normal situations of attorney negligence or inadvertence." *Harris v. Boyd Tunica, Inc.*, 628 F.3d 237, 238 (5th Cir. 2010). Despite Respondents' untimely filing, the Board nevertheless has

considered their Exceptions. As explained below, the Board finds that none of the Respondents' Exceptions raise meritorious challenges to the Recommended Decision or the proceedings below.

In particular, Respondents' Exceptions do not raise any factual or legal errors or point to any discrepancies in the record establishing that the CMP assessments are not warranted. Many of their Exceptions simply address minor points that do not affect the overall decision, and others raise meritless disputes regarding the ALJ's factual conclusions and interpretations of the applicable regulations. To the extent that they are pertinent to matters already addressed, the Board has in the context of the discussion above disposed of certain objections. Respondents' remaining Exceptions are addressed following.

Three of Respondents' six Exceptions (Exceptions 2, 3, 5), and nearly all of their accompanying brief, rest on the erroneous premise that the ALJ "improperly resolved factual issues and precluded Respondents from producing any evidence to support their position that no violations occurred." Respondents' Brief at 1. The notion is that, "due to the tribunal's improper resolution of [various] factual issues on Summary Disposition, Respondents were precluded from introducing . . . evidence" about those issues at the subsequent hearing before the ALJ. *Id.* at 2. Respondents have attached to their brief an assortment of exhibits that they purportedly would have introduced into evidence at the hearing, if they had been afforded an opportunity to do so.

Respondents' argument misapprehends the fundamental nature of a summary disposition under the FDIC's rules, which in all material respects is indistinguishable from a summary judgment under Rule 56 of the Federal Rules of Civil Procedure. When confronted with a motion for summary disposition, the non-moving party must come forward with evidence showing the existence of a genuine issue of material fact necessitating an evidentiary hearing.

The FDIC's rules make clear that "[n]o exception need be considered by the Board of Directors if the party taking exception had an opportunity to raise the same objection, issue, or argument before the administrative law judge and failed to do so." 12 C.F.R. § 308.39(b)(2); *accord Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 339 (5th Cir. 2005) ("It is well settled . . . that the scope of appellate review on a summary judgment order is limited to matters presented to the district court."); *id.* ("If a party fails to assert a legal reason why summary judgment should not be granted, that ground is waived and cannot be considered or raised on appeal.") (internal citation and quotation marks omitted); *see also Keenan v. Tejeda*, 290 F.3d 252, 262 (5th Cir. 2002) (refusing to consider "arguments [that] were not properly presented to the district court"). Respondents had a full and fair opportunity to present their evidence and arguments to the ALJ before the Recommended Decision was issued, and the Board declines to consider any evidence or legal arguments that were not raised before the ALJ.

In Exception 4, Respondents assert that the ALJ mistakenly applied a presumption that Officer P was an executive officer for Regulation O purposes. Respondents' Brief at 20-22. While the relevant definition, 12 C.F.R. § 215.2(e)(1), does not explicitly use the term "presumption," it does effectively create a rebuttable presumption, because it provides that "every vice president . . . [is] considered [an] executive officer[] ***unless*** the officer is excluded by resolution of the board of directors or by the bylaws of the bank or company, from participation (other than in the capacity of a director) in major policymaking functions of the bank or company, ***and*** the officer does not actually participate therein." 12 C.F.R. § 215.2(e)(1) (emphases added). The term "unless" signals what must be proven to rebut the presumption that a bank vice president is an "executive officer" within the meaning of Regulation O. Similar presumptions abound in the law. For example, Federal Rule of Evidence 609(b) provides that "[e]vidence of a conviction under this rule is not admissible if a period of more than ten years

has elapsed since the date of the conviction . . . ***unless*** the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect." Fed. R. Evid. 609(b) (emphasis added). Through this formulation, Rule 609(b) "creates, in effect, a rebuttable presumption that convictions over ten years old are more prejudicial than helpful and should be excluded." *United States v. Sims*, 588 F.2d 1145, 1150 (5th Cir. 1978). That is so despite the fact that Rule 609(b), like § 215.2(e)(1), does not use the term "presumption."

As a Vice President of the Bank, Officer P was an "executive officer" for Regulation O purposes "unless," among other things, he was "excluded by resolution of the board of directors or by the bylaws of the bank or company, from participation (other than in the capacity of a director) in major policymaking functions of the bank or company." 12 C.F.R. § 215.2(e)(1). Respondents did not present evidence to the ALJ—before the summary disposition ruling or after—that Officer P was excluded (i) by resolution of the board of directors, or (ii) by the bylaws of the Bank, from participation in major policymaking functions of the bank or company. Respondents do not attempt to make that showing even now in their exceptions. Accordingly, applying the plain language of § 215.2(e)(1), the Board finds that Officer P was an "executive officer" of the Bank, and that Respondents' fourth Exception has no merit.

The Board has considered Respondents' remaining Exceptions and has determined that they do not warrant further discussion.

V. CONCLUSION

After a thorough review of the record in this proceeding, and for the reasons set forth previously, the Board finds that an Assessment of CMPs is warranted against Respondents. In this case, the record plainly shows that during the period at issue, Respondents repeatedly caused the Bank to violate Regulation O by permitting Bank insiders to overdraw their personal

checking accounts at the Bank without paying the standard overdraft fees. Their conduct in this regard is particularly troublesome because FDIC examiners had previously criticized Respondents for permitting the same type of practices with respect to overdrafts and expressly warned Respondents that they would, if such conduct continued, be subject to CMP proceedings. In addition, Respondents violated Regulation O by approving extensions of credit to Bank directors and officers that did not comply with the applicable restrictions for insider loans. In light of the entire record, the Board finds that the CMPs imposed are appropriate and consistent with the statute's intended effects. Finally, the Board observes that while each of the Regulation O violations that form the bases for the CMP assessments is clearly established in the record, any one of the underlying violations provides sufficient basis to impose a First Tier CMP in the amount of $10,000 against each Respondent.

Based on the foregoing, the Board affirms the Recommended Decision of the ALJ and adopts in full the conclusions of law and findings of fact therein, and issues the following Order implementing its Decision.

ORDER TO PAY CIVIL MONEY PENALTY

The Board, having considered the entire record in this proceeding, and taking into account the appropriateness of the penalty with respect to the size of the financial resources and good faith of Respondents, the gravity of the violations and such other matters as justice may require, hereby ORDERS and DECREES that:

1. A civil money penalty is assessed against G. Harrison Scott in the amount of $10,000, and a civil money penalty is assessed against Johnny C. Crow in the amount of $10,000, and a civil money penalty is assessed against Sharry R. Scott in the amount of $10,000, pursuant to 12 U.S.C. § 1818(i).
2. This ORDER shall be effective and the penalties shall be final and payable thirty (30) days from the date of its issuance.

The provisions of this ORDER will remain effective and in force except to the extent that, and until such time as, any provision of this ORDER shall have been modified, terminated, suspended, or set aside by the FDIC.

IT IS FURTHER ORDERED that copies of this Decision and Order shall be served on Counsel for Respondents G. Harrison Scott, Johnny C. Crow, and Sharry R. Scott, Enforcement Counsel, the ALJ, and the Commissioner of the Louisiana Office of Financial Institutions.

By direction of the Board of Directors.

Dated at Washington, D.C., this 18th day of November, 2014.

(SEAL)

082323

/s/

Robert E. Feldman
Executive Secretary