FEDERAL RESERVE BANK *of* NEW YORK

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October 11, 2013

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Hon. Ronnie Abrams, U.S.D.J.
United States District Court
for the Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square, Room 2203
New York, NY 10007

Re: Carmen Segarra v. Federal Reserve Bank of New York
Civil Action No.: 13-CV-7173 (RA)

Dear Judge Abrams:

The Federal Reserve Bank of New York (the "New York Fed") respectfully submits this letter in the above-referenced matter in support of our emergency application for a protective order. The New York Fed's position is that portions of the complaint and attachments should not be publicly filed because they contain Confidential Supervisory Information ("CSI") under 12 C.F.R. Part 261 and must therefore be removed from public access. The New York Fed also requests that the Court order Plaintiff and her counsel not to publish any other CSI without further order of the Court.

The Second Circuit enumerated the steps a district court must take when deciding whether documents may be removed from public access in *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006). Under the Second Circuit's framework, the first step is to determine whether the documents at issue are "judicial documents." *Id.* at 119. "Judicial documents" are those documents filed with the court that are "relevant to the performance of the judicial function and useful in the judicial process." *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("Amodeo I"). If the court determines that the documents are "judicial documents," the court must assess the weight to be given to the presumption in favor of public access to the documents. *Lugosch*, 435 F.3d at 119. The weight assigned must be "governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts. Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance." *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995) ("Amodeo II"). Finally, "after determining the weight of the

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presumption of access, the court must balance competing considerations against it. . . . Such countervailing factors include but are not limited to the danger of impairing law enforcement or judicial efficiency and the privacy interests of those resisting disclosure." *Lugosch*, 435 F.3d at 120 (quoting *Amodeo II*, 71 F.3d at 1050) (internal quotation marks omitted).

The Second Circuit has held that "the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access." *Amodeo I*, 44 F.3d at 145. The documents filed in the appendices to the complaint in this matter are not judicial documents; they are bank supervisory materials that fall into two categories: (i) internal New York Fed e-mails and memoranda evaluating an institution that the New York Fed supervises; and (ii) documents provided to the New York Fed by Goldman Sachs, a supervised institution. These documents are all CSI. *See* 12 C.F.R. §§ 261.2(c)(1)(i) and (iii) (defining "[c]onfidential supervisory information" to include "any information derived from [or] related to" "reports of examination, inspection and visitation, confidential operating and condition reports" or "[a]ny documents prepared by, on behalf of, or for the use of . . . a Federal Reserve Bank"). These documents show that at the time she left the employ of the New York Fed, she purloined property of the Board of Governors of the Federal Reserve System. *See* 12 C.F.R. 261.22(e) ("All confidential supervisory information made available under this section shall remain the property of the Board. <u>Any person in possession of such information shall not use or disclose such information for any purpose other than that authorized by the General Counsel of the Board without his or her prior written approval.</u>") (emphasis added).

But assuming that the Court finds that these documents are "judicial documents," and the common law presumption of access attaches, the competing considerations against public disclosure in this matter outweigh the presumption. There is no question that the documents in the appendices are CSI: several of them are stamped as "Confidential Supervisory Information." Memos that were written by Plaintiff are designated by her as "Restricted FR," meaning that she understood how sensitive they were and that they were both: (i) never to be disclosed to the public; and (ii) property of the Federal Reserve System. ("Restricted FR" is the Federal Reserve System's second-highest classification level. Documents containing that designation may not be publicly disclosed without authorization.) By publishing these documents with the Complaint, Plaintiff has engaged in a flagrant and clear violation of Federal law.

Even under the *Lugosch* First Amendment analysis, "the presumption of access . . . can be overcome . . . by specific, on-the-record findings that higher values necessitate a narrowly tailored sealing." *Lugosch*, 435 F.3d at 126. In fact, the Second Circuit acknowledged that something like the attorney-client privilege might well be a sufficiently compelling reason to warrant a narrow sealing order like the one we seek here. *Id.* at 125. The bank examination privilege has been widely acknowledged. *See In re Bankers Trust Co.*, 61 F.3d 465, 471 (6^{th} Cir.

1995); *In re Subpoena Served Upon Comptroller of Currency*, 967 F.2d 630, 633-34 (D.C. Cir. 1992); *Linde v. Arab Bank, PLC*, No. 04 Civ. 2799, 2009 WL 3055282, at *1 (E.D.N.Y. Sept. 21, 2009); *Bank of China v. St. Paul Mercury Ins. Co.*, No. 03 Civ. 9797, 2004 WL 2624673, at *4 (S.D.N.Y. Nov. 18, 2004). The bank examination privilege, like the attorney-client privilege, exists so that supervised institutions (the equivalent of clients) share their most sensitive, confidential information with their supervisor (the equivalent of an attorney). In fact, the Congress amended Federal law by passing the Regulatory Relief Act of 2006, Section 607 of which enables supervised institutions to share information protected by the attorney-client privilege with their supervisors without the sharing constituting a waiver. 12 U.S.C. § 1828. The obvious policy reason is to encourage such a communication between the supervised and the supervisor. The current law shows the convergence between the attorney-client privilege and the bank examination privilege.

Federal law is very clear on the subject. CSI may not be communicated by any Federal Reserve employee without the permission that is required by the regulation. Ms. Segarra had no permission. She purloined CSI when she was discharged by the New York Fed, and now seeks to use the Court as an enabler of further wrongful communication of that information. In effect, her complaint is a vehicle for that further wrong. The incantation of a "public right to know" cannot ever be a license to discharged employees that they may violate Federal law simply by filing a complaint in Federal court.

Moreover, the Federal Reserve has shown zero tolerance for employee disrespect of the rules of Federal law that protect bank examination material. We attach an allocution before Judge Pauley of a former New York Fed employee who pleaded guilty to a criminal information for stealing confidential supervisory information. *United States v. Garzon*, 98-CR-1500, at 14-17 (S.D.N.Y June 4, 1999). Judge Pauley's acceptance of the plea in *Garzon* shows that this court recognizes such conduct as criminal. *See* Exhibit 1. We cannot turn a blind eye to Ms. Segarra's substantially similar conduct here.

Before concluding, the New York Fed must address one piece of material information that was omitted from Ms. Stengle's letter of October 11, 2013. In that letter, Ms. Stengle "opened the door" on settlement discussions that began with a letter sent to the New York Fed's General Counsel on behalf of Ms. Segarra. While Ms. Segarra has now publicly communicated some of those discussions, she has not communicated her demand that the New York Fed pay her over $7 million. Obviously, she believes that the "right to know" has a multi-million-dollar price tag. She is incorrect that the New York Fed never met with her prior counsel: I met with him on several occasions. But she is correct that we had no interest in that kind of "settlement" proposal.

Ms. Segarra has a right to have her case adjudicated in this Court, and we are ready and willing to litigate and prove she was discharged for good reason. We are not saying that she cannot put on proof of her claim. But the case must be litigated within the bounds of Federal law, and Ms. Segarra does not get to decide what law she will and will not follow. We ask the Court to instruct the parties as to what Federal law says, and to issue a narrow sealing order protecting the bank examination privilege by sealing the parts of the complaint that contain it, paragraphs 16, 17, 20-34, 36-39, 41-43, 46-52, 59-90, 95, 97, 105, and 107, and all of the appendices. Finally, we request that the Court order Plaintiff and her counsel not to publish any other CSI without further order of the Court.

Thank you for allowing us to be heard earlier today, and thank you for your consideration of our application.

Respectfully submitted,

David Gross

David Gross
Counsel and Vice President

cc: Linda J. Stengle, Esq., Counsel for Plaintiff (via e-mail to linda@lindastengle.com)
Thomas C. Baxter, Jr., Esq., General Counsel, Federal Reserve Bank of New York
Thomas M. Noone, Esq., Attorney, Federal Reserve Bank of New York

Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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UNITED STATES OF AMERICA,

v. 98 Cr. 1500

MAURICIO GARZON,

Defendant.

------------------------------x

June 4, 1999
9 a.m.

Before:

HON. WILLIAM H. PAULEY, III,

District Judge

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
DAVID GREENWALD,
Assistant United States Attorney

MARK R. HELLERER, ESQ.
Attorney for Defendant

(Case called)

THE COURT: Would counsel give their appearances for the record.

MR. GREENWALD: David Greenwald for the government.

MR. HELLERER: Mark Hellerer from Winthrop Stimson for the defendant, Mr. Garzon.

THE COURT: Good morning, Mr. Hellerer.

I am informed, Mr. Hellerer, that the defendant has an application in this matter. What is that application?

MR. HELLERER: It's not actually an application, your Honor. We are here on a misdemeanor information that was filed with the court on our last appearance and Mr. Garzon is prepared today to plead guilty to that misdemeanor information.

THE COURT: All right.

Very well. Is this plea pursuant to a plea agreement?

MR. GREENWALD: Yes, your Honor.

THE COURT: Would you hand up an executed copy, Mr. Greenwald, and I will ask my deputy to mark it as Court Exhibit 1, and then pass it up to me for my inspection.

All right, at this time I am going to ask my courtroom deputy to administer the oath to the defendant,

Mr. Garzon.

(Defendant sworn)

BY THE COURT:

Q. Mr. Garzon, do you understand that you are now under oath and that if you answer any of my questions falsely your false or untrue answers may later be used against you in another prosecution for perjury or making a false statement?

A. I do, your Honor.

Q. Mr. Garzon, what is your full name?

A. Mauricio Garzon.

Q. How old are you?

A. 35.

Q. How far did you go in school?

A. Graduate program in business.

Q. From what college or university?

A. New York University.

Q. Did you obtain a degree?

A. Masters in business administration.

Q. Are you able to read, write, speak and understand English?

A. Yes.

Q. Are you now or have you recently been under the care of a doctor or a psychiatrist?

A. No, sir.

Q. Have you ever been treated or hospitalized for any mental illness or any type of addiction, including drug or alcohol addiction?

A. No, sir.

Q. In the past 24 hours have you taken any drugs, medicine or pills or have you drunk any alcohol?

A. No, sir.

Q. Is your mind clear today, Mr. Garzon?

A. Yes, it is, your Honor.

Q. Are you feeling all right today?

A. Yes.

Q. Are you represented by counsel?

A. Yes, sir.

Q. And who is that?

A. Mr. Mark Hellerer.

THE COURT: Mr. Hellerer, do you have any doubt as to Mr. Garzon's competence to plead at this time?

MR. HELLERER: No, your Honor.

Q. Now, Mr. Garzon, your attorney has informed me that you wish to enter a plea of guilty. Do you wish to enter a plea of guilty?

A. Yes, sir.

Q. Have you had a full opportunity to discuss your case with your attorney and to discuss the consequences of entering a plea of guilty?

A. Yes, sir.

Q. Are you satisfied with your attorney, Mr. Hellerer, and his representation of you in this matter?

A. Yes, sir.

THE COURT: On the basis of Mr. Garzon's responses to my questions and my observations of his demeanor here in my courtroom this morning, I find that he is fully competent to enter an informed plea at this time.

Q. Mr. Garzon, before I accept any plea from you I am going to ask you certain questions. My questions are intended to satisfy me that you wish to plead guilty because you are guilty and that you fully understand the consequences of your plea. I am now going to describe to you certain rights that you have under the Constitution and laws of the United States which rights you will be giving up if you enter a plea of guilty. Please listen carefully.

If you do not understand something I am saying or describing, stop me and either I or your attorney, Mr. Hellerer, will explain it to you more fully.

Under the Constitution and the laws of the United States you have the right to a speedy and public trial by a jury on the charges against you which are contained in the misdemeanor information. Do you understand that?

A. Yes, sir, I do.

Q. If there were a trial, Mr. Garzon, you would be

presumed innocent and the government would be required to prove you guilty by competent evidence and beyond a reasonable doubt. You would not have to prove that you were innocent at a trial. Do you understand that?

A. Yes, sir.

Q. If there were a trial a jury composed of 12 people selected from this district would have to agree unanimously that you were guilty. Do you understand that, Mr. Garzon?

A. Yes, sir.

Q. If there were a trial you would have the right to be represented by an attorney and if you could not afford one an attorney would be provided to you free of cost, do you understand that?

A. Yes, I do.

Q. If there were a trial, Mr. Garzon, you would have a right to see and hear all of the witnesses against you and your attorney could cross examine them. You would have a right to have your attorney object to the government's evidence and offer evidence on your behalf if you so desired and you would have the right to have subpoenas issued or other compulsory process used to compel witnesses to testify in your defense. Do you understand that?

A. Yes, sir.

Q. If there were a trial, Mr. Garzon, you would have

the right to testify, if you wanted to, but no one could force you to testify if you did not want to. Further, no inference or suggestion of guilt could be drawn if you chose not to testify at a trial. Do you understand that?

A. Yes, sir.

Q. Do you understand that by entering a plea of guilty today you are giving up each and every one of the rights that I have described, that you are waiving these rights and that you will have no trial?

A. I do, sir.

Q. Do you understand that you can change your mind right now and refuse to enter a plea of guilty?

A. Yes, sir.

Q. You do not have to enter this plea if you do not want to for any reason. Do you understand this fully, Mr. Garzon?

A. Yes, I do.

Q. Now, Mr. Garzon, have you received a copy of the misdemeanor information?

A. Yes, I have.

Q. And have you read it?

A. Yes.

Q. And did your attorney, Mr. Hellerer, discuss the information with you?

A. Yes, he did, sir.

Q. Do you waive my reading of the information word for word here in open court?

A. Yes, sir.

Q. Now, do you understand that the information charges you with, while being an assistant bank examiner, unlawfully taking property of value in possession of banks that were members of the Federal Reserve system in violation of Title 18 of the United States Code, Section 655?

A. I do, sir.

Q. And do you understand that you have a constitutional right to be charged by an indictment rather than by an information?

A. Yes, sir.

Q. An indictment, Mr. Garzon, would be from a grand jury and not like the information, simply a charge by the prosecutor. Do you understand that you have waived the right to be charged by an indictment and that you have consented to being charged by an information of the government?

A. Yes, sir.

Q. And do you waive this right voluntarily and knowingly?

A. Yes, I do.

Q. Mr. Garzon, do you understand that if you did not plead guilty the government would have to prove each and

every part or element of the charge in the information beyond a reasonable doubt at a trial?

A. Yes, I do.

Q. And do you understand that the government would be required to prove that you were a bank examiner or an assistant bank examiner, that you had stolen or unlawfully taken or unlawfully concealed money, notes, drafts, bonds or securities, or any other property of value from a bank or banking institution which is a member of the Federal Reserve system or insured by the Federal Deposit Insurance Corporation or a branch or agency of a foreign bank or an organization operating under Sections 25 or 25(a) of the Federal Reserve Act, do you understand that?

A. Yes, sir.

Q. Do you understand that the maximum possible penalty of the crime to which you are entering a plea of guilty is one year of imprisonment, plus a maximum fine of the greatest of $100,000, twice the gross pecuniary gain derived from the offense or twice the gross pecuniary loss to persons other than yourself resulting from the offense, do you understand that?

A. Yes, sir, I do.

Q. And do you also understand that you would be subject to a special assessment of $25?

A. Yes, sir.

Q. And supervised release of a maximum term of one year?

A. Yes, sir.

Q. And supervised release, Mr. Garzon, means that you will be subject to monitoring when you are released from prison, the monitoring to be under terms and conditions which could lead to reimprisonment without a jury trial for all or part of the term of supervised release without credit for time previously served on post-release supervision if you violated the terms and conditions of supervised release, do you understand that?

A. I do.

Q. Do you understand that if I accept your guilty plea and adjudge you guilty that adjudication may deprive you of valuable civil rights, such as the right to vote, the right to hold public office, the right to serve on a jury and the right to possess any kind of firearm?

MR. HELLERER: Your Honor, I think for a misdemeanor information that is not accurate.

THE COURT: I think you are correct on that, Mr. Hellerer, and I withdraw that statement, Mr. Garzon, recognizing that this information supersedes the prior information and only charges you with a misdemeanor.

Q. Under current law, Mr. Garzon, there are sentencing guidelines that judges must follow in determining

your sentence.

Have you talked with your attorney, Mr. Hellerer, about the sentencing guidelines?

A. Yes, sir.

Q. Do you understand that the court will not be able to determine your guideline sentence until after a presentence report has been completed by the U.S. Probation office and you and the government have had a chance to challenge any of the facts reported by the probation office?

A. Yes, sir.

Q. Do you further understand that even after it is determined what guideline range applies to your case I have the authority in some circumstances to impose a sentence that is higher or lower than the sentence called for by the guidelines?

A. Yes, sir.

Q. Do you understand that if you are sentenced to prison parole had been abolished and you will not be released any earlier on parole?

A. Yes, sir.

Q. Do you understand that if your attorney or anyone else has attempted to estimate or predict what your sentence will be, that their estimate or prediction could be wrong?

A. Yes, sir.

Q. No one, Mr. Garzon, not even your attorney or the

government, can nor should give you any assurance of what your sentence will be. Your sentence cannot be determined until after the probation office report is completed and I have ruled on any challenges to the report and determined whether I believe there are grounds to depart up or down from the guideline range, do you understand this?

A. I do.

Q. Do you also fully understand that even if your sentence is different from what your attorney or anyone else told you it might be or if it is different from what you expect, you will still be bound to your guilty plea and you will not be allowed to withdraw your plea of guilty?

A. I do, your Honor.

Q. Now, I have been given a plea agreement dated May 20, 1999 which has been marked as Court Exhibit 1.

Have you signed this plea agreement, Mr. Garzon?

A. Yes, sir.

Q. Did you read this agreement prior to signing it?

A. I did.

Q. Did you discuss it with your attorney, Mr. Hellerer, prior to the time you signed it?

A. I did.

Q. And did you read it at the time you signed it?

A. Yes, I did.

Q. Did you fully understand this agreement before

you signed it?

A. Yes, sir.

Q. Does this letter agreement, Court Exhibit 1, constitute your complete and total understanding of the entire agreement between the government, your attorney and you?

A. Yes, sir.

Q. Is everything about your plea and sentence contained in this agreement?

A. Yes, sir.

Q. And has anything been left out?

A. No, sir.

Q. Has anyone offered you any inducements or threatened you or forced you to plead guilty or to enter into this plea agreement which is Court Exhibit 1?

A. No, sir.

Q. Do you understand that as part of this plea agreement you are giving up or waiving your right to appeal if I sentence you within the guidelines range?

A. I do, sir.

Q. Do you understand that I am completely free to disregard any position or recommendation by your attorney or by the government as to what your sentence should be and that I have the ability to impose whatever sentence I believe is appropriate under the circumstances and

guidelines and you will have no right to withdraw your plea?

A. I do.

THE COURT: Mr. Hellerer, do you know of any valid defense that would prevail at trial or do you know of any reason why your client should not be permitted to plead guilty?

MR. HELLERER: No, your Honor.

THE COURT: Is there an adequate factual basis to support this plea of guilty, Mr. Hellerer?

MR. HELLERER: We believe so, your Honor. I think the government believes so as well.

THE COURT: Mr. Greenwald, in the government's view, is there an adequate factual basis to support this plea of guilty?

MR. GREENWALD: Absolutely, your Honor.

Q. Mr. Garzon, please tell me what you did in connection with the crime to which you are entering a plea of guilty?

A. Yes, sir. While I worked at the Federal Reserve Bank as part of my job responsibilities I took certain documents home to work on them and kept --

Q. You have to speak up. I am having trouble hearing you.

A. While working for the Federal Reserve Bank as part of my job responsibilities I took certain documents

home to work on them and kept those documents after I left the Federal Reserve and some of those documents were of a confidential nature.

Q. And when did you do this?

A. I worked at the Federal Reserve between 1995 and 1997.

Q. And where did you work at the Federal Reserve Bank, what branch of the Federal Reserve Bank did you work at?

A. The Federal Reserve Bank of New York.

Q. Here in the Southern District of New York in lower Manhattan?

A. Yes, sir.

Q. And at that time what was your position at the Federal Reserve Bank?

A. It was assistant bank examiner.

Q. And did you know at the time that you were taking these documents home that that was unlawful?

MR. HELLERER: One moment, your Honor.

(Pause)

A. The taking of the documents it was my understanding it was illegal to take the documents and to keep them after I left. I understand it was illegal.

Q. So is it your testimony that you took documents home while employed and after you left the Federal Reserve

Bank you never returned those documents to the Federal Reserve Bank?

A. Yes, sir.

Q. Is that correct?

A. That is correct.

Q. And when you failed to return those documents to the Federal Reserve Bank, did you know that that was wrong?

A. I knew it was wrong.

MR. GREENWALD: If your Honor can just confirm that among the documents the defendant failed to return were documents that belonged to banks that were members of the Federal Reserve system.

Q. What kind of documents did you fail to return to the Federal Reserve Bank upon your departure from the employ of the Federal Reserve Bank?

A. Internal policies and procedures, some documentations for pricing model testing, just internal manuals for procedures written by the banks.

Q. What banks were these?

A. They were Chase Manhattan Bank, Bankers Trust, Chemical Bank and J.P. Morgan, sir.

Q. And you knew those institutions to be members of the Federal Reserve system?

A. I did.

THE COURT: Would the government please summarize

its evidence against the defendant?

MR. GREENWALD: Yes.

The government's evidence against the defendant would consist primarily of the introduction of documents seized pursuant to a search warrant from the defendant's home and from his workplace that the government would prove by competent evidence came from examinations that the defendant had worked on.

Q. Mr. Garzon, how do you now plead to the charge in the information, guilty or not guilty?

A. Guilty, sir.

Q. Are you pleading guilty because you are guilty?

A. Yes, sir.

Q. Are you pleading guilty voluntarily and of your own free will?

A. I am.

THE COURT: Mr. Hellerer, do you wish me to make any further inquiries of Mr. Garzon?

MR. HELLERER: No, your Honor, I don't think any further inquiry is required.

THE COURT: Does the government wish me to make any further inquiries of the defendant?

MR. GREENWALD: No, your Honor.

THE COURT: Mr. Garzon, because you acknowledge that you are guilty as charged in the information and

because I find you know your rights and are waiving them knowingly and voluntarily, and because I find your plea is entered knowingly and voluntarily and is supported by an independent basis in fact containing each of the essential elements of the offense, I accept your guilty plea and adjudge you guilty of the offense to which you have pleaded.

Now, the U.S. Probation office will next prepare a presentence report to assist me in sentencing you. You will be interviewed by the probation office. It is important that the information you give the probation officer be truthful and accurate. The report is important in my decision as to what your sentence will be. You and your attorney have a right and will have an opportunity to examine the report, challenge or comment upon it, and to speak on your behalf before sentencing.

I am going to fix September 10, 1999 at 2:30 as the date and time for sentencing in this matter.

Do either counsel have any applications with respect to or requests to alter any bail conditions?

MR. HELLERER: If I may just have a moment, your Honor.

THE COURT: Certainly.

(Pause)

MR. HELLERER: Your Honor, since the intervening period between now and the sentencing is over the summer

months, Mr. Garzon would like to have his bail geographical limitations extended so that he can visit family in California and in Massachusetts over the course of the summer and I don't believe that the government has any objection to that request.

THE COURT: Mr. Greenwald.

MR. GREENWALD: No objection.

THE COURT: Very well. I am going to modify the geographic limitations on Mr. Garzon's bail conditions to extend them to include California and Massachusetts for the purpose of Mr. Garzon visiting with members of his family who reside in those states and I will note that Mr. Garzon has appeared here on each occasion when the court has required his appearance and I have previously allowed Mr. Garzon to travel outside of the United States for a business purpose with the consent of both counsel in this matter.

So I am modifying his bail conditions to that extent.

Now, Mr. Garzon, do you understand that if you fail to return to my courtroom for sentencing on the day and time set that you will be guilty of a criminal act for which you could be sentenced to imprisonment separate and apart from and in addition to any other sentences you might receive for the crime to which you have just pleaded guilty?

THE DEFENDANT: I do, sir.

THE COURT: And do you further understand that all of the conditions on which you were released up to now continue to apply except that I have extended the geographic limitations and a violation of any of those conditions can be severe?

THE DEFENDANT: Yes, sir.

THE COURT: Then I will fully expect to see you in my courtroom on the date of sentencing and I will at this time advise counsel and you, Mr. Garzon, that when the date of sentencing comes around we will not be in this courtroom but we will be in courtroom 618 in this building, just four floors above where we are presently sitting. So I will expect to see you in courtroom 618 on September 10, 1999.

Is there anything further that we need to address at this time?

MR. HELLERER: I don't believe so, your Honor.

MR. GREENWALD: No, your Honor.

THE COURT: Very well.

Thank you, gentlemen.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CARMEN M. SEGARRA,

Plaintiff,

v. 13 CV 7173 (RA)

THE FEDERAL RESERVE BANK OF NEW YORK,
MICHAEL SILVA, MICHAEL KOH,
and JOHNATHON KIM,

Defendants.

------------------------------------x

New York, N.Y.
October 15, 2013
10:00 a.m.

Before:

HON. RONNIE ABRAMS

District Judge

APPEARANCES

STENGLE LAW
Attorneys for Plaintiff
BY: LINDA J. STENGLE, ESQ.

THE FEDERAL RESERVE BANK OF NEW YORK
BY: THOMAS C. BAXTER, JR., ESQ.
DAVID L. GROSS, ESQ.

(In open court)

THE CLERK: In the matter of Segarra v. Federal Reserve Bank of New York, Docket No. 13 Civil 7173, counsel please state your name for the record.

MS. STENGLE: Linda Stengle, attorney for the plaintiff.

THE COURT: Good morning.

MS. STENGLE: Good morning.

MR. GROSS: David Gross for the Federal Reserve Bank of New York. Good morning, your Honor.

THE COURT: Good morning.

MR. BAXTER: Thomas Baxter for the Federal Reserve.

THE COURT: Good morning.

Before we hear the expedited motion of the Federal Reserve Bank of New York pursuant to Fed.R.Civ.P. 26(c) to redact 67 paragraphs of plaintiff's complaint and all of the attached exhibits and to order plaintiff's counsel not to publish any additional confidential supervisory information without further order of the Court, I have your letters. Have all of them been filed on ECF?

MS. STENGLE: There is some confusion with the ECF docket. I take some responsibility for that confusion. I was operating -- I thought my colleague followed the Court's procedures on those and so I didn't communicate with chambers. I apologize.

THE COURT: My rules have been changed since the rules for filing on ECF have been changed, so I would just ask you to file your letter on ECF so there is a complete record on the docket.

MS. STENGLE: I'm happy to straighten that out and the errors, your Honor.

THE COURT: Thank you.

Mr. Gross, would you like to be heard first on your motion?

MR. GROSS: Yes, please, your Honor.

Your Honor, as the Court knows, *Roche* and those cases do acknowledge a right to access to the documents in question. But there are countervailing considerations also to be taken into consideration. The cases mention things like attorney-client privilege, or possibly the right of law enforcement to conduct operations unfettered by thinking that information is going to be made public.

The Federal Reserve argues that the information in this case is very much like the information in those examples I just mentioned. There is an acknowledged bank examination privilege that exists between the Federal Reserve and the institutions it supervises, so that there can be a free exchange of ideas and a free exchange of information between them. If the supervised institutions don't believe that the Federal Reserve is going to keep their information confidential, then they're not going to be as forthcoming and it's going to inure to the detriment of the whole financial system.

THE COURT: Let me ask you a question, actually. One of the cases that I believe you cited, the DC Circuit case regarding the bank examiner's privilege, *In Re Subpoena Served Upon Comptroller of Currency*, notes that the privilege may be overridden to shed light on alleged government malfeasance. Isn't that what the plaintiff is alleging here?

MR. GROSS: Judge, as you point out, for now that is an allegation; you're correct. But it also notes, the cases do note that at this early stage there is a possibility for, I forget the exact words that the Court uses, but there is a possibility for gossip and rumor mongering and things like that. And so there are countervailing balances to that argument, exposing government waste. For now those are just allegations. There will come a time when that will come before the Court, but we don't believe that is ripe just yet.

THE COURT: What do you think plaintiff was supposed to do here? How is she supposed to bring her complaint? Was she supposed to get permission from the Federal Reserve that she was suing beforehand?

MR. GROSS: The first thing is that the documents that she took were taken without authorization. Those documents were stolen from the Federal Reserve. The regulations make clear that confidential supervisory information is the property of the board of governors of the Federal Reserve system. That's in Title 12 CFR 261. So the information was stolen from the Fed. What she certainly could have done was filed a complaint without the appendix containing information that was taken. The complaint could have been filed under seal, or with work redacted, and the Federal Reserve would not have objected to that. Of course she has a right to have her case heard. We don't argue with that. It's only the question of making certain information public that was never meant to be public.

THE COURT: Put aside the attachments. If she had not attached any of the memos and the other items that were attached to the complaint, you're still seeking to have redacted or sealed 67 paragraphs of the complaint. So your view is, she should have filed the complaint under seal?

MR. GROSS: That is our view, your Honor.

THE COURT: What's your position with regard to how the litigation was played out, if I were to seal it? What would happen at summary judgment? What would happen at trial?

MR. GROSS: Well, I do think we'll have to take those as they come, we'll have to cross that bridge when we come to it. But I note that the cases do have, I believe, possibly a more stringent standard for summary judgment, and so the Federal Reserve will have to make a higher showing at that point. I believe that's right. Because that's a dispositive motion. So at that point we will have to show that the documents should be continued to remain under seal.

THE COURT: I noted this Friday morning, but one of the real concerns I have here is that this has already been disseminated to the press. The whole complaint and all the attachments are online in various places. And I think I asked you to address this on Friday. I didn't see anything directly addressing it in your letter. As you may know, the Second Circuit, in *Gambale v. Deutsche Bank*, 377 F.3d 144, found that the District Court erred by disclosing a settlement amount in one its orders but refused to seal that order, saying that the genie was already out of the bottle, even if it was the district court's error. And so I would like you to address that now if you could.

MR. GROSS: I have two arguments on that point, your Honor. The first is, the Court would be -- I hesitate to use the term aiding and abetting -- but the Court would be helping this improper conduct by publishing it in Pacer on its own website because if the Court agrees that these documents are privileged, that they should never have been published, that they're confidential supervisory information that are the property of the board of governors and were stolen from the Federal Reserve, then the Court would be aiding this improper conduct in a way --

THE COURT: Do you have a case to support that? And again, I had asked you to address this on Friday. I didn't see it in your letter.

MR. GROSS: I know, and I do acknowledge I don't have the --

THE COURT: Please proceed.

MR. GROSS: So if the Court agrees that the conduct in the case, taking the documents, was improper, then the Court is furthering that end by having handled it and publishing it on its website. That is our argument.

Furthermore, we don't know what else Ms. Segarra took. So our second argument is, we would like the Court to please address this to tell plaintiff and her counsel not to publish any more of this information without an order of the Court.

THE COURT: Thank you, Mr. Gross.

MR. GROSS: Thank you, your Honor.

THE COURT: Ms. Stengle, would you like to be heard?

MS. STENGLE: Yes. Defendant's argument, to the extent I understand it, is that Congress granted them authority to operate outside of the constitutional documents, separation of powers. They are not law enforcement. They are not even an executive agency. They're a private corporation that has obligations within congressional regulation.

They have cited us their regulations as granted by Congress. My position is that those characterizations of their authority are overly broad. I tried to bring some documents that I thought would be helpful -- *In re Bankers Trust Company*, a Sixth Circuit case, an opinion that ruled against the notion that the Federal Reserve could allege that these documents were -- that similar documents were stolen or that they somehow had the authority under their congressional -- the statutes and regulations to characterize documents like these as stolen and that they could disallow testimony like we're talking about and documents to be placed on the record of Court. The Sixth Circuit found against them and went into the regulatory and statutory underpinnings of the Federal Reserve's argument, found that their characterization of the grant of authority was overly broad and in fact referenced 5 U.S.C. § 301, which is very short. I brought copies of *Bankers Trust* and 301 for the Court. The section does not authorize withholding information from the public or limiting the availability of records to the public.

THE COURT: Let me ask you, do you dispute that the information attached to the complaint, as well as some of the allegations in the complaint, constitute confidential supervisory information, as that term is defined in the CFR?

MS. STENGLE: I think that's a gray area. I think that the defendants are interpreting confidential supervisory information in a way that's much more broad than was intended by Congress, or authorized by Congress, I guess. There are some references to specific sections of the CFR. And in one section I found a limitation. It's either 26.14 or 261.2. There's a limitation on the definition of records, and the records in that section are constrained to define those that are on record at the Federal Reserve Board's central office. Nothing that is attached to the complaint, to my knowledge, conforms to that definition under the regulation.

THE COURT: Let me stop you if I can. Some of the documents specifically state on them "confidential supervisory information," and others indicate that they're restricted from other things.

MS. STENGLE: Your Honor, there are two points about that. One is that I would submit that I see a lot of defendants in litigation that try to evade their liability by writing "confidential," "attorney-client privilege," "release," all sorts of things on the top of the document. Something listed at the top of the document does not mean that the contents of the document conforms to the legal definition that's described at the top of the document. I believe in a lot of these situations there is no relationship between the two. There are some sort of references to attorney-client privilege here. For example, there is nothing suggesting attorney-client privilege at play in any of these documents.

THE COURT: Well, let's just put in a definition under CFR 261.2(c)(1)(ii). "Information" -- this is the definition of "confidential supervisory information" -- "means information gathered by the board in the course of any investigation." And then the definition goes on. That seems rather broad to me.

MS. STENGLE: In *Bankers Trust*, your Honor, which I highly recommend, they talk about the purpose -- the authorization that's given to defendants was to make rules and regulations that assisted in carrying out its responsibilities under the statute. They're not binding on, say, The New York Times, past employees, private counsel. That's an overly broad interpretation of this. And there are constraints on what defendants can do. In *Bankers Trust*, they traced for the authority authorizing regulations and they find that this position is overly broad.

THE COURT: In *Bankers Trust*, unless I'm remembering incorrectly, didn't the Court remand to consider whether the privilege applied?

MS. STENGLE: Yes, they did.

THE COURT: So that wasn't decided, ultimately.

MS. STENGLE: That wasn't decided. I offered it today because I thought it would be illustrative of the regulatory authority that they were citing and the tracings of the constraints on that authority. There are limitations to what Congress can authorize an executive branch agency to do.

THE COURT: Let me ask you this. Why were all those attachments, 60 pages of attachments, with that detailed information about business practices, including descriptions of screenshots and how subsidiaries interact with foreign governments and security provided the client, why was that all necessary to assess the sufficiency of the complaint?

MS. STENGLE: Plaintiff is bringing the action under 12 U.S.C. 1831(j). It is redress for retaliation in execution of her protected conduct. She has the burdens of proof on persuasion in the court system. She must be allowed broad discretion in meeting those burdens. She's just telling what happened, your Honor.

THE COURT: Anything else?

MS. STENGLE: We're asking you to deny the motion in its entirety.

And also, I would like to lodge a motion to strike; there's a discussion on page 3 of defendant's October 11, 2013 last paragraph discussing numbers that were allegedly discussed in the settlement demand. Federal Rules of Evidence 408 -- that's the basis for my objection.

Also, I would ask that the defendants be instructed not to characterize the plaintiff as stealing any documents. The criminal elements of a stealing allegation are very clear. She never interfered with the dominion or possession of the documents. It's misplaced.

THE COURT: Yes. I'm not going to prevent them from arguing that, which they've done. It's their position, they have argued to me and attached a plea allocution from another case in which confidential supervisory information was stolen, and at least if I understand their argument, they're arguing that your client could be subject to civil if not criminal penalties as a result of taking and exposing this information. That's their allegation.

Am I right, Mr. Gross?

MR. GROSS: You are, your Honor. And also I would just like to point out that last week, a former supervisor of the Federal Reserve Bank of Chicago was sentenced for stealing federal supervisory information.

MS. STENGLE: They're not a law enforcement agency, your Honor. I think it's inappropriate. But I understand the ruling. Thank you.

THE COURT: Anything else from the Federal Reserve?

MR. GROSS: Just one thing, your Honor. I wasn't sure that I understood one point that the plaintiff's counsel made about disclosure being made by employees or former employees of the Federal Reserve system. I just want to point the Court to 12 CFR 261.14(e), "Prohibition against disclosure. Except as provided in this part, no officer, employee, or agent of the board or any Federal Reserve Bank shall disclose or permit the disclosure of any unpublished information of the board to any person (other than Board or Reserve Bank officers, employees, or agents properly entitled to such information for the performance of official duties)."

THE COURT: Thank you.

After considering the letters and arguments of the parties made here today, I am ready to rule.

I fully appreciate the Federal Reserve's desire, indeed obligation, to seek to keep confidential supervisory information of the banks it supervises and to keep that information confidential. Although much if not all of the information in the complaint does appear to be relevant to plaintiff's claim pursuant to 12 CFR 261.22, this information was intended to be confidential and privileged by law. Indeed, the Federal Reserve has at least asserted that plaintiff's conduct in continuing to possess such information and use it for an unauthorized purpose may subject her to civil and even criminal charges.

My rule here today, however, is solely to determine whether the information must be redacted from the public version of the complaint. The problem I have is this, and I think I noted it on Friday and noted it again today: It has already been disclosed and the complete version of the complaint with all attachments is available on numerous websites. The Second Circuit addressed a somewhat similar situation in *Gambale v. Deutsche Bank*, 377 F.3d 133, when a district court erroneously published in an order the amount of a confidential settlement. In refusing to seal the district court's order, the Circuit held that although the amount of the settlement should have remained confidential, "subsequent to publication, it was confidential no longer." It explained that the court's order now resides on the highly accessible databases of Westlaw and LEXIS, and apparently has been disseminated prominently elsewhere. We simply do not have the power, the Court said, even if we were of the mind to use it, to make what has thus become public private again." "This is generally so," the Court further noted, "when information that is supposed to be confidential -- whether it be settlement terms of a discrimination lawsuit or the secret to the hydrogen bomb...is publicly disclosed, it necessarily remains public." Following *Gambale*, other courts in this circuit have also declined to seal materials that have already become part of the public domain. See Judge Weinstein's decision in *JetBlue Airways Corp. v. Helferich*, 2013 WL 713929 at 11, as well as the decisions in *Gucci American Incorporated v. Guess Incorporated*, 2010 WL 14168946, at 1, and *In re Application to Unseal*, 98 Crim. 1101, 891 F.Supp.2d at 300.

The cat is similarly out of the bag here and the genie out of the bottle, in metaphors or phrases this Circuit has used. I'm not without sympathy. The Federal Reserve attempts to ensure that the laws regarding confidentiality are adhered to so that banks continue to be candid and forthcoming. But I am simply not convinced and the Federal Reserve has not presented me with any case suggesting that anything will be accomplished by sealing or redacting a complaint that is publicly available elsewhere, or that that will accomplish anything to further the goals of the Federal Reserve or the banks that it supervises.

Finally, the Federal Reserve seeks an order precluding plaintiff and her counsel from disseminating any further confidential supervisory information without further order of the Court. I'm not going to enter an order at this time because we haven't yet had a full briefing or a hearing on a motion for preliminary injunction, but I do want to make clear that I expect the plaintiff and her counsel, I expect that you will not reveal any additional confidential supervisory information without leave of this Court. Of course, plaintiff may proceed with her case and is free to make any motions that she chooses during the course of the litigation. But at this time I expect you to come to me before you disclose any additional CSI.

MS. STENGLE: Just a clarification, your Honor: So am I to understand that the way you are defining "confidential supervisory information" is if those three words appear on some version of the document?

THE COURT: I don't think that the words need to appear on the document, but I think that "confidential supervisory information" is defined in the CFR. A lot has already been disclosed, and as I said it's already been disclosed, it is out of the bag, but if there is any additional confidential supervisory information you are seeking to disseminate at this point, I would ask that you request leave of the Court.

MS. STENGLE: I am also clarifying that you're constraining plaintiff's right to talk about aspects of her case? I'm just trying to understand. I don't want to run afoul of your order.

THE COURT: No, no, absolutely. This is not a gag order. I'm not telling plaintiff that she can't talk. In the complaint and attached to the complaint, there is a lot of information that appears to be confidential supervisory information, as that term is defined in the CFR. What I'm asking is, if there is any additional CSI, other than what's in the complaint and the attachments, that plaintiff is seeking to disclose, that she request leave of the Court before doing so.

MS. STENGLE: I understand, your Honor.

THE COURT: Thank you. We are adjourned.

MR. GROSS: Thank you, your Honor.

MR. BAXTER: Thank you.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARMEN M. SEGARRA,	
Plaintiff,	
	ECF CASE
v.	
	13-CV-07173 (RA)
FEDERAL RESERVE BANK OF NEW YORK, MICHAEL SILVA, MICHAEL KOH, and JOHNATHON KIM,	ORAL ARGUMENT REQUESTED
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

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Defendants Federal Reserve Bank of New York (the "New York Fed") and Michael Silva, Michael Koh, and Johnathon Kim (collectively, the "Individual Defendants") respectfully submit this memorandum of law in support of their motion to dismiss Plaintiff Carmen Segarra's Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

Plaintiff presents four purported causes of action, each of which fails to state a claim for the following reasons.

Federal "whistleblower" statute. On its face, 12 U.S.C. § 1831j creates no liability for individual employees of a Federal Reserve Bank. Plaintiff, therefore, cannot sue the Individual Defendants under this statute. Plaintiff's claim against the New York Fed fails for two reasons. *First*, Plaintiff has not alleged a protected activity. Although Plaintiff asserts that she reported a violation of conflict of interest "regulations," the authority to which she refers is an advisory letter, not a regulation. Even if the Complaint concerned illegal conduct, as opposed to suboptimal practices, Plaintiff's claim that she "provided information" that Goldman Sachs "had no firmwide conflict of interest policy" is belied by her allegation that *someone else* actually provided that information to the New York Fed. Plaintiff cannot now, in hindsight, seek protection for information that she did not provide. *Second*, Plaintiff's "whistleblower" claim is implausible owing to numerous contradictions within her pleadings. Most glaringly, despite Plaintiff's allegation that Goldman Sachs lacked a firmwide conflict of interest policy, she has attached exhibits showing that Goldman Sachs's "nonexistent" policies were, in fact, available on its public website. Considered in its entirety, the gravamen of the Complaint is not a "whistleblower's" provision of information, but a non-actionable disagreement between a supervised employee and more senior colleagues over how to interpret a Federal Reserve policy.

New York consumer protection statute. Plaintiff cannot bring a "consumer protection" claim against any of the Defendants because the exercise of government supervisory responsibilities is not consumer-oriented conduct—*i.e.*, offering goods and services for sale to the general public. On its face, the New York statute plainly does not apply to employment disputes, much less the supervision of financial institutions by a federal instrumentality like the New York Fed, whose operations are governed by Congress, not the states.

Breach of Implied Contract. Plaintiff cannot recover against the Individual Defendants for breach of an "implied" employment contract because she does not and cannot allege any contractual privity with them. Moreover, Plaintiff's allegation that she had an "implied" employment contract with the New York Fed rests on the erroneous legal assertion that she was *not* an "at will" employee, which is expressly contradicted by the Federal Reserve Act.

Wrongful Termination. New York does not recognize the tort of wrongful termination in "at will" employment arrangements. Even if it did, Plaintiff could not recover against the Individual Defendants because she admits that it was the New York Fed that actually employed her and, *a fortiori*, would be the party compelled to rehire her (the principal relief sought).

Remedies. Plaintiff is not entitled to reinstatement or front pay because she flagrantly violated New York Fed policies, federal regulations, and federal criminal law when she misappropriated and published confidential supervisory information without permission from the Board of Governors of the Federal Reserve System. This conduct provides independent grounds for termination, and, under settled law, necessarily precludes an equitable right to future employment or front pay. Finally, the New York Fed is not liable for punitive damages because, as part of the Nation's central bank, it may not be punished absent clear authorization from Congress—a notable omission from the Complaint.

STATEMENT OF FACTS

The New York Fed is one of twelve regional reserve banks that, along with the Board of Governors and the Federal Open Market Committee, make up the Federal Reserve System, the nation's central bank. Pursuant to authority delegated by the Board of Governors, the New York Fed supervises numerous financial institutions located within the Second District of the Federal Reserve System, which includes New York State.

The Individual Defendants were, at all relevant times, employees of the New York Fed who worked in its supervisory division. Mr. Silva served as the Senior Supervisory Officer of the New York Fed team conducting an examination of Goldman Sachs, and Mr. Koh served as the Deputy Supervisory Officer. Mr. Kim was Plaintiff's immediate supervisor in the Legal & Compliance group within the New York Fed's supervisory division. The combined tenure of the three Individual Defendants at the New York Fed exceeds 45 years.

Plaintiff, by contrast, worked at the New York Fed for not quite seven months—from October 31, 2011 through May 23, 2012. Although she is an attorney and worked previously at a number of financial institutions, this was her first position as a bank examiner. Her first (and only) assignment was to the Goldman Sachs examination team led by Mr. Silva and Mr. Koh, where she was one of approximately 30 examiners.

According to the Complaint, Plaintiff examined several aspects of Goldman Sachs's compliance function and concluded that the firm "*does not have a conflicts of interest policy*, not firmwide, and not for any divisions. I would go so far as to say they have *never* had a policy on conflicts . . . ." (Compl. Ex. at 56-57 (emphases added).) This, apparently, was not news: Plaintiff alleges that "Goldman's lack of a firmwide conflict of interest policy" was "frequently discussed" among her colleagues. (Compl. ¶ 23.) She also alleges that Goldman Sachs admitted its lack of a firmwide conflict of interest policy at several meetings with the New York Fed, including a meeting on December 8, 2011—approximately one month after Plaintiff was hired. (Compl. ¶¶ 22, 24.) As alleged, Goldman Sachs's December 8 admission was made not to Plaintiff directly, but rather to a group of examiners that included Mr. Silva and Mr. Kim (Compl. Ex. at 39), who instructed her to organize the meeting (Compl. ¶ 23). Plaintiff further alleges that the Individual Defendants predicted that news of Goldman Sachs's lack of a conflict of interest policy would cause that firm to "explode" and would trigger a "run off" of "consumers and clients." (Compl. ¶¶ 30-31.) Just how the results of a confidential examination would ever become public is, however, left to the imagination.

In Plaintiff's view, Goldman Sachs's lack of a conflict of interest policy violated "SR 08-8," an advisory letter published in 2008 by the Board of Governors' Division of Bank Supervision and Regulation (hence, "SR").[1] SR 08-8 contains "clarification as to the Federal Reserve's views" regarding "a firmwide approach to compliance risk management and oversight." (Declaration of David Gross ("Gross Decl.") Ex. A at 2.) The letter advises, among other things, that supervised financial institutions "should have effective compliance risk management programs that are appropriately tailored to the organizations' risk profiles," which may "vary considerably." (*Id* at 3.) Especially for "[l]arger, more complex banking organizations" (*id.*), SR 08-8 recommends "compliance policies," a defined term with two components: (1) a firmwide policy applicable to "all employees throughout the organization," and (2) more tailored policies for "specific business lines." (Gross Decl. Ex. A at 11-12 n.4.)

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[1] According to the Board of Governors' website, SR Letters "address significant policy and procedural matters related to the Federal Reserve System's supervisory responsibilities" and are "a means of disseminating information to banking supervision staff at the Board and the Reserve Banks, as well as to supervised banking organizations." (Gross Decl. Ex. B ("About SR Letters," *available at* http://www.federalreserve.gov/bankinforeg/srletters/about.htm).)

Plaintiff's "finding" about a lack of conflict of interest policies allegedly received attention from many others at the New York Fed, including the two most senior officers in charge of the Goldman Sachs supervisory team (Mr. Silva and Mr. Koh) and colleagues in the Legal & Compliance group (including Mr. Kim). Many meetings were held to discuss her findings, both internally and with Goldman Sachs. (*See, e.g.*, Compl. ¶¶ 24, 29, 49, 52, 63, 79, and 83.) The issue was even vetted with the Operating Committee ("OC"), a system-wide committee for large institution oversight established by the Board of Governors. (Compl. Ex. at 55.) In the end, however, the Defendants took issue with Plaintiff's conclusions in two respects. *First*, Plaintiff had not analyzed Goldman Sachs' conflict of interest policies sufficiently to support her conclusions. For example, according to the exhibits appended to the Complaint, Mr. Kim and Mr. Silva wrote to Plaintiff in May 2012 that it was premature to jump to a conclusion about Goldman Sachs's policies because "due diligence has not been completed" (*id.* at 56) and "we have not even submitted our . . . follow-up questions" (*id.* at 55). *Second*, written conflict of interest policies—including eponymous sections of a firmwide "Code of Business Conduct and Ethics" (Gross Decl. Ex. C at 4-5) and "Report of the Business Standards Committee" (Gross Decl. Ex. D at 16-25)—were available on Goldman Sachs's public website. (Compl. Ex. at 55-56.) As Mr. Silva wrote to Plaintiff, the existence of those public documents raised "serious questions in my mind as to your judgment in reaching and communicating conclusions without a sound basis in the supervisory process and before the due diligence and vetting process is complete." (*Id.* at 55.)

Soon after her exchange of email with Mr. Silva and Mr. Kim in May 2012, the New York Fed fired Plaintiff for cause. Plaintiff was *not* fired because she identified a possible violation of law or regulation. Indeed, her pleading demonstrates on its face that her concerns about Goldman Sachs had the attention of very senior management, who investigated her concerns but disagreed with her conclusions. Even Mr. Silva, for whom Plaintiff reserves her sharpest criticism, wrote to Plaintiff in May 2012 that further investigation of Goldman Sachs was warranted:

> [A]s examiners, we can and should point out ways the firm's [Conflict of Interest] policy needs to be improved, or be better organized, or be better documented in the event that, after conducting appropriate due diligence and vetting of our conclusions, we find it to be deficient in any of these respects. Perhaps [Goldman Sachs's Conflict of Interest] policies should be more like the ones for [other banks] that you mention. (*Id.* at 55.)

Approximately 17 months after she was fired, Plaintiff sued the New York Fed and three former colleagues for wrongful termination.[2] Plaintiff's core claim of wrongful termination is divided into four distinct purported causes of action: (1) a violation of the Federal Deposit Insurance Corporation Improvement Act of 1991, as amended and codified at 12 U.S.C. § 1831j ("section 1831j"); (2) a violation of New York's "consumer protection" law, N.Y. Gen. Bus. Law § 349; (3) breach of an implied employment contract; and (4) a common law tort of wrongful termination in violation of public policy. Not one of these purported claims is cognizable, for the reasons addressed below.

ARGUMENT

Under Rule 8 of the Federal Rules of Civil Procedure, a complaint must be "facially plausible" and "give fair notice to the defendants of the basis for the claim." *Barbosa v. Continuum Health Partners, Inc.*, 716 F. Supp. 2d 210, 215 (S.D.N.Y. 2010) (quotation marks omitted). A claim is facially plausible when it contains "factual content that allows the court to

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[2] As the Court is aware, the Complaint and its exhibits contain confidential supervisory information, which is protected from public disclosure by federal regulations. *See* Gross Decl. Ex. E (Letters to the Court dated October 10, 2013 and October 11, 2013.) Notwithstanding these regulations, Plaintiff published unredacted copies of her Complaint, including the attachments, to members of the news media before filing her lawsuit.

draw the reasonable inference that the defendant is liable for the misconduct alleged," a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). In reviewing a motion brought under Rule 12(b)(6) of the Federal Rules of Civil Procedure, legal conclusions, as opposed to factual allegations, need not be credited, *id.* at 678, and factual allegations that are (a) inconsistent with other allegations in the pleadings, or (b) inconsistent with documents referenced in the pleadings, are not presumed to be true. *See, e.g.*, *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 405 (S.D.N.Y. 2001) (stating that the court will not credit allegations that are "contradicted either by statements in the complaint itself or by documents upon which its pleadings rely").

I. Plaintiff Has Failed to State a Claim Under Section 1831j.

A. Section 1831j does not create liability for the Individual Defendants.

The Individual Defendants may not be sued under section 1831j because that statute does not create liability for individual employees of a Federal Reserve Bank. *See Cosgrove v. Fed. Home Loan Bank*, No. 90 Civ. 6455, 1999 U.S. Dist. LEXIS 7420, at *24 (S.D.N.Y. Mar. 22, 1999) ("Section 1831j has no provision imposing liability upon individuals or permitting remedies against individuals."). Instead, section 1831j prohibits federal bank supervisors—specifically, a "Federal banking agency, Federal home loan bank, [or] Federal reserve bank"—from firing an employee for reporting "any possible violation of any law or regulation." 12 U.S.C. § 1831j(a)(2). Former employees who were terminated in violation of section 1831j(a)(2) may sue their former employers to enforce their right against unlawful discrimination, *see id.* at § 1831j(b), but the available relief is expressly directed at the employer, "which committed the violation," *id.* at § 1831j(c), and not the people who do the employer's work.[3]

So far as Defendants are aware, every court to consider the issue has concluded, as Judge Patterson did in *Cosgrove*, that there is no individual liability under section 1831j. *See, e.g.*, *Fasano v. Fed. Reserve Bank of N.Y.*, 457 F.3d 274, 283 n.11 (3d Cir. 2006) (collecting cases); *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 502-03 (5th Cir. 1994) (observing that section 1831j applies to only "two types of actors," depository institutions and federal bank supervisors); *Hicks v. Resolution Trust Corp.*, 767 F. Supp. 167, 172 (N.D. Ill. 1991) (dismissing claims under section 1831j against "individual defendants in both their official and individual capacities"). Indeed, *Hicks* observed that 12 U.S.C. § 1813, which defines the terms used in section 1831j, includes a defined term for "institution-affiliated party" that included "directors, officers, employees or controlling stockholders." *Hicks*, 767 F. Supp. at 172. Congress, however, did not include that class of defendants in section 1831j.

B. Plaintiff has not alleged a protected activity.

As it applies to the instant case, activity protected by section 1831j occurs where "any employee . . . provid[es] information to [a Federal Reserve Bank] regarding any possible violation of any law or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety by . . . any depository institution." 12 U.S.C. § 1831j(a)(2). Plaintiff asserts that the New York Fed fired her for two

[3] The lone exception to the general rule that only institutions are liable under section 1831j(a)(2) concerns "*any person* who is performing, directly or indirectly, any function or service on behalf of the [*Federal Deposit Insurance*] *Corporation* ["FDIC"]." During the "savings and loan crisis" of the late 1980s, the FDIC met the temporarily increased need for supervisors of thrifts by engaging contractors to perform its supervisory functions. Congress determined that employees of those contractors, who were performing delegated responsibilities, should enjoy the same degree of "whistleblower" protection as federal employees. *See* 139 Cong. Rec. H10162, 103rd Cong. (1st Sess. 1993) (discussing liability for "FDIC contractors and bank regulators"). The inclusion of this exception, however, only proves the general rule. Congress chose not to create similar liability for "any person" working on behalf of a Federal Reserve Bank.

reasons: "[1] finding Goldman did not have a firmwide conflicts of interest policy in compliance with SR 08-8 and [2] refusing to change her examination findings." (Compl. ¶ 97.) Neither reason constitutes protected activity, and so neither reason is sufficient to state a claim.

The first alleged basis for Plaintiff's termination—"finding Goldman did not have a firmwide conflicts of interest policy in compliance with SR 08-8"—does not constitute protected activity for two reasons.

First, Plaintiff's assertion that SR 08-8 is a "conflict of interest regulation[]" (Compl. ¶ 95) is legally erroneous. Section 1831j requires a plaintiff to have "provided information . . . regarding any possible violation of any law or regulation." SR 08-8, however, is an *advisory letter*, not a regulation. The Administrative Procedures Act ("APA"), which provides the procedural prerequisites for exercising regulatory authority, requires that an agency "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," consider those views, publish a statement of purpose, and provide an opportunity to petition for the "issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(c)-(e). *See also Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979) ("[T]he promulgation of . . . regulations must conform with any procedural requirements imposed by Congress. . . . The pertinent procedural limitations in this case are those found in the APA."). By contrast, "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," are exempt from public notice and comment requirements. 5 U.S.C. § 553(b).

The distinction between regulation and policy is important in several respects. Valid, properly promulgated regulations have the force and effect of law, the same as a statute, because of the opportunity for public notice and comment, which the Supreme Court has characterized as a "quasi-legislative" element. *Chrysler Corp.*,441 U.S. at 302. Administrative policies and guidance, which lack the same procedural safeguards, are not legally binding. *See, e.g.*, *Rinaldi v. United States*, 434 U.S. 22, 29 (1977) (requiring courts to be "receptive, not circumspect" of a Department of Justice policy on duplicative prosecutions). Thus, unlike agency guidance, a properly promulgated regulation of a federal banking agency, like the Federal Reserve, may override and preempt any inconsistent state law. *See Fidelity Fed. Sav. and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982). Agency policy and guidance, therefore, is *not* published in the Code of Federal Regulations, which is reserved for regulations with "legal effect." *See* 44 U.S.C. § 1510 (authorizing a "complete codification[] of the documents of each agency of the Government having general applicability and *legal effect*") (emphasis added); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986) (Scalia, J.) ("The real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations . . . .").[4]

SR 08-8, which was not promulgated according to APA procedures or published in the Code of Federal Regulations, reflects the views of the department within the Board of Governors responsible for the supervision of financial institutions. It is important and persuasive, and gives supervised financial institutions some indication of what bank examiners expect, but it is not a binding agency regulation enacted by the Board of Governors following a period of public notice

[4] The bright-line distinction between regulations and policies was illustrated in a recent decision from the District of New Jersey interpreting a federal criminal statute that had, as a statutory predicate, a "violation of *any law or regulation* of any State." *United States v. Reeves*, 891 F. Supp. 2d 690, 691 (D.N.J. 2012), quoting 16 U.S.C. § 3372(a)(2)(A) (emphasis added). The defendant had been indicted for the unlawful interstate transportation of oysters, and the predicate was a violation of New Jersey's oyster harvest quota. The quota and related "Terms and Conditions" appeared in an official state publication, but were not included in a regulation enacted pursuant to the procedural requirements of New Jersey's Administrative Procedures Act. *Id.* at 704-06 (outlining the notice, comment, publication, and response requirements to enact regulations in New Jersey). Because the oyster quota was not contained in a regulation, the charges predicated on the oyster quota were dismissed. *Id.* at 706-07.

and comment. A quick survey of SR 08-8 confirms its forward-looking, advisory nature. *See Brock*, 796 F.2d at 538 (examining the language used in a Department of Labor policy to assess the intent of the agency, such as the use of "may" versus "will"). The letter "strongly encourages" large financial institutions to devote adequate resources to address compliance challenges, states "expectations" for compliance with the "principles" outlined by the Basel Committee, and aims to provide "clarification as to the Federal Reserve's views regarding certain compliance risk management and oversight matters." (Gross Decl. Ex. A at 2.) SR 08-8 goes on to recommend that large, complex banking organizations "*should* generally implement firmwide compliance risk management programs," and supplies an illustrative list of the topics that these programs "*should* include." (*Id.* at 4 (emphases added).) To be clear, the supervisory expectations in SR 08-8 are important standards for financial institution oversight, which explains the letter's promulgation. *See supra*, n.1. But the letter does not purport to establish new binding regulations to which financial institutions "must" or "shall" adhere. Because SR 08-8 is not a "law" or "regulation," Plaintiff cannot allege protected activity by reporting a violation by Goldman Sachs of mere guidance.[5]

Second, accepting the allegations in the Complaint as true, it was *Goldman Sachs*, not Plaintiff, who reported its lack of a firmwide conflict of interest policy directly to the New York Fed. Plaintiff alleges that at a meeting on December 8, 2011, which was attended by Mr. Silva and Mr. Kim (Compl. Ex. at 39), "*Goldman* stated that it had no firmwide conflict of interest

[5] We also note that, as a technical matter, "Goldman Sachs" is not a "depository institution," as defined in Title 12, Chapter 16 of the United States Code. As a financial institution holding company, The Goldman Sachs Group, Inc. is a "depository institution holding company," which is a separately defined term. 12 U.S.C. § 1813(w)(1). By contrast, a "depository institution" means "any bank or savings association," *id.* at 1813(c)(1), and neither of those terms is defined to include a holding company, *see id.* at 1813(a)(1) ("bank") and (b)(1) ("savings association"). To the extent that a "firmwide" conflict of interest policy refers to the Goldman Sachs holding company, Plaintiff has failed to state a claim under section 1831j.

policy" (Compl. ¶ 24). Mr. Silva then held a follow-up meeting where he "expressed alarm" about what he had just heard. (Compl. ¶ 30.) As pleaded, therefore, Plaintiff happened to attend a meeting at which the admission occurred; she herself did not provide that information. Indeed, Plaintiff also alleges that "Federal Reserve[] employees *frequently discussed* Goldman's lack of a firmwide conflict of interest policy" (Compl. ¶ 23 (emphasis added)), which presumably led her supervisors to request the December 8 meeting (Compl. ¶ 24). If a lack of a conflict of interest policies was "frequently discussed" prior to December 8, by which time Plaintiff had worked at the New York Fed for only *one month*, it is hard to imagine how Plaintiff "blew the whistle" on Goldman Sachs. On its face, section 1831j does not permit a former employee to claim retrospectively that she was fired because *someone else* provided information to a Federal Reserve Bank. Plaintiff, therefore, cannot state a claim based on information provided to the New York Fed by Goldman Sachs.

Plaintiff's second alleged basis for termination—"refusing to change her examination findings" (Compl. ¶ 97)—is not actionable because the statute protects the *provision of information*, not a disagreement between an employee and other more senior officials over the supervisory consequences of that information. *See* 12 U.S.C. 1831j(a)(2) (prohibiting dismissal or discrimination "because the employee . . . provided information"). Were it otherwise, a "whistleblower" statute could be invoked anytime a supervised employee disagrees with the judgment of his supervisors and thereafter feels the supervisors are holding the disagreement against the employee. Moreover, Plaintiff does not and cannot allege that the responsibility for the New York Fed's conclusions regarding a supervised financial institution belonged to her. Throughout her Complaint, Plaintiff repeatedly refers to "*her* examination," "*her* bank examination," "*Carmen's* examination," or "*her* multiple ongoing examinations" of Goldman

Sachs, appropriating for herself what was the prerogative of the Federal Reserve. (*See, e.g.*, Compl. ¶¶ 46-50, 64, 88, 90, and 105.) It was the duty of officials more senior than Plaintiff to decide on the findings of the examination. As Judge Patterson observed in a similar case, involving a bank examiner working for the Federal Home Loan Bank of New York:

> Plaintiff's position that her findings were not incorporated, or not incorporated accurately, into the final reports issued by the FHLBNY is of no consequence here and is insufficient to raise a triable issue of fact. *It is the examiner-in-charge who decides what findings are properly supported in the workpapers and put in the Report of Examination, not the individual examiners working under his or her supervision.* As part of a team of individual examiners, plaintiff had no authority to insist that the Report of Examination be prepared in any specific manner.

Cosgrove, 1999 U.S. Dist. LEXIS 7420 at *48-49 (emphasis added, record citations omitted).

C. Plaintiff's allegations are implausible.

Plaintiff's Complaint is replete with contradictions, and when they are arrayed and aggregated, these contradictions undermine the plausibility of her claim. Most glaringly, Plaintiff alleges that, in December 2011, Goldman Sachs admitted that it "had no firmwide conflict of interest policy." (Compl. ¶ 24.) Goldman Sachs apparently made the same statement—that "it had no firmwide conflict of interest policy"—"on several occasions from November [*sic*] 8, 2011, through May 23, 2012." (Compl. ¶ 22.) Indeed, in May 2012, Plaintiff transmitted the same information to the Individual Defendants: "Just to confirm, Goldman Sachs does not have a conflicts of interest policy, not firmwide, and not for any divisions. I would go so far as to say they never had a policy on conflicts, based on the dates of the documents provided to us for review." (Compl. Ex. at 56-57.) Yet, an exhibit that Plaintiff attached to her Complaint shows that Goldman Sachs had a firmwide conflict of interest policy, the components of which were published on the firm's public website. Mr. Silva's email of May 13, 2012 contains hyperlinks to and excerpts from Goldman Sachs's (1) "Code of Business Conduct and

Ethics," which addresses personal conflict of interests, and (2) "Report of the Business Standards Committee," which summarizes the conflict of interest policies for particular business divisions. (Compl. Ex. at 55-56; Gross Decl. Exs. C at 4-5 & D at 16-25.) The Court may note that SR 08-8 recommends precisely this type of program for large, complex financial institutions:

> Compliance policies refer to both: (1) firmwide compliance policies that apply to *all employees* throughout the organization as they conduct their business and support activities; and (2) the more detailed, *business-specific policies* that are further tailored to, and more specifically address, compliance risks inherent in specific business lines and jurisdictions of operation, and apply to employees conducting business and support activities for the specific business line and/or jurisdiction of operation. (Gross Decl. Ex. A at 11-12 n.4 (emphases added).)

The existence of Goldman Sachs's conflict of interest policies is not a trivial inconsistency. It contradicts the core allegation of the Complaint: that Goldman Sachs "had no firmwide conflict of interest policy" (Compl ¶¶ 22, 24), at any time, neither firmwide nor "for any divisions" (Compl. Ex. at 57). And, for the purpose of a motion to dismiss, the pleading contains on its face a coherent reason for why Plaintiff was dismissed: She rushed to judgments that even her own evidence refuted.

At best, Plaintiff can allege that Goldman Sachs's conflict of interest policies were inadequate. (*Compare* Compl. ¶ 24 ("Goldman stated it had no firmwide conflict of interest policy.") *with* Compl. ¶ 97 ("Goldman did not have a firmwide conflicts of interest policy *in compliance* with SR 08-08.") (emphasis added).) But any theory that Plaintiff was fired because of a disagreement over the meaning of SR 08-8 is inconsistent with facts within the pleadings. Most notably, on May 13, 2012, a few days before Plaintiff was fired, Mr. Silva wrote to Plaintiff that the New York Fed should continue to "point out ways the firm's COI policy needs to be improved, or be better organized, or be better documented," and should consider adopting another firm's policies as a model. (Compl. Ex. at 55.) This statement, which Plaintiff does not and cannot allege was false, shows on its face that there was ongoing discussion about whether Goldman Sachs's policies complied with SR 08-8 and belies any allegation that Plaintiff was fired because of her "finding" about a non-compliant policy. More fundamentally, a disagreement between a supervised employee and more senior colleagues over the application of a Federal Reserve policy is not whistleblowing activity—*i.e.*, the provision of information regarding illegal activity. Under Plaintiff's unique view of section 1831j, any such disagreement in the context of a bank examination would become a federal "whistleblower" case. In the context of organizational employment, however, it is normal for more experienced and seasoned officials to substitute their judgment for that of less experienced employees. The plain meaning of the words that Congress used in section 1831j—a violation of any "law or regulation"—reveals that Congress did not intend to treat a mere substitution of judgment as a cognizable whistleblower claim.[6]

Setting aside the existence of Goldman Sachs's conflict of interest policies, many of the other contradictions and inconsistencies within the Complaint coalesce around Plaintiff's theory that the New York Fed wanted to protect Goldman Sachs from the "implications of Goldman's failure to properly manage conflicts of interest, should those failures become known to consumers and clients." (Compl. ¶ 30.) (*See also* Compl. ¶ 11 (describing connections between the New York Fed and Goldman Sachs).) These contradictions cast doubt on whether Plaintiff's Complaint is plausible on its face and makes "common sense." *Iqbal*, 556 U.S. at 679.

[6] Plaintiff has not alleged that her "findings" demonstrated "gross mismanagement," another type information protected under section 1831j. Any such belated assertion would fail because "gross mismanagement" means "such serious errors . . . that a conclusion the [entity] erred is not debatable among reasonable people," and not "[m]ere differences of opinion between an employee and his agency superiors as to the proper approach to a particular problem." *White v. Dep't of the Air Force*, 391 F.3d 1377, 1381-1382 (Fed. Cir. 2004) (interpreting the Whistleblower Protection Act).

First, in May 2012, just ten days before she was fired, Mr. Silva wrote to Plaintiff that he had personally raised Plaintiff's "finding" at a "vetting session with the [Operating Committee]," only to be told afterwards that the policies were, in fact, posted on Goldman Sachs's website. (Compl. Ex. at 55.) If the Defendants sought to protect Goldman Sachs, why would Mr. Silva elevate Plaintiff's finding to a committee of the Board of Governors or, as noted above, recommend to Plaintiff that Goldman Sachs's policies be reviewed further?

Second, Plaintiff alleges that, during the six months that followed Goldman Sachs's alleged admission, she conducted extensive work on that firm's management of conflicts of interest, including three document requests (Compl. ¶ 21) and innumerable meetings, both internally and with Goldman Sachs (*see, e.g.*, Compl. ¶¶ 24, 29, 49, 52, 63, and 79). She also appears to have had regular and direct contact with the most senior examiner on the supervisory team, Mr. Silva (Compl. ¶ 49), and free communication with the Legal & Compliance group (Compl. ¶ 65). If the Defendants sought to protect Goldman Sachs, why would they have allowed Plaintiff to pursue the conflict of interest matter for six months?[7]

Third, the state of Goldman Sachs's conflict of interest policies was well-known to its "consumers and clients." For one thing, each of the deals "investigated" by Plaintiff received extensive public attention before, during, and after her employment at the New York Fed. Indeed, Plaintiff quotes from a February 29, 2012 decision from the Delaware Chancery Court, which criticized Goldman Sachs for a conflict of interest in a deal concerning Kinder Morgan.

[7] In addition, although temporal proximity between protected activity and discharge may be a basis to infer a causal connection, a six-month gap is too long to create that inference. *See Hollander v. American Cyanamid Co.*, 895 F.2d 80, 85-86 (2d Cir. 1990) (finding no causation where three months elapsed between filing an agency complaint and the alleged discrimination); *Murray v. Visiting Nurse Servs.*, 528 F. Supp. 2d 257, 275 (S.D.N.Y. 2007) (stating that "two to three months between the protected activity and the adverse employment action does not allow for an inference of causation").

(Compl. ¶¶ 53-58.) The decision by Chancellor Strine was widely reported in the mainstream media, *see*, *e.g.*, Andrew Ross Sorkin, "As an Advisor, Goldman Sachs Guaranteed Its Payday," *The New York Times*, March 6, 2012, at B1 (Gross Decl. Ex. F), and it defies reason to speculate that Federal Reserve officials were helping Goldman Sachs hide its well-known business conduct. In addition, Goldman Sachs's conflict of interest policies were available for public inspection on the firm's website. (Compl. Ex. at 55-56.) An investor, client, or enterprising reporter could review the policies and determine whether the firm had adequate safeguards to avoid conflicts of interest.

Fourth, it is unclear how the "run off" allegedly forecast by Mr. Silva and Mr. Koh (Compl. ¶ 31) would come to pass if the New York Fed's supervisory conclusions about Goldman Sachs's conflict of interest policies were *confidential* supervisory information.

These contradictions do not merely render Plaintiff's claim unlikely. They cast significant doubt on whether her claim makes common sense. Because Plaintiff has not pleaded a plausible theory to explain the alleged retaliation, her section 1831j claim must be dismissed.

II. Plaintiff Has Failed to State a Claim under New York's Consumer Protection Law.

Plaintiff's state law "consumer protection" claim must be dismissed because the exercise of government supervisory responsibilities is not "consumer-oriented conduct," which is the touchstone of the New York statute. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25 (1995). Section 349(a) of the New York General Business Law prohibits "[d]eceptive acts or practices in the conduct of any *business, trade or commerce or in the furnishing of any service* in this state." (Emphasis added.) On its face, the statute does not apply to employment disputes, much less the governmental supervision of financial institutions. Instead, "[t]he typical violation contemplated by the statute involves an individual consumer who falls victim to misrepresentations made by a seller of consumer goods usually by way of false and misleading advertising." *Genesco Entm't, Div. of Lymutt Indus., Inc. v. Koch*, 593 F. Supp. 743, 751 (S.D.N.Y. 1984) (Weinfeld, J.). The critical nexus is to some consumer-oriented conduct, "consumer" being the operative word. *See Cruz v. NYNEX Info. Resources*, 263 A.D.2d 285, 289 (1st Dep't 2000) ("In New York law, the term 'consumer' is consistently associated with an individual or natural person who purchases goods, services or property for personal, family or household purposes." (quotation marks omitted)). Thus, section 349 did not provide a cause of action against the Triborough Bridge and Tunnel Authority for overcharges to his E-ZPass account because the defendant was "performing an essential governmental function"—the collection of a toll—which was not a "consumer oriented transaction." *Kinopf v. Triborough Bridge & Tunnel Auth.*, 6 Misc. 3d 73, 74 (N.Y. App. Term, 2d Dep't 2004). For the same reason, an employment dispute arising out of government supervision of a financial institution cannot give rise to a claim for consumer protection. Indeed, the entity that Plaintiff alleges offered "consumer" services (Goldman Sachs) is not even a party to this lawsuit.

Plaintiff's section 349 claim against the New York Fed must also be dismissed because it is barred by the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, cl. 2. As part of the central bank of the United States, the New York Fed is an instrumentality of the federal government,[8] and the scope of its liability for employment lawsuits is established by the

[8] Federal courts routinely characterize Federal Reserve Banks as "instruments" or "instrumentalities" of the United States because of their important governmental function. *See, e.g.*, *Fasano*, 457 F.3d at 281-82 (summarizing "strong arguments" in favor of recognizing a Federal Reserve Bank as an instrumentality of the federal government); *Starr International Co. v. Fed. Reserve Bank of N.Y.*, 906 F. Supp. 2d 202, 231 (S.D.N.Y. 2012) (listing the tests for instrumentality status and concluding that the New York Fed "satisfies all of these standards, including the most stringent"). *See also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 422

Federal Reserve Act of 1913, 12 U.S.C. § 341, and federal anti-discrimination statutes. In order for states or municipalities to superimpose additional liability on a federal instrumentality, Congress must provide "clear and unambiguous" authorization for such regulation. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988) ("It is well settled that the activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides 'clear and unambiguous' authorization for such regulation."). *Accord Armand Schmoll, Inc. v. Fed. Reserve Bank of N.Y.*, 286 N.Y. 503, 506 (1941) ("The Federal Reserve Bank is a federal agency exercising powers conferred by federal statute and performing duties imposed upon it by federal statute in a field which, under the Constitution of the United States, is within the sole and exclusive jurisdiction of the federal government."). No provision of federal law suggests, much less clearly and unambiguously states, that state consumer protection laws should govern the employment or supervisory practices of Federal Reserve Banks.[9] Without such authorization, Plaintiff cannot state a claim against the New York Fed.

III. Plaintiff Has Failed to State a Claim for Breach of an Implied Contract.

Plaintiff cannot maintain her claim for breach of an implied employment contract against the three Individual Defendants because she lacks privity of contract. A claim for breach of contract ordinarily lies against a contracting party. *See generally Yucyco, Ltd. v. Republic of Slovenia*, 984 F. Supp. 209, 215 (S.D.N.Y. 1997). Plaintiff, however, does not and cannot allege

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(1819) (describing the Second Bank of the United States, then the Nation's central bank, and its branches as a "convenient, a useful, and essential instrument in the prosecution of [the Nation's] fiscal operations").

[9] Nor would such a provision make sense. If Federal Reserve Banks across the country would be required to conform their conduct to different standards set by the laws of each state in which they operate, instead of to the uniform standards set by federal law, state governments would be allowed to dictate the terms by which Federal Reserve Banks, through their employees, carry out their vital central banking functions—a perverse result that could not have been intended by Congress and should not be allowed by this Court.

that she had an employment contract with the Individual Defendants; indeed, she admits that her employer was the New York Fed (Compl. ¶ 16).

Plaintiff's breach-of-contract claim against the New York Fed fails as a matter of law because Plaintiff was an "at will" employee who was not subject to an employment contract. The Federal Reserve Act provides that "officers and employees" of Federal Reserve Banks may be "dismiss[ed] at pleasure," 12 U.S.C. § 341 (Fifth), which is synonymous with "at will" employment. *See Moodie v. Fed. Reserve Bank of N.Y.*, 831 F. Supp. 333, 336-37 (S.D.N.Y. 1993) (describing Federal Reserve Banks as "employers at will"); *Daniels v. Fed. Reserve Bank of Chicago*, No. 98 C 1186, 2004 U.S. Dist. LEXIS 3412, at *26 n.3 (N.D. Ill. Mar. 3, 2004) (stating that the Federal Reserve Act created an "at-will employment situation"); *see also Kroske v. US Bank Corp.*, 432 F.3d 976, 984 (9th Cir. 2005) (concluding that, under the National Bank Act, "a bank's power to dismiss at pleasure is analogous to dismiss at will, implying the absence of a contractual relationship between employer and employee") (internal quotation marks omitted). The New York Fed's statutory right to dismiss employees "at pleasure" is fundamentally inconsistent with a contractual employment relationship, in which an employee has a contractual right to retain employment. *See Mele v. Fed. Reserve Bank of N.Y.*, 359 F.3d 251, 255 (3d Cir. 2004) ("[T]he Federal Reserve Act precludes enforcement against a Federal Reserve Bank of an employment contract that would compromise its statutory power to dismiss at pleasure, and prevents the development of a reasonable expectation of continued employment."); *Jaffe v. Fed. Reserve Bank of Chicago*, 586 F. Supp. 106, 107-08 (N.D. Ill. 1984) ("Courts uniformly hold that [the Federal Reserve Act] precludes the enforcement of any employment contract against a Federal Reserve Bank and prevents the development of any reasonable expectation of continued employment.").

There is no basis to support Plaintiff's legal assertion that section 1831j fundamentally changes the nature of "at will" employment at Federal Reserve Banks. (Compl. ¶ 118.) Section 1831j does not alter the fundamental right of an employee to "walk away" from a job, or the general right of a Federal Reserve Bank to fire the employee with or without cause. It merely prohibits firing for certain causes. To the extent that Plaintiff also asserts that any of the New York Fed's employee policies—communicated "in writing and verbally"—create an implied employment contract (Compl. ¶ 119), the possibility of abrogating the Federal Reserve Act by private contract was long ago considered and rejected. *See Obradovich v. Fed. Reserve Bank of N.Y.*, 569 F. Supp. 785, 790 (S.D.N.Y. 1983) (Weinfeld, J.) ("The Court holds, therefore, that the 'dismiss at pleasure' provision of the Federal Reserve's corporate powers statute restricts the Federal Reserve's power to contract with *all employees*. Any implied contract based upon the Federal Reserve's personnel rules would exceed the Federal Reserve's authority, and be unenforceable."); *Bollow v. Fed. Reserve Bank of San Francisco*, 650 F.2d 1093, 1098 (9th Cir. 1981) ("[N]o process or tenure rights are conferred on reserve bank employees by [the Federal Reserve Act]. . . . [A]ttempts to create such rights by reference to independent sources are violative of the statute and void thereunder.").

IV. Plaintiff Has Failed to State a Claim for Wrongful Termination in Violation of Public Policy.

Plaintiff's claim for the tort of wrongful termination in violation of public policy must be dismissed because "New York does not recognize a tort of wrongful discharge for at-will employment." *Caruso v. City of New York*, No. 06 Civ. 5997, 2013 U.S. Dist. LEXIS 138643, at *77 (S.D.N.Y. Sept. 26, 2013) (Abrams, J.). *See also Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 301 (1983) (declining, in the context of an "at will" employment arrangement, to recognize a tort for "abusive discharge . . . where employees have been discharged for disclosing illegal activities on the part of their employers"). As explained above, Plaintiff was unquestionably an "at will" employee, and the status of her employment arrangement is fixed by federal law. Even if Plaintiff could bring this tort against the New York Fed, her claim against the Individual Defendants must be dismissed for the independent reason that Plaintiff could only be fired by her employer, the New York Fed (Compl. ¶ 16), not by any of her co-employees. Indeed, two of the three Individual Defendants—Mr. Silva and Mr. Koh—are not even alleged to have been Plaintiff's supervisors. Although any institution necessarily acts through its employees, the power of a Federal Reserve Bank to "dismiss at pleasure" is expressly vested by statute in the *institution*, not any particular individuals. 12 U.S.C. § 341. Moreover, only the New York Fed may reinstate Plaintiff, which is the principal relief sought. (Compl. ¶ 115.)

V. Plaintiff is Not Entitled to Reinstatement or Front Pay.

Plaintiff is not entitled to reinstatement or front pay because of her own wrongdoing, which was discovered after the New York Fed fired her. Although reinstatement is a remedy available under many federal employment statutes, the Supreme Court has held that where a defendant learns in the course of litigation of an independent ground to fire a former employee, neither reinstatement nor front pay is an appropriate remedy. *See McKennon v. Nashville Banner Publ. Co.*, 513 U.S. 352, 361 (1995).

The circumstances of the instant case are strikingly similar to the facts in *McKennon*. In that case, a former employee sued her employer under the Age Discrimination in Employment Act of 1967 ("ADEA"), which authorized courts to grant reinstatement, front pay, and other equitable relief. *See* 29 U.S.C. § 626(b). During the course of litigation, the plaintiff admitted that she had "copied several confidential documents bearing upon the company's financial condition" during the last year of her employment as a form of "insurance and protection" against being fired on the basis of her age. *McKennon*, 513 U.S. at 355. As soon as her former employer learned of her conduct, it informed the plaintiff that her actions violated company policies and were independent grounds for termination. *Id.* When the case reached the Supreme Court, the only question presented was whether reinstatement could be an appropriate remedy where a plaintiff would otherwise be ineligible for further employment. The Court unanimously concluded that, in balancing the equities to determine whether reinstatement was practicable, "the employee's wrongdoing becomes relevant . . . to take due account of the lawful prerogatives of the employer in the usual course of its business and the corresponding equities that it has arising from the employee's wrongdoing." *Id.* at 361 (quotation marks and citation omitted). If a plaintiff admitted to misappropriating confidential information in violation of company policy, and if termination were an ordinary and expected response to this type of violation, then "*as a general rule in cases of this type, neither reinstatement nor front pay* is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds." *Id.* at 361-62 (emphasis added).

The instant case concerns not just a violation of internal policies, but a potential crime. Under federal law, confidential supervisory information is the property of the Board of Governors and may not be used without permission from the Board. (*See* Gross Decl. Ex. E.) Without even seeking—much less actually receiving—permission from the Board of Governors, Plaintiff published unredacted confidential supervisory information in her Complaint, both in substantive pleadings and as attached exhibits. And, prior to initiating this lawsuit, Plaintiff circulated her Complaint, including its confidential attachments, to the news media. Plaintiff's actions violate federal criminal law, *see* 18 U.S.C. §§ 641 (theft of government property) and

655 (theft of property of value by bank examiner), and federal regulations (*see* Gross Decl. Ex. E). It would be, in the Supreme Court's words, "inequitable and pointless" to order that she be reinstated, or to compel the New York Fed to bear the cost (in the form of front pay) for Plaintiff's reckless conduct. In this regard, it is important to note that Plaintiff could have obtained the same information lawfully through discovery with appropriate protective measures. But she did not. To the extent that Plaintiff might have been entitled to reinstatement and front pay under Section 1831j or any common law claim, she has forfeited that right.

VI. The New York Fed is Not Liable for Punitive Damages.

Finally, Plaintiff cannot recover punitive damages from the New York Fed because she has not pointed to any Congressional authorization for a civil penalty, which is required where a defendant is a federal instrumentality. *See Missouri Pacific R.R. Co. v. Ault*, 256 U.S. 554, 563 (1921) (stating that "Congress is not to be assumed to have adopted the method of fines paid out of public funds to insure obedience to the law," and establishing the presumption that "[t]he purpose for which the government permitted itself to be sued was compensation, not punishment"). Courts in virtually every federal circuit have applied *Ault*'s presumption that federal agencies or instrumentalities are not liable for punishment without Congress's clear approval—a sensible presumption avoiding the absurd effect of inflicting punishment on the taxpayer.[10] The New York Fed is unquestionably a federal instrumentality owing to its role as an

[10] *See, e.g.*, *Reconstruction Fin. Corp. v. J. G. Menihan Corp.*, 111 F.2d 940, 942 (2d Cir. 1940) (stating that, under *Ault*, a "sue and be sued" provision did not "sanction the recovery of penalties" against a federal instrumentality); *Bank One, Texas, N.A. v. Taylor*, 970 F.2d 16, 33-34 (5th Cir. 1992) (no punitive damages liability for the FDIC absent unequivocal Congressional authorization); *Commerce Fed. Sav. Bank v. Fed. Deposit Ins. Corp.*, 872 F.2d 1240, 1247-48 (6th Cir. 1989) (same); *Smith v. Russellville Production Credit Ass'n*, 777 F.2d 1544, 1550 (11th Cir. 1985) ("[A] federal agency or instrumentality of the United States cannot be liable for punitive damages unless Congress makes a special provision permitting such damages."); *Rohweder v. Aberdeen Production Credit Ass'n.*, 765 F.2d 109, 113 (8th Cir. 1985) (same); *In re*

important component of the Nation's central bank. *See supra* n.8. Moreover, its earnings after the deduction of expenses are paid to the United States Treasury. *See* 12 U.S.C. § 290. Section 1831j(c), which enumerates the relief available to whistleblowers, expressly provides only *remedial* relief, and never mentions punishment. Accordingly, the New York Fed is not liable for punitive damages under that statute or any of Plaintiff's other causes of action.

CONCLUSION

For the reasons set forth herein, the Complaint should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Dated: November 14, 2013
New York, New York

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By: /s/ David Gross
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Sparkman, 703 F.2d 1097, 1100-01 (9th Cir. 1983) (same); *Mays v. Tennessee Valley Auth.*, 699 F. Supp. 2d 991, 1030 (E.D. Tenn. 2010) (same); *Harrison v. Fed. Deposit Ins. Corp.*, No. 92-CV-0304E, 1993 U.S. Dist. LEXIS 18924, at *1 (W.D.N.Y. Apr. 16, 1993) ("FDIC, as an instrumentality of the United States, is immune from punitive damages."); *United States v. Halpin*, No. 88-0215, 1989 U.S. Dist. LEXIS 1051, at *4 (E.D.N.Y. Jan. 12, 1989) ("[F]ederal courts have long held that neither a penalty nor punitive damages may be recovered against the United States and its agencies and instrumentalities absent express Congressional approval."); *Massachusetts v. Hills*, 437 F. Supp. 351, 354 (D. Mass. 1977) (same).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARMEN M. SEGARRA,	
Plaintiff,	
	ECF CASE
v.	
	13-CV-07173 (RA)
FEDERAL RESERVE BANK OF NEW YORK, MICHAEL SILVA, MICHAEL KOH, and JOHNATHON KIM,	
Defendants.	

DECLARATION OF DAVID GROSS IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

Pursuant to 28 U.S.C. § 1746, DAVID GROSS declares as follows:

1. I am an attorney admitted to practice before this Court and am currently employed by the Federal Reserve Bank of New York in the Enforcement, Litigation, Protection, and Investigations Division of the Legal Department, where my title is Counsel and Vice President.

2. Attached hereto as Exhibit A is a true and correct copy of "SR 08-8," an advisory letter published by the Board of Governors of the Federal Reserve System dated October 16, 2008.

3. Attached hereto as Exhibit B is a true and correct excerpt from the Board of Governors' website entitled "About SR Letters," available at http://www.federalreserve.gov/bankinforeg/srletters/about.htm.

4. Attached hereto as Exhibit C is a true and correct copy of Goldman Sachs's "Code of Business Conduct and Ethics," available at http://www.goldmansachs.com/investor-relations/corporate-governance/corporate-governance-documents/revise-code-of-conduct.pdf.

5. Attached hereto as Exhibit D is a true and correct copy of Goldman Sachs's "Report of the Business Standards Committee," available at http://www.goldmansachs.com/who-we-are/business-standards/committee-report/business-standards-committee-report-pdf.pdf.

6. Attached hereto as Exhibit E are true and correct copies of letters that I wrote to the Court on October 10, 2013 and October 11, 2013, respectively.

7. Attached hereto as Exhibit F is a true and correct copy of an article by Andrew Ross Sorkin entitled "As an Advisor, Goldman Sachs Guaranteed Its Payday," which was published in the *New York Times* on March 6, 2012 at page B1.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: November 14, 2013
New York, New York

/s/ David Gross
David Gross

EXHIBIT A

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D. C. 20551

DIVISION OF BANKING
SUPERVISION AND REGULATION

DIVISION OF CONSUMER
AND COMMUNITY AFFAIRS

SR 08-8 / CA 08-11

October 16, 2008

TO THE OFFICER IN CHARGE OF SUPERVISION AND APPROPRIATE SUPERVISORY AND EXAMINATION STAFF AT EACH FEDERAL RESERVE BANK AND CERTAIN ORGANIZATIONS SUPERVISED BY THE FEDERAL RESERVE

SUBJECT: **Compliance Risk Management Programs and Oversight at Large Banking Organizations with Complex Compliance Profiles**

In recent years, banking organizations have greatly expanded the scope, complexity, and global nature of their business activities. At the same time, compliance requirements associated with these activities have become more complex. As a result, organizations have confronted significant risk management and corporate governance challenges, particularly with respect to compliance risks that transcend business lines, legal entities, and jurisdictions of operation.[1] To address these challenges, many banking organizations have implemented or enhanced firmwide compliance risk management programs and program oversight.

While the guiding principles of sound risk management are the same for compliance as for other types of risk, the management and oversight of compliance risk presents certain challenges. For example, quantitative limits reflecting the board of directors' risk appetite can be established for market and credit risks, allocated to the various business lines within the organization, and monitored by units independent of the business line. Compliance risk does not lend itself to similar processes for establishing and allocating overall risk tolerance, in part because organizations must comply with applicable rules and standards. Additionally, existing compliance risk metrics are often less meaningful in terms of aggregation and trend analysis as compared with more traditional market and credit risk metrics. These distinguishing characteristics of compliance risk underscore the need for a firmwide approach to compliance risk management and oversight for large, complex organizations. A firmwide compliance function that plays a key role in managing and overseeing compliance risk while promoting a strong culture of compliance across the organization is particularly important for large, complex organizations that have a number of separate business lines and legal entities that must comply with a wide range of applicable rules and standards.

The Federal Reserve has, primarily through the examination process, emphasized the need for effective firmwide compliance risk management and oversight at large, complex banking organizations. While firmwide compliance risk management programs and oversight at the largest supervised banking organizations have generally improved, the level of progress at individual banking organizations varies and opportunity for improvement remains. The Federal Reserve strongly encourages large banking organizations with complex compliance profiles to ensure that the necessary resources are dedicated to fully implementing effective firmwide compliance risk management programs and oversight in a timely manner.[2]

The Federal Reserve's expectations for all supervised banking organizations are consistent with the principles outlined in a paper issued in April 2005 by the Basel Committee on Banking Supervision, entitled *Compliance and the compliance function in banks* (Basel compliance paper). The principles in the Basel compliance paper have become widely recognized as global sound practices for compliance risk management and oversight, and the Federal Reserve endorses these principles. Nevertheless, some banking organizations have sought clarification as to the Federal Reserve's views regarding certain compliance risk management and oversight matters. This SR/CA letter clarifies Federal Reserve views applicable to large banking organizations with complex compliance profiles in the following areas where guidance has been requested:

I. Organizations that should implement a firmwide approach to compliance risk management and oversight;
II. Independence of compliance staff;
III. Compliance monitoring and testing; and
IV. Responsibilities of boards of directors and senior management regarding compliance risk management and oversight.

I. Firmwide Compliance Risk Management and Oversight

Overview

Organizations supervised by the Federal Reserve, regardless of size and complexity, should have effective compliance risk management programs that are appropriately tailored to the organizations' risk profiles.[3] The manner in which the program is implemented and the type of oversight needed for that program can vary considerably depending upon the scope and complexity of the organization's activities, the geographic reach of the organization, and other inherent risk factors. Larger, more complex banking organizations tend to conduct a wide range of business activities that are subject to complex compliance requirements that frequently transcend business lines and legal entities and, accordingly, present risk management and corporate governance challenges. Consequently, these organizations typically require a firmwide approach to compliance risk management and oversight that includes a corporate compliance function. In contrast, smaller, less-complex banking organizations are not generally confronted with the types of compliance risks and challenges that require a comprehensive firmwide approach to effectively manage and oversee compliance risk. The following discussion, therefore, is *not* directed at smaller, less-complex banking organizations.

Firmwide compliance risk management refers to the processes established to manage compliance risk across an entire organization, both within and across business lines, support units, legal entities, and jurisdictions of operation. This approach ensures that compliance risk management is conducted in a context broader than would take place solely within individual business lines or legal entities. The need for a firmwide approach to compliance risk management at larger, more complex banking organizations is well demonstrated in areas such as anti-money laundering, privacy, affiliate transactions, conflicts of interest, and fair lending, where legal and regulatory requirements may apply to multiple business lines or legal entities within the banking organization. Certain other compliance risks may also warrant a firmwide risk management approach to address similar rules and standards that apply to the organization's operations across different jurisdictions. In all such instances, compliance risk management benefits from an aggregate view of the organization's compliance risk exposure and an integrated approach to managing those risks.

The processes established for managing compliance risk on a firmwide basis should be formalized in a compliance *program* that establishes the framework for identifying, assessing, controlling, measuring, monitoring, and reporting compliance risks across the organization, and for providing compliance training throughout the organization. A banking organization's compliance risk management program should be documented in the form of compliance policies and procedures and compliance risk management standards.[4]

Firmwide compliance oversight refers to the processes established to oversee compliance risk management across the entire organization, both within and across business lines, legal entities, and jurisdictions of operation. In addition to the oversight provided by the board of directors and various executive and management committees of an organization, a key component of firmwide compliance oversight in larger, more complex banking organizations is a corporate compliance function that has day-to-day responsibility for overseeing and supporting the implementation of the organization's firmwide compliance risk management program, and that plays a key role in controlling compliance risks that transcend business lines, legal entities, and jurisdictions of operation.

Federal Reserve Supervisory Policies

Large Banking Organizations with Complex Compliance Profiles. Although balance sheet size is not the defining indication of a banking organization's compliance risk management needs, experience has demonstrated that banking organizations with $50 billion or more in consolidated total assets typically have multiple legal entities that pose the type of compliance risks and challenges that call for a comprehensive firmwide approach to appropriately control compliance risk and provide effective oversight. Accordingly, such organizations should generally implement firmwide compliance risk management programs and have a corporate compliance function.

Compliance programs at such organizations should include more robust processes for identifying, assessing, controlling, measuring, monitoring, and reporting compliance risk, and for providing compliance training throughout the organization in order to appropriately control the heightened level and complexity of compliance risk. The corporate compliance function should play a key role in overseeing and supporting the implementation of the compliance risk management program, and in controlling compliance risks that transcend business lines, legal entities, and jurisdictions of operation.[5]

Large Banking Organizations with Less-Complex Compliance Profiles. In some instances, banking organizations that meet the $50 billion asset threshold may have few legal entities, be less complex in nature, and may engage in only a very limited range of business activities. Such organizations may be able to effectively manage and oversee compliance risk without implementing a comprehensive firmwide approach. Alternatively, these organizations may choose to implement a firmwide approach whose scope is highly risk-focused on particular compliance risks that exist throughout the organization. In lieu of relying on a corporate compliance function to play a key role in providing day-to-day oversight of the compliance program, these organizations may rely on executive and management committees that are actively involved in providing ongoing corporate oversight of the compliance risk management program. An organization that adopts this approach, however, should ensure that its compliance program incorporates controls that effectively address compliance risks that transcend business lines, legal entities, and jurisdictions of operation; that appropriate firmwide standards are established for the business lines to follow in managing compliance risk and reporting on key compliance matters; and that the organization is appropriately overseeing the implementation of its compliance risk management program.

Foreign Banking Organizations. Each foreign banking organization supervised by the Federal Reserve should implement a compliance program that is appropriately tailored to the scope, complexity, and risk profile of the organization's U.S. operations. The program should be reasonably designed to ensure that the organization's U.S. operations comply with applicable U.S. rules and standards, and should establish effective controls over compliance risks that transcend business lines or legal entities. Foreign banking organizations with large, complex U.S. operations should implement compliance programs for these operations that have more robust processes for identifying, assessing, controlling, measuring, monitoring, and reporting compliance risk, and for providing compliance training, than would be appropriate for foreign banking organizations with smaller, less-complex U.S. operations.[6]

With respect to oversight, foreign banking organizations should provide effective oversight of compliance risks within their U.S. operations, including risks that transcend business lines or legal entities. A foreign banking organization, however, has flexibility in organizing its oversight structure. Compliance oversight of U.S. activities may be conducted in a manner that is consistent with the foreign banking organization's broader compliance risk management framework. Alternatively, a separate function may be established specifically to provide compliance oversight of the organization's U.S. operations. Regardless of the oversight structure utilized by a foreign banking organization, its established oversight mechanisms, governing policies and procedures, and supporting infrastructure for its U.S. operations should be sufficiently transparent for the Federal Reserve to assess their adequacy.

II. Independence of Compliance Staff

Federal Reserve supervisory findings at large, complex banking organizations consistently reinforce the need for compliance staff to be appropriately independent of the business lines for which they have compliance responsibilities. Compliance independence facilitates objectivity and avoids inherent conflicts of interest that may hinder the effective implementation of a compliance program. The Federal Reserve has observed compliance independence to be an area in which there is considerable variation in practices, some of which do not consistently meet supervisory standards. A particular challenge for many organizations is attaining an appropriate level of independence with respect to compliance staff operating within the business lines.

The Federal Reserve does not prescribe a particular organizational structure for the compliance function. Large banking organizations with complex compliance profiles are encouraged, however, to avoid inherent conflicts of interest by ensuring that accountability exists between the corporate compliance function and compliance staff within the business lines. Such accountability would provide the corporate compliance function with ultimate authority regarding the handling of compliance matters and personnel decisions and actions relating to compliance staff, including retaining control over the budget for, and remuneration of, all compliance staff.[7] Compliance independence should not, however, preclude compliance staff from working closely with the management and staff of the various business lines. To the contrary, compliance functions are generally more effective when strong working relationships between compliance and business line staff exist.

The Federal Reserve recognizes, however, that many large, complex banking organizations have chosen to implement an organizational structure in which compliance staff within a business line have a reporting line into the management of the business. In these circumstances, compliance staff should also have a reporting line through to the corporate compliance function with respect to compliance responsibilities. In addition, a banking organization that chooses to implement such a dual reporting structure should ensure that the following minimum standards are observed in order to minimize potential conflicts of interest associated with this approach:

(1) In organizations with dual reporting line structures, the corporate compliance function should play a key role in determining how compliance matters are handled and in personnel decisions and actions (including remuneration) affecting business line compliance and local compliance staff, particularly senior compliance staff. Furthermore, the organization should have in place a process designed to ensure that disputes between the corporate compliance function and

business line management regarding compliance matters are resolved objectively. Under such a process, the final decision-making authority should rest either with the corporate compliance function, or with a member or committee of senior management that has no business line responsibilities.

(2) Compensation and incentive programs should be carefully structured to avoid undermining the independence of compliance staff. Compliance staff should not be compensated on the basis of the financial performance of the business line. Such an arrangement creates an improper conflict of interest.

(3) Banking organizations with dual reporting line structures should implement appropriate controls and enhanced corporate oversight to identify and address issues that may arise from conflicts of interest affecting compliance staff within the business lines. For example, in these circumstances, the process for providing corporate oversight of monitoring and testing activities performed by compliance staff within the business lines should be especially robust.

III. Compliance Monitoring and Testing

Robust compliance monitoring and testing play a key role in identifying weaknesses in existing compliance risk management controls and are, therefore, critical components of an effective firmwide compliance risk management program. Federal Reserve supervisory findings at large, complex banking organizations indicate that opportunities for improving compliance monitoring and testing programs at many of these organizations remain.

Risk Assessments and Monitoring and Testing Programs. Risk assessments are the foundation of an effective compliance monitoring and testing program. The scope and frequency of compliance monitoring and testing activities should be a function of a comprehensive assessment of the overall compliance risk associated with a particular business activity.[8] Many larger, more complex banking organizations, however, remain in the process of implementing comprehensive risk assessment methodologies. This presents a challenge to the effectiveness of compliance monitoring and testing programs as the effectiveness of these programs relies upon comprehensive risk assessments. Larger, more complex banking organizations are strongly encouraged to complete the implementation of comprehensive risk assessment methodologies and to ensure that compliance monitoring and testing activities are based upon the resulting risk assessments.

Testing. Although the Federal Reserve has generally observed considerable progress in the level of compliance monitoring, there continues to be room for improvement regarding the testing of compliance controls. Compliance testing is necessary to validate that key assumptions, data sources, and procedures utilized in measuring and monitoring compliance risk can be relied upon on an ongoing basis and, in the case of transaction testing, that controls are working as intended. The testing of controls and remediation of deficiencies identified as a result of testing activities are essential to maintaining an effective internal control framework.

The scope and frequency of compliance testing activities should be based upon the assessment of the specific compliance risks associated with a particular business activity. Periodic testing of compliance controls by compliance staff is strongly encouraged as this practice tends to result in an enhanced level of compliance testing. If, however, compliance testing is performed exclusively by the internal audit function, particular care should be taken to ensure that high-risk compliance elements are not otherwise obscured by a lower overall risk rating of a broadly defined audit entity. Otherwise, the scope and frequency of audit coverage of higher-risk compliance elements tends to be insufficient.

IV. Responsibilities of the Board of Directors and Senior Management

The primary responsibility for complying with applicable rules and standards rests with the individuals within the organization as they conduct their day-to-day business and support activities. The board, senior management, and the corporate compliance function are responsible for working together to establish and implement a comprehensive and effective compliance risk management program and oversight framework that is reasonably designed to prevent and detect compliance breaches and issues.

Boards of Directors.[9] Boards of directors are responsible for setting an appropriate culture of compliance within their organizations, for establishing clear policies regarding the management of key risks, and for ensuring that these policies are adhered to in practice. The following discussion is intended to clarify existing Federal Reserve supervisory views with regard to responsibilities of the board related to compliance risk management and oversight, and to differentiate these responsibilities from those of senior management.

To achieve its objectives, a sound and effective firmwide compliance risk management program should have the support of the board and senior management. As set forth in applicable law and supervisory guidance, the board and senior management of a banking organization have different, but complementary, roles in managing and overseeing compliance risk.[10]

The board has the responsibility for promoting a culture that encourages ethical conduct and compliance with applicable rules and standards. A strong compliance culture reinforces the principle that an organization must conduct its activities in accordance with applicable rules and standards, and encourages employees to conduct all activities in accordance with both the letter and the spirit of applicable rules and standards. The board should have an appropriate understanding of the types of compliance risks to which the organization is exposed. The level of technical knowledge required of directors to fulfill these responsibilities may vary depending on the particular circumstances at the organization.

The board should ensure that senior management is fully capable, qualified, and properly motivated to manage the compliance risks arising from the organization's business activities in a manner that is consistent with the board's expectations. The board should ensure that its views about the importance of compliance are understood and communicated by senior management across, and at all levels of, the organization through ongoing training and other means. The board should ensure that senior management has established appropriate incentives to integrate compliance objectives into the management goals and compensation structure across the organization, and that appropriate disciplinary actions and other measures are taken when serious compliance failures are identified. Finally, the board should ensure that the corporate compliance function has an appropriately prominent status within the organization. Senior management within the corporate compliance function and senior compliance personnel within individual business lines should have the appropriate authority, independence, and access to personnel and information within the organization, and appropriate resources to conduct their activities effectively.

The board should be knowledgeable about the general content of the compliance program and exercise appropriate oversight of the program. Accordingly, the board should review and approve key elements of the organization's compliance risk management program and oversight framework, including firmwide compliance policies, compliance risk management standards, and roles and responsibilities of committees and functions with compliance oversight responsibilities. The board should oversee management's implementation of the compliance program and the appropriate and timely resolution of compliance issues by senior management. The board should exercise reasonable due diligence to ensure that the compliance program remains effective by at least annually reviewing a report on the effectiveness of the program. The board may delegate these tasks to an appropriate board-level committee.

Senior Management. Senior management across the organization is responsible for communicating and reinforcing the compliance culture established by the board, and for implementing measures to promote the culture. Senior management also should implement and enforce the compliance policies and compliance risk management standards that have been approved by the board. Senior management of the corporate compliance function should establish, support, and oversee the organization's compliance risk management program. The corporate compliance function should report to the board, or a committee thereof, on significant compliance matters and the effectiveness of the compliance risk management program.

Senior management of a foreign banking organization's U.S. operations should provide sufficient information to governance or control functions in its home country, and should ensure that responsible senior management, including in the home country, maintain a thorough understanding of the risk and control environment governing U.S. operations. U.S. management should assess the effectiveness of established governance and control mechanisms on an ongoing basis, including processes for reporting and escalating areas of concern and implementation of corrective action as necessary.

V. Conclusion

This SR/CA letter should be disseminated to all large, complex banking organizations, and other institutions supervised by the Federal Reserve as Reserve Bank staff believes appropriate. Questions may be directed to Karen El Kochta, Senior Supervisory Financial Analyst, Compliance Risk, Division of Banking Supervision and Regulation, at (202) 452-5206; Chris Laursen, Manager, Risk Policy & Guidance, Division of Banking Supervision and Regulation, at (202) 452-2478; or Phyllis Harwell, Manager, Division of Consumer and Community Affairs, at (202) 452-3658. In addition, questions may be sent via the Board's public website.[11]

signed by
Deborah P. Bailey
Deputy Director
Division of Banking
Supervision and Regulation

signed by

Glenn E. Loney
Deputy Director
Division of Consumer
and Community Affairs

Cross Reference:

SR letter 04-18, "Bank Holding Company Rating System"

SR letter 95-51, "Rating the Adequacy of Risk Management Processes and Internal Controls at State Member Banks and Bank Holding Companies"

Notes:

1. Compliance risk is the risk of legal or regulatory sanctions, financial loss, or damage to reputation resulting from failure to comply with laws, regulations, rules, other regulatory requirements, or codes of conduct and other standards of self-regulatory organizations applicable to the banking organization (applicable rules and standards). (See, generally, *Compliance and the compliance function in banks*, Basel Committee on Banking Supervision, April 2005, www.bis.org.) Return to text

2. Effective compliance risk management programs incorporate controls designed to maintain compliance with applicable rules and standards, including safety and soundness and consumer protection guidance issued by supervisory authorities. Return to text

3. See SR letter 95-51, "Rating the Adequacy of Risk Management Processes and Internal Controls at State Member Banks and Bank Holding Companies." This letter provides general guidance on risk management processes and internal controls for consolidated organizations, and discusses the elements of a sound risk management system applicable to all banking organizations for which the Federal Reserve has supervisory responsibility. SR 95-51 states that all bank holding companies should be able to assess the major risks of the consolidated organization. See also 12 CFR Part 208, appendix D-1, "Interagency Guidelines Establishing Standards for Safety and Soundness." Return to text

4. *Compliance policies* refer to both: (1) firmwide compliance policies that apply to all employees throughout the organization as they conduct their business and support activities; and (2) the more detailed, business-specific

policies that are further tailored to, and more specifically address, compliance risks inherent in specific business lines and jurisdictions of operation, and apply to employees conducting business and support activities for the specific business line and/or jurisdiction of operation. *Compliance procedures* refer to the control procedures that are designed to implement compliance policies. *Compliance risk management standards* refer to policies and procedures applicable to compliance staff as they fulfill their day-to-day compliance responsibilities. Compliance standards should clearly articulate expectations regarding the processes to be followed in implementing the organization's firmwide compliance risk management program, including the processes and criteria to be utilized in identifying, assessing, controlling, measuring, monitoring, and reporting compliance risk, and in providing compliance training. Compliance standards should also clearly articulate the roles and responsibilities of the various committees, functions, and staff with compliance support and oversight responsibilities. Return to text

5. While the corporate compliance function is generally responsible for overseeing and supporting the compliance risk management program, it is recognized that the board of directors may assign primary responsibility for aspects of the compliance program to other units within the organization (e.g., finance, information technology, human resources, etc.). The corporate compliance function, therefore, may or may not have responsibility for monitoring and testing the controls over certain compliance activities embedded within these units, such as those over regulatory reporting and regulatory capital. Nevertheless, it is important that an organization's compliance program incorporates appropriate controls over these risks and that proper oversight of the management of these risks is conducted. Return to text

6. Foreign banking organizations with $50 billion or more in U.S. third-party assets will generally be considered as large banking organizations with complex compliance profiles for purposes of this SR/CA letter unless their U.S. activities are less complex in nature as described in Section I of this letter. The Federal Reserve's views on compliance risk management programs apply equally to the large, complex U.S. operations of foreign banking organizations. Return to text

7. The reference to all compliance staff includes corporate, business line, and local compliance staff. Return to text

8. Risk assessments should be based upon firmwide standards which establish the method for, and criteria to be utilized in, assessing risk throughout the

organization. Risk assessments should take into consideration both the risk inherent in the activity, and the strength and effectiveness of controls designed to mitigate the risk. Return to text

9. Foreign banking organizations should ensure that, with respect to their U.S. operations, the responsibilities of the board described in this section are fulfilled in an appropriate manner through their oversight structure and risk management framework. Return to text

10. See, for example, the Basel compliance paper; SR letter 04-18, "Bank Holding Company Rating System"; SR letter 95-51, "Rating the Adequacy of Risk Management Processes and Internal Controls at State Member Banks and Bank Holding Companies"; and the United States Sentencing Commission's *Federal Sentencing Guidelines Manual*, Chapter Eight, "Sentencing of Organizations." Return to text

11. See http://www.federalreserve.gov/feedback.cfm Return to text

Last update: October 16, 2008

EXHIBIT B

⊞ Actions and Applications
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Basel Regulatory Capital Framework
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Supervision and Regulation Letters

By year By topic About

Supervision and Regulation Letters, commonly known as SR Letters, address significant policy and procedural matters related to the Federal Reserve System's supervisory responsibilities. Active SR letters are listed here in reverse chronological order. Obsolete letters or letters that contain confidential supervisory information are not included.

Search all SR letters

2013 Select Year

About SR Letters

Supervision and Regulation Letters, commonly known as SR Letters, address significant policy and procedural matters related to the Federal Reserve System's supervisory responsibilities. These letters are issued by the Board of Governors' Division of Banking Supervision and Regulation and are a means of disseminating information to banking supervision staff at the Board and the Reserve Banks, as well as to supervised banking organizations.

SR Letters are numbered sequentially by year. For example, the first letter issued in 2005 is numbered SR 05-1.

Active SR letters are listed in reverse chronological order by year. Obsolete letters or letters that contain confidential supervisory information are not included.

Attachments to most of the SR letters are included. Hard copies of attachments not provided electronically are available from the Board's Freedom of Information Office.

Letters released prior to November of 2001 were assigned a designation identifying the primary supervisory function addressed in that letter, for example, SR 97-2 (SPE). The designations are explained below.

Letters issued from 1990 through 1994 were classified in one of four functional areas:

- FIS (domestic financial institution supervision),
- IB (international banking supervision),
- SA (specialized banking activities), and
- STR (banking structure and expansion).

In 1995, the functional areas were redefined, as follows:

- APP (Applications)
- ENF (Enforcement)
- GEN (General)
- NIC (National Information Center)
- SPE (Specialized Banking Activities)
- SRV (Surveillance)
- SUP (Financial Institution Supervision)
- TRN (Training)

Letters that concerned only foreign banking activities carried an additional designation, IB (International Banking), for example, SR 97-13 (SUP.IB).

Other Sources of Information on Supervisory Policies and Procedures

Supervision Manuals:

- *Bank Holding Company Supervision Manual*
- *Bank Secrecy Act/Anti-Money Laundering Examination Manual*
- *Commercial Bank Examination Manual*
- *Examination Manual for U.S. Branches and Agencies of Foreign Banking Organizations*
- *FFIEC Information Systems Handbook*
- *Trading and Capital-Markets Activities Manual*

Regulations

Application Filing Information

Federal Reserve Regulatory Service (FRRS), available through Publications Services

Last update: August 2, 2013

EXHIBIT C

Our Shared Responsibility to
Our Clients, Colleagues and Communities

Goldman Sachs

Code of Business Conduct and Ethics

To the People of Goldman Sachs:

Since our beginnings as a family business in 1869, Goldman Sachs has evolved into one of the leading companies in our industry. We have always aspired to create a workplace where talented individuals collaborate to deliver extraordinary results for our clients and, starting in 1999, our shareholders. In recent years, we have expanded that vision to reflect the value we place on diverse opinions, experiences and backgrounds, and to adapt to the changing needs of an increasingly interconnected world. Our Business Principles capture this vision, and our Code of Business Conduct and Ethics outlines the behaviors we expect of everyone at Goldman Sachs in order to achieve it.

As part of the Business Standards Committee's review, the firm has revisited our Code to ensure it reflects the highest legal and ethical standards in our industry. In tandem with our Business Principles, the Code articulates Goldman Sachs' commitment to integrity and honesty in everything we do. While no single document can address every situation, the updated Code provides clear guidance on critical issues. When facing a situation not covered by the Code, we expect our people to exercise good judgment and especially to seek guidance in resolving potential issues.

It has often been said that one person can cause more harm to Goldman Sachs from a single bad decision than good to the firm over the course of a career. As stewards of the firm's legacy and drivers of its future success, our actions each day have a profound impact. No financial incentive or opportunity—regardless of the bottom line—justifies a departure from our values. In fact, loosening our ethical standards in pursuit of business is a betrayal of our duty to clients, shareholders and colleagues and compromises everything we aspire to as a firm.

I ask each of you to review this Code of Business Conduct and Ethics as well as the Business Principles, and join me in making a personal commitment to using it to guide your work. In doing so, you protect the trust our clients place in us and uphold the moral and ethical principles that define Goldman Sachs.

Sincerely,

Lloyd C. Blankfein
Chairman and
Chief Executive Officer

Preamble to

Code of Business Conduct and Ethics

At Goldman Sachs, we believe the best way to build and to maintain trust is to conduct every element of our business according to the highest standards of integrity.

Our ability to do so rests on the behavior of those who work here, from consultants to employees to our chief executive to our directors. To that end, we select our people based not just on their skills, accomplishments and potential, but also on their principles and values. A commitment to integrity and ethical behavior is a critical factor in our decisions regarding professional advancement and compensation.

The firm maintains a Code of Business Conduct and Ethics, supplemented by both our Business Principles and compendium of internal policies, to inform and guide our people in their roles. We recognize, however, that a formal Code or policy cannot cover every situation. In a fast-paced and complex industry and an inherently innovative business, it is impossible to predict the various different unique circumstances our people will face during their careers. As such, the policies outlined in this Code should be viewed as the baseline of expected behavior at the firm.

While ethical behavior requires us to comply fully with all laws and regulations, "compliance" with the law is the minimum standard to which we hold ourselves. Those who work with us honor not just the letter of existing laws, but the spirit that underpins and informs them. We recognize that over time what is considered acceptable today may be viewed differently tomorrow. Thus, we do not look to prevailing "market practices" as an indication of appropriate behavior. We base our decisions on legal and regulatory rules, our Code, our Business Principles and our values. For the people of Goldman Sachs, ethical behavior is inseparable from integrity and good judgment.

Our franchise has evolved considerably since our founding in 1869, driven by the changing needs of a global world and an increasingly sophisticated and diverse client base. The scope of our business means that delivering outstanding client service may at times generate real or perceived conflicts for the firm. We are committed to addressing such conflicts with all appropriate disclosure and transparency. If a transaction generates a conflict that cannot be addressed, we would prefer to lose the business than to abandon our principles.

Every person at Goldman Sachs is a steward to our heritage of client service and our reputation as an ethical company. Our success has been and will continue to be dependent on the trust that our clients and shareholders place in us. Everything we do—every piece of advice we give, every transaction we execute, every dollar we manage, every interaction in which we take part—must serve to strengthen that trust.

Code of Business Conduct and Ethics

Application of the Code

The Goldman Sachs Code of Business Conduct and Ethics embodies the firm's commitment to conduct our business in accordance with the highest ethical standards and in compliance with all applicable laws, rules and regulations. The Code applies to all of our people, including members of our Board of Direcrors.

The Goldman Sachs Business Principles and Compendium of Firmwide Compliance Policies

In addition to the Code, you should read and be familiar wirh our Business Principles and the portions of the Compendium that apply to you depending on your business, position and geographic location. The Compendium, posted on the firm's internal website, includes detailed policies and procedures to guide you in adhering to the letter and the spirit of all applicable laws, rules and regulations.

Reporting Issues under the Code

It is critical that you strive to identify and escalate potential issues before they lead to problems. When in doubt, you should ask questions about the potential application of this Code.

There are a number of ethics contacts available to provide guidance in this regard. In many cases, an immediate supervisor (or his or her supervisor) and a member of the Global Compliance Division or Legal Department supporting your business or area will be your first contacts. Should you become aware of any existing or potential violation of this Code, promptly notify one of these individuals. The escalation policy in the Compendium provides further information on internal and alternate reporting channels.

Non-Retaliation Policy

Our people play a critical role in safeguarding the integrity of our business and escalating any exisring or potential breach of that integrity. To enable you to fulfill this responsibility, the firm strictly prohibits retaliation against anyone who reports in good faith a possible violation of the Code, no matter whom the report involves.

In addition, you may have certain rights in connection with reporting legal, compliance, ethical or other issues to regulatory, administrative or other governmental or self-regulatory bodies. Nothing in this Code is intended to limit those rights or any protections that may be applicable in connection with reporting potential violations.

Violations of the Code

We take this Code and your obligations under it very seriously, and will take any disciplinary or preventive action deemed appropriate to address existing or potential violations of the Code, up to and including termination of your employment. Violations of the Code may also constirute violations of law, which may result in criminal or civil penalties for you and the firm.

Compliance with Laws, Rules and Regulations

You must comply with all applicable laws, rules and regulations, including those related to insider trading, financial reporting, money laundering, fraud, bribery and corruprion. Detailed rules regarding applicable laws are included in the Compendium.

Generally, if you are aware of material nonpublic information relating to the firm, any of our clients or any other private or governmental issuer of securities, you cannot buy or sell any securities of those issuers or recommend that another person buy, sell or hold the securities of those issuers. Questions regarding the purchase or sale of any firm securities or any securities of issuers that you are familiar with by virtue of your role at Goldman Sachs should be directed to an appropriate ethics contact prior to any purchase or sale.

Personal Conflicts of Interest

A personal conflict of interest occurs when your private interest improperly interferes with the interests of the firm. Actions or relationships that create personal conflicts of interest are prohibited, unless approved by the firm.

It is important that you carefully consider whether any of your activities or relationships, including business or volunteer positions outside the firm, could cause a conflict (or the appearance of a conflict) with the interests of the firm. Even if an activity seems unrelated to your role at the firm, you may be required to obtain pre-approval before engaging in it. The Compendium provides detailed guidance on when and how pre-approval is obtained.

Additionally, personal gain and advantage must never take precedence over your obligations to the firm. You must never use or attempt to use your position at the firm to obtain any improper personal benefit (including loans or guarantees of obligations or gifts, from any person or entity) for yourself, family member(s) or any other individual or group.

If you are aware of a transaction or relationship that could reasonably be expected to give rise to a conflict of interest or perceived conflict of interest, you should discuss the matter promptly with an appropriate ethics contact. When in doubt, raise the question for appropriate consideration.

Corporate Opportunities

You are prohibited from taking for yourself (or directing to any other person) a business opportunity that is discovered through the use of corporate property, information or position at the firm, unless the firm has already been offered the opportunity and turned it down or otherwise renounced the opportunity. More generally, you are prohibited from using corporate property, information or position for personal gain or competing with the firm.

We recognize that it sometimes can be difficult to determine the line between personal and firm benefits; at times both personal and firm benefits stem from particular activities. The prudent course of action is to obtain pre-approval from an appropriate ethics contact for any use of firm property or services that is not solely for the benefit of the firm.

Fair and Ethical Competition

We rely on our people to uphold our culture of integrity in all that we do. Our values demand that we deal fairly with our clients, service providers, suppliers, competitors and each other. No one at the firm may seek competitive advantage through illegal or unethical business practices. Taking unfair advantage of anyone through manipulation, concealment, abuse of privileged information, misrepresentation of material facts, or any unfair dealing practice is a violation of this Code.

Protecting Confidential Information

In the course of business, our people often have access to confidential or proprietary information about the firm, our clients, prospective clients or other third parties. Our business and reputation depend on the commitment of each of you to protect this information. You must maintain the confidentiality of the information with which you are entrusted, including complying with information barrier procedures applicable to your business. The only exception is when disclosure is authorized or legally mandated. Confidential or proprietary information includes, among other things, any non-public information concerning the firm (including its businesses, financial performance,

results or prospects) and any non-public information provided by a third party with the expectation that the information will be kept confidential and used solely for the business purpose for which it was conveyed. We encourage a careful review of the Compendium for detailed guidance on this important topic.

Public Disclosure

It is our policy that all information in our public communications — including SEC filings — be full, fair, accurate, timely and understandable. All individuals who are involved in our disclosure process must act in a manner consistent with this policy. In particular, they are required to maintain familiarity with the relevant disclosure requirements, and are prohibited from knowingly misrepresenting, omitting, or causing others to misrepresent or omit, material facts about the firm to others, whether within or outside the firm, including our independent auditors.

Equal Employment Opportunities and Commitment to Diversity

Concern for the personal dignity of each individual is an indispensable element of the standards we set for ourselves at Goldman Sachs. We focus our personnel decisions on merit and contribution to the firm's success. The firm affords equal employment opportunity to all qualified persons without regard to any impermissible criterion or circumstance. We do not tolerate any type of discrimination prohibited by law, including harassment.

We value diversity as an important asset that enhances our culture, helps us serve clients well and maximizes return for shareholders. For us to excel, we must create for our people an inclusive environment that welcomes and supports differences and encourages input from all perspectives.

Political Contributions and Activities

Laws and regulations regarding political contributions and activities vary around the world and, in many cases, penalties for violations can be severe. While we encourage participation in the political process, we maintain policies and procedures regarding political contributions and activities to ensure compliance with all existing laws and regulations.

Importantly, we prohibit our employees from making or soliciting political contributions or engaging in political activities whose purpose is to assist the firm in obtaining or retaining business. In addition to the detailed policies included in the Compendium, we have posted our "Statement on Policy Engagement and Political Participation" on our external website.

Protecting and Properly Using Firm Assets

You should protect the firm's assets and ensure their efficient use. All firm assets should be used for legitimate business purposes only.

Additional Procedures

All of our employees are required to affirm that they have reviewed the Code and will comply with it.

Our Board members and our Chief Executive Officer, Chief Financial Officer and Principal Accounting Officer should report any existing or potential violation of this Code to the firm's General Counsel. No waivers of this Code for executive officers or Board members of the firm may be made unless approved by the Board of Directors or a committee of the Board, and if approved, will be disclosed on our website.

Business Principles

Our clients' interests always come first.

Our experience shows that if we serve our clients well, our own success will follow.

Our assets are our people, capital and reputation.

If any of these is ever diminished, the last is the most difficult to restore. We are dedicated to complying fully with the letter and spirit of the laws, rules and ethical principles that govern us. Our continued success depends upon unswerving adherence to this standard.

Our goal is to provide superior returns to our shareholders.

Profitability is critical to achieving superior returns, building our capital, and attracting and keeping our best people. Significant employee stock ownership aligns the interests of our employees and our shareholders.

We take great pride in the professional quality of our work.

We have an uncompromising determination to achieve excellence in everything we undertake. Though we may be involved in a wide variety and heavy volume of activity, we would, if it came to a choice, rather be best than biggest.

We stress creativity and imagination in everything we do.

While recognizing that the old way may still be the best way, we constantly strive to find a better solution to a client's problems. We pride ourselves on having pioneered many of the practices and techniques that have become standard in the industry.

We make an unusual effort to identify and recruit the very best person for every job.

Although our activities are measured in billions of dollars, we select our people one by one. In a service business, we know that without the best people, we cannot be the best firm.

We offer our people the opportunity to move ahead more rapidly than is possible at most other places.

Advancement depends on merit and we have yet to find the limits to the responsibility our best people are able to assume. For us to be successful, our men and women must reflect the diversity of the communities and cultures in which we operate. That means we must attract, retain and motivate people from many backgrounds and perspectives. Being diverse is not optional; it is what we must be.

We stress teamwork in everything we do.

While individual creativity is always encouraged, we have found that team effort often produces the best results. We have no room for those who put their personal interests ahead of the interests of the firm and its clients.

The dedication of our people

to the firm and the intense effort they give their jobs are greater than one finds in most other organizations. We think that this is an important part of our success.

We consider our size an asset that we try hard to preserve.

We want to be big enough to undertake the largest project that any of our clients could contemplate, yet small enough to maintain the loyalty, the intimacy and the esprit de corps that we all treasure and that contribute greatly to our success.

We constantly strive to anticipate the rapidly changing needs of our clients and to develop new services to meet those needs.

We know that the world of finance will not stand still and that complacency can lead to extinction.

We regularly receive confidential information as part of our normal client relationships.

To breach a confidence or to use confidenrial information improperly or carelessly would be unthinkable.

Our business is highly competitive, and we aggressively seek to expand our client relationships.

However, we must always be fair competitors and must never denigrate other firms.

Integrity and honesty are at the heart of our business.

We expect our people to maintain high ethical standards in everything they do, both in their work for the firm and in their personal lives.

EXHIBIT D

Goldman Sachs

Report of the Business Standards Committee

January 2011

The Goldman Sachs Business Principles

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ABBREVIATIONS

BPC	Firmwide Business Practices Committee
CBSC	Firmwide Client and Business Standards Committee
CRBSG	Conflicts Resolution and Business Selection Group
EMEA	Europe, Middle East and Africa
EMD	Extended Managing Director
FASB	Financial Accounting Standards Board
GAAP	Generally Accepted Accounting Principles
GIR	Global Investment Research
GSAM	Goldman Sachs Asset Management
IBD	Investment Banking Division
ICAAP	Internal Capital Adequacy Assessment Process
IPO	Initial Public Offering
IRBC	Internal Risk Based Capital
IMD	Investment Management Division
MBD	Merchant Banking Division
MD&A	Management Discussion and Analysis
MPE	Maximum Probable Exposure
PMD	Participating Managing Director (Partner)
PWM	Private Wealth Management
RTL	Restricted Trading List
SEC	U.S. Securities and Exchange Commission
SPC	Structured Products Committee
TCM	Transaction Class Matrix

EXECUTIVE SUMMARY

A. OVERVIEW

The financial crisis has had a profound impact on thousands of financial institutions and businesses, and on millions of households. Its aftermath has been a time of reflection and reform.

For Goldman Sachs, this has been a challenging period. Our industry, and our firm in particular, have been subjected to considerable scrutiny. Our senior management and Board of Directors recognized this as an opportunity to engage in a thorough self-assessment and to consider how we can and should improve.

At our Annual Meeting of Shareholders on May 7, 2010, our Chairman and Chief Executive Officer, Lloyd C. Blankfein, announced the firm's intention to create the Business Standards Committee to conduct an extensive review of our business standards and practices. The Committee's mandate was to ensure that the firm's business standards and practices are of the highest quality; that they meet or exceed the expectations of our clients, other stakeholders and regulators; and that they contribute to overall financial stability and economic opportunity. The Committee has operated with oversight by the Board of Directors, which established a four member Board Committee to provide additional focus and guidance. In addition, the firm engaged two consulting firms to provide independent advice to the Business Standards Committee.

The scope and intensity of the Committee's eight month review have been significant, encompassing every major business, region and activity of the firm. We made 39 recommendations for change spanning client service, conflicts and business selection, structured products, transparency and disclosure, committee governance, training and professional development and employee evaluation and incentives. These recommendations have been approved by the firm's senior management and Board of Directors and implementation has already begun.

The firm's culture has been the cornerstone of our performance for decades. We believe the recommendations of the Committee will strengthen the firm's culture in an increasingly complex environment. We must renew our commitment to our Business Principles – and above all, to client service and a constant focus on the reputational consequences of every action we take. In particular, our approach must be: not just "can we" undertake a given business activity, but "should we."

We believe the recommendations contained in this report represent a fundamental re-commitment by Goldman Sachs: a re-commitment to our clients and the primacy of their interests; a re-commitment to reputational excellence associated with everything the firm does; a re-commitment to transparency of our business performance and risk management practices; a re-commitment to strong, accountable processes that reemphasize the importance of appropriate behavior and doing the right thing; and a re-commitment to making the firm a better institution.

We expect that the work and recommendations of the Committee will strengthen our culture and increase our focus on serving our clients, while recognizing our responsibilities to the financial markets, our stakeholders, regulators and the public at large.

B. THE GOLDMAN SACHS BUSINESS PRINCIPLES AND OUR COMMITMENT TO CLIENTS

The Committee began its work by evaluating the relevance of the firm's 14 Business Principles to our business today. Our Business Principles were codified 30 years ago and define our fundamental expectations for the way we should interact with our clients, manage our business and attract, retain and motivate our employees. The Committee concluded that the firm's Business Principles are as relevant today as ever. However, our business has evolved and become more complex in recent years, presenting challenges that require us both to strengthen certain core client service values for all interactions with clients and to describe more clearly our role-specific client responsibilities.

The core client service values of integrity, fair dealing, transparency, professional excellence, confidentiality, clarity and respect are embedded in our Business Principles and express how we intend to conduct ourselves in each and every client interaction.

In terms of our role-specific client responsibilities, across our various businesses we act in many capacities, including as an advisor, fiduciary, market maker and underwriter. Each of these capacities requires that we fulfill specific responsibilities to our clients. We must be clear to ourselves and to our clients about the capacity in which we are acting and the responsibilities we have assumed.

We believe these core client service values and role-specific client responsibilities are fundamental to all of the Committee's recommendations.

C. THE BUSINESS STANDARDS COMMITTEE WORKING GROUPS

The Business Standards Committee identified six important areas for detailed examination based on the events and developments of recent years. We established a working group for each area:

- Client Relationships and Responsibilities. We examined the responsibilities we have to our clients, their expectations of the firm, the different roles we may play to accomplish our clients' objectives and how the firm communicates with clients. We identified actions that would further strengthen our focus on clients and long-term relationships.
- Conflicts of Interest. We examined our approach to conflicts that arise in our business and how we can strengthen our procedures for resolving them. We reviewed the various ways in which our role in serving one client may intersect with our role in serving other clients or with the firm's own interests. We considered the views of our clients, our people, other stakeholders, regulators and the broader public.
- Structured Products. We examined how to improve the process for identifying structured products that should be subject to heightened review. We focused on strengthening our processes for evaluating and approving these products and their suitability for particular clients, as well as pre- and post-transaction sales practices, product origination, underwriting and disclosure standards.
- Transparency and Disclosure. We examined how to improve the firm's financial reporting and enhance disclosure of business mix, risk management, balance sheet composition and liquidity. In particular, we explored how to explain our activities more clearly, especially as they relate to our performance and our commitment to serve clients.
- Committee Governance. We reviewed the governance, standards and practices of certain of our firmwide operating committees to ensure their focus on client service, business standards and practices and reputational risk management. In particular, we found ways to strengthen accountability, compliance and internal control standards.
- Training and Professional Development. We examined how to ensure our training and professional development, including our annual performance evaluation process and incentives, enhance our culture and strengthen the values of client service as well as behavior and personal accountability.

D. SUMMARY OF RECOMMENDATIONS

The Committee made 39 recommendations to improve the firm's business standards and practices. Several key recommendations are presented below, grouped into broad priorities for improvement.

Strengthening Client Relationships. Our clients must be at the heart of the firm's decision-making, thinking and committee governance, both formally and informally. Key recommendations include:

- Establishing a new Client and Business Standards Committee to place our client franchise at the center of our decision-making processes.
- Detailing the firm's specific professional responsibilities to our clients which depend on the nature of the relationship, role and the specific activity we are asked to undertake. We act as an advisor, fiduciary, market maker and underwriter across various businesses and it is important to articulate clearly both to our people and to clients the specific responsibilities we assume in each case.
- Designing and implementing a comprehensive firmwide program to strengthen client interactions and relationships and to enhance our client franchise.
- Strengthening evaluation criteria for all employees in client-facing roles to achieve an appropriate long-term, client-focused orientation.

Strengthening Reputational Excellence. Goldman Sachs has one reputation. It can be affected by any number of decisions and activities across the firm. Every employee has an equal obligation to raise issues or concerns, no matter how small, to protect the firm's reputation. We must ensure that our focus on our reputation is as grounded, consistent and pervasive as our focus on commercial success. Key recommendations include:

- Implementing a comprehensive training and professional development program on our Business Principles, core client service values and role-specific client responsibilities.
- Strengthening our standards for the identification, review, approval and documentation of structured products and the framework for evaluating their suitability for various client segments.
- Implementing enhanced disclosure and origination standards for each business unit that is responsible for originating structured product securities.

- Moving certain underwriting and origination activities from the Securities Division to the Financing Group in the Investment Banking Division, and implementing enhanced and consistent policies and procedures on disclosure, approval processes and other controls.
- Providing plain language explanations to our clients about the firm's conflicts resolution and business selection processes, including describing activities we may continue to conduct while we are advising or financing a particular client.
- Updating and strengthening the Code of Business Conduct and Ethics and requiring employees to certify their compliance.

Strengthening Committee Governance. The firm's committee governance structure must encourage ownership and accountability for client service, all business activities and reputational risk management and be oriented to action and decision-making. Key recommendations include:

- Restructuring the firm's existing committee governance:
  - Establishing a new Client and Business Standards Committee to place our client franchise at the center of our decision-making processes and to reflect the important interrelationships between clients, business practices and reputational risk management.
  - Establishing corresponding divisional and regional Client and Business Standards Committees to enhance accountability for all our business activities.
  - Establishing a Firmwide New Activity Committee to consolidate and strengthen existing processes for approving new products and activities and to assess the important question of not just "can we" undertake a given business opportunity, but "should we."
  - Establishing a Firmwide Suitability Committee to oversee standard setting for client, product and transaction suitability across the firm.
- Forming an Event Review Group to perform timely, focused reviews of incidents or other matters of concern arising from the firm's day-to-day business activities or in our industry more broadly.
- Establishing and maintaining a formal policy framework for committee best practices, processes and procedures governing all aspects of committee operations, including charters, regular meeting agendas, minutes and statements of action.

Enhancing Transparency of Communication and Disclosure. We recognize the need to better explain our business activities and how these activities relate to our performance and to our mission to serve clients. Key recommendations to improve and increase our financial disclosure include:

- Reorganizing our revenue reporting from three existing segments into four to provide greater clarity and visibility on the importance of our client franchise activities and client facilitation to our revenues.
- Providing a simplified balance sheet showing assets by business unit / activity as well as the firm's excess liquidity position.
- Describing in greater detail our overall risk management structure, culture and processes.
- Providing additional disclosure related to credit risk, operational risk and capital adequacy.

Strengthening Training and Professional Development. We must provide training and professional development to strengthen our culture, reinforce our core values and implement and embed the recommendations in this report into our daily practices. Key recommendations include:

- Creating a global program, led by our Chairman and CEO, to explain the Committee's recommendations, underline the importance of client service, our business standards and reputational risk management and reinforce the key attributes of our culture to the firm's 2,200 participating and extended managing directors. The "Chairman's Forum on Clients and Business Standards" will represent a large investment of time of our senior management team over the course of 2011.
- Implementing training and professional development programs tailored for each division to clarify the different roles their professionals have with clients and the client-specific responsibilities associated with each of those roles.
- Increasing emphasis on evaluation criteria relating to reputational risk management in the firm's annual performance review and compensation and other incentive and recognition processes.
- Increasing the focus on leadership, culture and values as part of the employee annual promotion, performance review and compensation processes.

E. IMPLEMENTATION OF THE RECOMMENDATIONS

Senior management and the Board of Directors are committed to the implementation of the recommendations and expect our employees to dedicate themselves to this initiative. Senior management and the Board of Directors will receive periodic progress reports on implementation of the Committee's recommendations.

Extensive training and professional development efforts that influence behavior over time are critical to the success of the overall implementation effort. In addition, the enhancements and changes arising from the Committee's recommendations will be documented and reflected in the policies, practices and procedures that govern how we conduct our business.

The Committee recognizes that the impact of its work will be measured by the success of the implementation effort and, ultimately, how well the employees of Goldman Sachs act on the recommendations and embrace their spirit.

SECTION I: STRUCTURE OF THE REPORT

Sections II through VII of this report present the recommendations of the six working groups established by the Committee.

The recommendations of each working group follow a common format:

Part A: Introduction and Overview, the context and setting in which the recommendations were developed.

Part B: Guiding Principles, the broad objectives that the recommendations of the working group are intended to achieve.

Part C: Discussion and Recommendations, the rationale and recommendations of each working group.

Each recommendation aims to strengthen our business standards and practices and is stated in terms of one or more broad priorities for improvement:

- Strengthening client relationships
- Strengthening reputational excellence
- Strengthening committee governance
- Enhancing transparency of communication and disclosure
- Strengthening training and professional development

The two objectives that underlie a majority of the recommendations are strengthening client relationships and reputational excellence.

Section VIII describes the comprehensive and rigorous implementation plan for the recommendations. The implementation plan establishes a time line, details a framework of internal control emphasizing ownership and accountability and puts in place procedures to ensure follow up and full documentation.

SECTION II: CLIENT RELATIONSHIPS AND RESPONSIBILITIES

A. INTRODUCTION AND OVERVIEW

The cornerstone of the Business Standards Committee's recommendations is the relationship between Goldman Sachs and its clients and a deeply rooted belief that if our clients are successful, our own success will follow. With this in mind, we have sought to understand and address client concerns, clarify our responsibilities to clients and recommend ways to strengthen our client relationships.

The Committee recognizes that we need to clearly articulate standards and expectations for client service and reputational excellence in order to strengthen client relationships. We have established three core components that describe how we interact with clients:

- Guiding principles for client relationships and responsibilities that complement our Business Principles and respond to current financial market realities.
- Client service values that apply to all client relationships. These values are embedded in the firm's Business Principles.
- Role-Specific Client Responsibilities that articulate the basic responsibilities we must fulfill when acting in different capacities for our clients.

Taken together, these components constitute the foundation of our commitment to client service and reputational excellence.

Client Survey: Background and Methodology

To better understand how our clients view Goldman Sachs, we retained an independent consultant to conduct non-attributable, in-depth, in-person discussions with senior management of more than 200 of our clients worldwide. Our consultant reported our clients' views in such a way that no Goldman Sachs employee knows what any individual client said during the interviews.

We selected the sample of clients from our three main businesses – Investment Banking, Investment Management and Securities – and all of our geographic regions. Our sample comprised, in roughly equal proportion, relationships we would characterize as strong, moderate, and weak.

The client interviews were conducted over a four month period without the presence or participation of Goldman Sachs employees so that clients would be more likely to offer critical feedback, concerns and perceptions.

The consultant used a structured but open-ended interview format that not only allowed clients to provide their views on the specific topics posed, but also invited them to share any other thoughts on Goldman Sachs. Specific topics covered included:

- How well Goldman Sachs serves the interests of its clients and how well we communicate our role when serving our clients;
- The client's view of its coverage team and its view of Goldman Sachs as an institution;
- Goldman Sachs' risk management capabilities;
- Goldman Sachs' business model;
- Goldman Sachs' approach to legal and regulatory compliance;
- Goldman Sachs' effectiveness at communicating its Business Principles;
- Goldman Sachs' research capabilities;
- Goldman Sachs' corporate citizenship activities;
- Other issues that Goldman Sachs senior management should be aware of or should consider; and
- Goldman Sachs' overall strengths and weaknesses, as compared to its competitors.

The consultant presented its findings and analysis to the Business Standards Committee, senior management, the Board Committee and the Board of Directors. We used these meetings to ask clarifying questions, identify and analyze the key themes and issues that emerged from the client interviews and to discuss and develop recommendations. In addition, the senior leadership of each division reviewed feedback relating specifically to their businesses.

Client Survey Summary

The client survey found that our clients view Goldman Sachs as a firm with highly talented people, strong execution and risk management capabilities and a well-respected brand. Clients recognized that Goldman Sachs' culture of teamwork enables the firm to work seamlessly across products and regions to execute difficult or multi-faceted transactions on their behalf. Clients also said they have a high level of confidence in the individuals at Goldman Sachs who serve them directly and whom they know well.

More importantly, the client survey included critical feedback. Clients raised concerns about whether the firm has remained true to its traditional values and Business Principles given changes to the firm's size, business mix and perceptions about the role of proprietary trading. Clients said that, in some circumstances, the firm weighs its interests and short-term incentives too heavily. These concerns pointed to the need to strengthen client relationships which, in turn, will strengthen trust. Clients recommended that we communicate our core values more clearly, both through individual interactions and through corporate communications. Clients also said they would like us to communicate more clearly about our roles and responsibilities in particular transactions.

B. GUIDING PRINCIPLES

These principles guided the Committee in making our recommendations:

- Client-Focused Approach. The firm will strengthen its focus on clients and client objectives. We must make decisions over time that result in our clients recognizing our commitment to serving their needs.

- Long-Term Orientation. The firm will recommit to the importance and value of building and sustaining a long-term client franchise. Goldman Sachs must place even greater emphasis in our incentive systems to support building long-term client relationships.

- Earn Clients' Respect and Trust. To earn the respect and trust of clients, we must attract, develop and retain employees who demonstrate character, act with the highest integrity and consistently provide clients with accurate, timely and clear communications.

C. DISCUSSION AND RECOMMENDATIONS

The Committee is making the following recommendations to strengthen client relationships and responsibilities:

1. The Business Standards Committee recommends that the firm reemphasize the client service values listed below. These values are embedded in our Business Principles and

express how we intend to conduct ourselves in each and every client interaction. This recommendation reflects our objective of strengthening client relationships.

- **Integrity**: Adhering to the highest ethical standards.
- **Fair Dealing**: Pursuing a long-term and balanced approach that builds clients' trust.
- **Confidentiality**: Protecting confidential information.
- **Clarity**: Providing clear, open and direct communication.
- **Transparency**: Informing our clients so that our role in any transaction is understood by them.
- **Respect**: Being respectful of our clients, other stakeholders and broader constituencies.
- **Professional Excellence**: Consistently providing high quality service, responsiveness, thoughtful advice and outstanding execution.

2. The Business Standards Committee recommends that the firm implement the framework for Role-Specific Client Responsibilities to communicate with clients about our different roles and responsibilities and as a benchmark for training and professional development for employees. Above all, we must be clear to ourselves and to our clients about the capacity in which we are acting and the responsibilities we have assumed. This recommendation reflects our objective to strengthen client relationships.

In broad terms, our clients ask the firm to act in the capacity of advisor, fiduciary, market maker and underwriter, and may require us to act in multiple capacities in our overall relationship. We have developed a "Role-Specific Client Responsibilities" matrix, provided on the following page, to briefly describe these roles and our responsibilities to clients. The matrix is illustrative and does not capture every possible client interaction, since our client service responsibilities will differ depending on the nature of the transaction, the role we are asked to play in any given situation and the applicable law of the relevant jurisdiction. We must be clear to ourselves and to our clients about the capacity in which we are acting and the responsibilities we have assumed.

Goldman Sachs Role-Specific Client Responsibilities

Relationship With Client: Advisor

Role	Activities	Basic Responsibilities
Banking Advisor	• Act as an advisor as agreed with client in engagement letter • Act as an advisor on an informal, client service basis with no engagement letter in place	• Provide our best advice • Disclose conflicts • Assist client in reviewing alternatives on their merits • In some jurisdictions, fiduciary duties apply

Relationship With Client: Fiduciary

Role	Activities	Basic Responsibilities
Asset and Private Wealth Manager	• Advise on asset allocation, portfolio construction and manager or securities selection • May invest on a discretionary basis	• Provide our best advice • Disclose conflicts • May assist in reviewing investment alternatives on their merits • Fiduciary duties apply, although not in all jurisdictions

Relationship With Client: Market Participant

Role	Activities	Basic Responsibilities
Market Maker / Counterparty (Principal)	• Make markets by committing capital • Provide investing ideas • Make our inventory available or add to our inventory	• Communicate clearly our role as principal • Stand ready to buy and sell regardless of whether the other side of the transaction is available • Set pricing to reflect market conditions • Fulfill applicable suitability and other pre-and post-transaction responsibilities
Broker	• Execute transactions for the account of clients • Provide investing ideas • Provide advice incidental to acting as broker	• Provide best execution • Arrange adequate protection of client assets for which we are responsible • Fulfill applicable suitability and other pre-and post-transaction responsibilities

Relationship With Client: Underwriter / Structurer

Role	Activities	Basic Responsibilities
Underwriter / Product Structuring	• Structure and execute underwritings, distributions or loan syndications • May make or buy loans, or buy securities or other instruments, and issue / sell securities that are based upon those assets • Prepare disclosure and conduct marketing • Set pricing to reflect relevant issuer- and market-related factors, including investor demand, when making a broad distribution	• Conduct appropriate and thorough due diligence on issuer and / or structure, as applicable • Disclose conflicts • Endeavor to ensure there is no material misstatement / omission in disclosure • Fulfill applicable suitability obligations • In underwritings in which the issuer or selling shareholder participates in selling efforts, make allocations explicitly taking into account their interests and expressed preferences • Generally make secondary trading market

While most of the roles, activities and responsibilities highlighted in this matrix are straight forward, the terms "market maker" and "underwriter" require some explanation.

Market making refers to our secondary sales and trading activities. We can act as an agent for buyers and sellers by executing their orders in the market or act as a principal by supplying liquidity directly to our clients. We do this regardless of market conditions and our view of the market. Our liquidity obligations in certain markets can also be explicit and obligatory – when, for example, we act as a Primary Dealer in government securities markets or as a New York Stock Exchange Designated Market Maker.

Our market making responsibilities can also be implicit. In the credit and mortgage markets, for example, our clients expect us to be willing to sell positions to them as a principal or to be willing to buy positions from them. Market making involves risk, and as a result, market makers engage in risk management activities such as hedging and managing inventory in both cash and derivative instruments.

Market makers provide liquidity and play a critical role in price discovery. They contribute to the overall efficiency of the capital markets, facilitating capital raising for corporations and governments and allowing money managers to better manage their portfolios and generate returns.

The role of an underwriter differs from that of a market maker. An underwriter of financial instruments works with the issuer in connection with offering financial instruments to investors. In this context, securities laws effectively impose a gatekeeper role on Goldman Sachs: as an underwriter, the firm is expected to assist the issuer in providing an offering document to investors that discloses all material information relevant to the offering. The purchaser of securities then evaluates whether they are worthy of investment based on his or her own view and analysis of the security in light of expectations about the future prospects of a company, financial instrument or market.

3. The Business Standards Committee recommends that the firm increase its emphasis on client service and client relationships in our annual performance review and other incentive processes. Among other things, the performance review system will seek to assess how well our people represent the Goldman Sachs client franchise and how well they build long-term client relationships. This recommendation reflects our objective of strengthening client relationships.

4. The Business Standards Committee recommends that the new Client and Business Standards Committee design and implement a comprehensive firmwide program to strengthen client interactions and relationships to enhance our client franchise. This recommendation reflects our objectives of strengthening client relationships and committee governance.

5. The Business Standards Committee recommends that the firm implement a comprehensive training and professional development program on the firm's Business Principles, client service values and the Role-Specific Client Responsibilities. Each division will tailor its program to emphasize its different roles and responsibilities to clients. This recommendation reflects our objectives of strengthening client relationships, reputational excellence and training and professional development.

6. The Business Standards Committee recommends that the leaders of each division play a critical role in the design and execution of a multi-faceted communication program to introduce the Committee's recommendations to clients. This recommendation reflects our objectives of strengthening client relationships and enhancing transparency of communication and disclosure.

SECTION III: CONFLICTS OF INTEREST

A. INTRODUCTION AND OVERVIEW

Conflicts of interest and the firm's approach to dealing with them are fundamental to our client relationships, our reputation and our long-term success. We must earn the trust of our clients by consistently fulfilling the responsibilities we undertake when we assume a role on their behalf. We also recognize the concerns of clients, other stakeholders, legislators, regulators, market participants and the general public over the potential for conflicts of interest in the financial services industry and at Goldman Sachs.

The Committee undertook a broad examination of the firm's infrastructure, policies and procedures in the area of conflicts resolution. Following this, we developed guiding principles and recommendations that will enhance our conflicts resolution and business selection practices. In the long term we believe that any constraints these enhancements may impose on the firm will be outweighed by the benefits derived from building client trust and strengthening the firm's reputation.

Goldman Sachs is a full-service, global investment bank. Many of our clients interact with the firm in several of our businesses. For example, working with entirely separate areas of the firm, a corporate client may issue securities through us in connection with an acquisition in which we acted as their financial advisor. That same client may engage in a commodity-related hedging program related or entirely unrelated to the acquisition, and, through its pension fund, may be an asset management client.

We are most effective in serving our clients when we are able to meet the full range of their financing, risk management, liquidity and advisory needs. Acting in these roles for multiple clients simultaneously, however, we necessarily encounter potential conflicts and business selection issues. It is critical for our business to have a comprehensive conflict management and business selection process that is overseen by senior, experienced people and embedded in core decision-making processes of the firm.

The term "conflict of interest" does not have a universally accepted meaning, and conflicts can arise in many forms within a business or between businesses. The responsibility for identifying potential conflicts, as well as complying with the firm's policies and procedures, is shared by the entire firm. The firm has invested considerable time and resources over many years in its conflicts resolution infrastructure, policies and procedures.

We have a multilayered approach to resolving conflicts and addressing reputational risk. The firm's senior management and divisional leadership oversee policies related to conflicts resolution. The firm's divisional leadership, a Conflicts Resolution and Business Selection Group (CRBSG), the Legal and Compliance Departments, the Firmwide Business Practices Committee (BPC) and other internal committees all play roles in the formulation of policies, standards and principles and assist in making judgments regarding the appropriate resolution of particular conflicts. Resolving potential conflicts necessarily depends on the facts and circumstances of a particular situation and the application of experienced and informed judgment.

The firm's Legal, Compliance and Internal Audit Departments help the firm's businesses operate in accordance with applicable laws and regulations and the firm's policies and procedures. The Compliance Department monitors the mechanisms – such as information barriers between business units – that are designed to ensure appropriate use and protection of confidential information, including having physical and other information barriers between business units.

At the transaction level, various people and groups have roles. As a general matter, prior to businesses accepting mandates, or making new loans or investments, the CRBSG reviews the potential transaction. It reviews all financing and advisory assignments in the Investment Banking Division (IBD) and lending, investing and other activities by the Merchant Banking Division (MBD), the Securities Division and segments of the Investment Management Division (IMD). Various transaction oversight committees, such as the Capital, Commitments, Investment, Suitability and Structured Products Committees, also review new underwritings, loans, investments and structured products. These committees work with internal and external lawyers and the Compliance Department to evaluate and address any actual or potential conflicts.

B. <u>GUIDING PRINCIPLES</u>

The Committee observed the following principles in making its recommendations relating to conflicts:

- <u>Ability to Perform.</u> Prior to accepting a role with a client, we will exercise care to ensure that we are able to fulfill our responsibilities to that client. Having assumed a role, we will not undertake activities or accept a new mandate that would prevent us from fulfilling those responsibilities.

- Long-Term Focus. In resolving potential conflicts and making business selection decisions, we will pursue a long-term and balanced approach that builds clients' trust.

- Clarity Regarding Our Responsibilities. Our clients ask the firm to provide various services. We will be clear with our clients about the specific responsibilities we are assuming. We will also be clear about what other activities we may continue to perform while we are advising or financing a particular client.

C. DISCUSSION AND RECOMMENDATIONS

We took the following steps to identify areas of focus:

- Reviewing the various ways in which a role we play with one client may intersect with the role we might play on behalf of another client or with the firm's own interests;
- Conducting an extensive survey of business and functional leaders within the firm;
- Reviewing the results of the client survey;
- Analyzing relevant judicial decisions and legislative material; and
- Considering forthcoming changes to the regulatory framework for our industry.

As a result of this process, we identified the following areas for in-depth review and enhancement:

- Information barriers;
- Origination and underwriting activities across the firm;
- Written communications about securities while the firm is contemporaneously underwriting or advising the issuer of the securities;
- Transactions where the firm may have multiple roles;
- Fund and firm balance sheet investment and lending activities;
- Documentation and conflicts policies, processes and principles; and
- Client communications.

C-1. Information Barriers

In accordance with industry practices, Goldman Sachs maintains information barriers (Information Barriers or Walls) to prevent the unauthorized disclosure of confidential information by "private side" personnel (predominantly in IBD) to "public side" personnel in the Securities Division and IMD.[1] The Compliance Department maintains the policies and procedures governing Information Barriers and monitors the communication of confidential information within the firm. It also conducts surveillance of trading activities during periods in which the firm possesses material non-public information and trains employees on Information Barrier policies and procedures. Consistent with applicable law, Information Barriers enable the firm to continue to conduct sales and trading activities on the public side of the firm while the private side has material, non-public information.

The Compliance Department may permit private side employees to communicate material, non-public information to public side employees, pursuant to established record-keeping and surveillance procedures to help facilitate investment banking transactions that require market judgment. In our equity capital markets business, for example, a client who owns a substantial block of stock may ask us to buy the stock, which we would then resell to other clients. In these circumstances, we would typically seek the judgment of a small number of professionals from the Securities Division regarding the potential market appetite for the stock in order to price it properly. Once wall crossed, these employees cannot influence, make recommendations or direct trading in the securities of the issuer on which they have received non-public information.

The Business Standards Committee and the BPC undertook a systematic review of the firm's wall crossing procedures with a view to reducing the number and duration of wall crosses. The following enhancements were implemented during the summer of 2010 and resulted in a reduction in the number and duration of wall crosses.

7. With respect to Information Barriers and wall crosses, requests by IBD to initiate a wall cross for a Securities Division employee must be approved by a participating managing director (PMD) or a senior extended managing director (EMD) in IBD who is supervising the relevant transaction or project, as well as one of a small number of PMDs or senior EMDs in the Securities Division, designated by divisional management. One of the heads of the Securities Division or his designee must approve requests when more than

[1] Goldman Sachs Asset Management is separated from other divisions of the firm both physically and pursuant to policies and procedures that have been developed in accordance with applicable regulations.

five Securities Division employees are needed to cross the Wall in connection with any particular transaction or project. This recommendation reflects our objectives of strengthening client relationships and reputational excellence.

The firm is also enhancing training and professional development programs and putting in place additional surveillance of Information Barriers.

C-2. Origination and Underwriting Activities

IBD personnel have primary responsibility for the execution of underwritings of corporate, sovereign and municipal debt and corporate equity securities. The Securities Division has historically executed some transactions that involve the issuance, creation or repackaging of financial instruments.

8. The Business Standards Committee recommends that certain underwriting and origination activities be moved from the Securities Division to the Financing Group within IBD, including certain activities related to mortgage-backed and asset-backed securitization, emerging markets debt and money market instruments such as commercial paper. Business units of the Securities Division that continue to conduct origination activities will have policies and standards, approval processes, disclosure requirements and oversight that are consistent with those that apply to all origination activities in IBD. This recommendation reflects our objectives of strengthening client relationships and reputational excellence.

C-3. Written Communications During Underwriting and Advisory Assignments

In connection with an underwriting or an advisory engagement involving a material strategic transaction, the firm operates a Restricted Trading List Policy (RTL Policy). This policy may impose restrictions on sales communications, trading and research to mitigate legal, regulatory, or conflict issues and to eliminate any appearance of the improper use of material non-public information. The RTL Policy permits the publication of research and the continuation of market making only to the extent permitted by applicable law.

Our clients expect our salespeople and traders to express their independent views on markets and companies and to develop trading ideas. These activities occur on the public side of the firm's Information Barriers. The RTL Policy restricts written client communications[2] regarding an underwritten security from the announcement of that offering until the offering is priced. Moreover, in connection with U.S. initial public offerings (IPOs), the policy further restricts written communications until 25 days after pricing. Subject to guidelines, the policy generally permits written communications by sales and trading personnel during a pending material strategic transaction on which the firm is advising a client, once that transaction is in the public domain.

We reviewed the RTL Policy to determine how we could reduce the appearance of conflicts of interest in the firm's sales and trading activities during and immediately after underwriting securities and advising clients, while preserving the firm's ability to appropriately serve its investing clients.

9. The Business Standards Committee recommends that the firm's existing policies regarding written communications during underwriting and advisory assignments be supplemented to restrict Securities Division and Private Wealth Management (PWM) personnel from disseminating broadly to clients written sales communications either (i) recommending an investment or transaction, or (ii) expressing a view[3] regarding the issuer or client, its securities or its other financial instruments, or regarding other transaction parties and their securities or their other instruments as follows:

   – For offerings of equity or equity-linked securities or high yield debt offerings or loan syndications,[4] the restriction would apply from the pricing date until 30 days thereafter.

   – For material strategic transactions in which Goldman Sachs is advising a party, the restriction would apply from public announcement through closing of the transaction.

[2] This discussion does not address written communications by the firm's Global Investment Research Division ("GIR"). There are regulations and well-established firm policies that govern the publication of research by the firm's independent Global Investment Research Division in connection with an offering being underwritten by Goldman Sachs or a material strategic transaction in which the firm is advising a client. To the extent permitted by law and policy, GIR may continue to publish research.

[3] We will continue to permit written communications with views that are consistent with recently-published GIR research or that attaches, summarizes or references that research.

[4] Offerings and syndications of investment grade debt and offerings and trading of asset-backed and mortgage-backed securities are generally excluded because of their frequency and because they generally are not material to the issuer or originator of the underlying assets, in each case unless otherwise determined by the Capital Committee or a subcommittee thereof. Municipal and not-for-profit issuers will be treated as issuers of high yield corporate debt.

This recommendation reflects our objectives of strengthening client relationships and reputational excellence.

Securities Division or PWM personnel may request that the Legal or Compliance Departments grant an exception, subject to applicable regulations, if there is a fundamental change in the business or prospects of the issuer or other relevant party. In addition, if the time between the announcement and the closing date for a material strategic transaction becomes longer than is standard for transactions of this type, Securities Division and PWM personnel may also request an exception from the Legal or Compliance Departments, subject to applicable regulations.

C-4. Multiple Roles in a Particular Transaction

The firm often plays multiple roles in a specific transaction. Examples include the following:

- The firm provides financing for an acquisition by a firm-managed fund;
- The firm executes transactions, such as derivatives or purchases of loan portfolios, with an IBD advisory client;
- The firm underwrites securities of an issuer in which the firm or a firm-managed fund is an existing lender or investor; and
- The firm provides financing (staple financing) to potential buyers of an asset when IBD is advising the seller of that asset.

The CRBSG and, in most cases, one of the firm's transaction oversight committees review these transactions in advance because of the potential for actual or perceived conflict between the firm and a client or fund. The firm may be able to address potential conflicts by providing disclosure to its clients, obtaining appropriate consents, relying on Information Barriers, carefully defining its role and / or requesting that the client engage a co-advisor. The Committee has reviewed the firm's policies and practices governing these activities and makes the following recommendations.

10. To strengthen client relationships and reputational excellence, the Business Standards Committee recommends as follows:

    (i) Goldman Sachs will not be the sole financing source for acquisitions by MBD private funds, other firm-managed private funds or portfolio companies controlled by those funds,[5] except in special circumstances with the approval of senior management or an appropriate committee of the firm.

(ii) Goldman Sachs will carefully review requests to provide financing to competing bidders when a MBD fund or other firm-managed private fund is pursuing an acquisition as a bidder. Senior management or an appropriate committee of the firm will be part of the review process.

(iii) Goldman Sachs will carefully review requests to provide staple financing when IBD is selling a public company. This review will occur as part of the firm's customary staple financing approval process. Senior management or an appropriate committee of the firm will be part of the review process.

(iv) The applicable transaction oversight committees – with the assistance of the CRBSG and the Legal Department – will undertake a heightened review before approving an underwriting for an issuer in which the firm or its affiliates, including MBD and other firm-managed private funds, have a material interest as a shareholder or creditor.

C-5. Fund and Firm Balance Sheet Investing and Lending Activities

Several business units of the firm may pursue lending and investing activities. For example, the Securities Division as well as funds in IMD and MBD may make or invest in senior, subordinated and mezzanine loans. Equity investments may also be made by business units in different divisions. The Securities Division generally lends and invests for the firm's own account, while IMD and MBD generally invest and lend on behalf of funds for which the firm is acting as investment manager and fiduciary. Potential conflicts of interest may arise in connection with certain of these activities.

11. The Business Standards Committee recommends that IMD funds that make alternative investments should be integrated into the firmwide Conflicts Resolution and Business Selection process in a manner consistent with their fiduciary duties. This recommendation reflects our objective of strengthening client relationships and reputational excellence.

[5] Rules to be adopted as part of financial regulatory reform may limit or restrict certain of the activities described above between Goldman Sachs and MBD funds, other firm-managed funds and / or portfolio companies controlled by those funds.

C-6. Conflicts Policies / Processes / Principles

The CRBSG has developed policies and guidance on activities requiring advance clearance. To identify potential conflicts, the CRBSG relies on internal databases and consults with relevant firm employees. In addition, CRBSG professionals are members of many of the committees that oversee transaction execution. They also receive committee meeting agendas. The group obtains information about activities on the public side of the firm's Information Barriers – including positions in securities and confidential information possessed by employees – primarily by monitoring internal databases. This ensures that public side personnel are not inadvertently alerted to a potential transaction on the private side of the Wall. The group also obtains information about private side activities from relevant private side personnel. The CRBSG continually reviews and updates its policies and procedures in this regard.

12. To strengthen reputational excellence, the Business Standards Committee recommends that the firm review and update conflicts-related policies and procedures, as appropriate. The firm will make a consolidated and comprehensive compilation of these policies and procedures available to relevant personnel in connection with training and professional development initiatives. This compilation will also serve as an ongoing resource to the firm and its employees and facilitate monitoring by the Compliance and Internal Audit Departments. The Committee stresses that all employees share the responsibility to identify and elevate potential conflicts.

C-7. Client Communications

It is important that each client understand the roles and responsibilities that we assume in any particular transaction. We have reviewed what we disclose about actual or perceived conflicts in engagement letters, standard disclaimers and other documents. Our goal was to enhance the firm's overall conflicts resolution process, provide relevant information to clients and strengthen their confidence in Goldman Sachs.

13. The Business Standards Committee recommends that the firm employ materials written in plain language that articulate:

    (i) What it means that the firm has completed its conflicts resolution and business selection process in any particular situation; and

    (ii) What other activities the firm may continue to conduct while we are advising or financing a particular client.

We recognize that the language in engagement letters and standard disclaimers is often complex. We will provide education and training for firm employees and encourage them to communicate with clients through discussions and plain language written presentations about our conflicts resolution and business selection process. We will tailor this material to the business of a specific division and update it over time. Each employee who interacts with clients will be responsible for understanding and communicating the guiding principles for conflicts resolution and business selection to clients and will be accountable for following them. This recommendation reflects our objectives of strengthening client relationships and reputational excellence and enhancing transparency of communication and disclosure.

C-8. Training and Professional Development related to Conflicts Resolution

14. The Business Standards Committee recommends that the firm enhance its training and professional development programs regarding conflicts resolution. These programs will be updated to focus on familiarizing people with the compilation of conflicts policies and procedures discussed in the prior recommendation. Each employee who interacts with clients will participate in these programs. This recommendation reflects our objectives of strengthening client relationships and reputational excellence and enhancing transparency of communication and disclosure.

SECTION IV: STRUCTURED PRODUCTS

A. INTRODUCTION AND OVERVIEW

In the area of structured products,[6] we have recently seen efforts by market participants to simplify products and structures and avoid unnecessary complexity. Of course, the underlying forces which drive innovation in our financial markets and products cannot be eliminated; in fact, that innovation produces many benefits. However, for the most complex products, there may be a serious question about whether a complex product should be introduced into the market at all, even though it may address a client's needs.[7]

The Committee believes all financial institutions, including Goldman Sachs, bear responsibility for constantly improving practices and procedures relating to the marketing and distribution of structured products. In addition, regulators and lawmakers around the world are considering changes to rules and law governing these products. We also recognize that the financial services industry and capital markets will continue to evolve. Accordingly, the firm must maintain the flexibility to adapt over time the recommendations discussed below to address changes in markets, regulation and the competitive and macro-economic environment.

The Committee examined several issues related to structured products, including the firm's existing internal approval process, the suitability of products for different types of clients, pre- and post-transaction sales practices, disclosure and documentation. Our recommendations will strengthen the firm's standards by:

- Improving the process for identifying structured products that should be subject to heightened review and approval;
- Enhancing our framework for evaluating suitability by distinguishing between different client segments and focusing on individual clients;

[6] This section of the report deals with three categories of products and transactions: complex, structured and strategic. We use the term "structured products" to refer to these categories collectively and we use the category names complex, structured and strategic when discussing these categories individually.

[7] The Firmwide New Activity Committee (described in Section VI of this report) and the firm's transaction oversight committees will be expressly charged with addressing this question.

- Developing additional pre- and post-transaction sales practices that, by building on existing practices, strengthen the firm's responsibilities to our clients, provide stronger controls and enhance the post-transaction experience through additional client service; and
- Formalizing practices regarding securities origination and disclosure standards.

Several aspects of the Committee's principles and recommendations exceed current regulatory requirements. Certain recommendations will result in the documentation of practices that are already part of the firm's existing business standards. Documenting all practices will create greater accountability.

While the recommendations on structured products focus on the Securities Division, each division will implement these recommendations in a manner appropriate for their particular businesses.

B. GUIDING PRINCIPLES

The following principles guided the development of the recommendations on structured products:

- Standards of Sophistication. We are committed to knowing our clients and ensuring that they have the ability and background to understand the risks of all transactions they execute with us, including structured products.
- Market Participation. Before participating in a market for structured products, we will answer the critical question of whether we "should" engage in the relevant activity while we consider whether we "can" engage in the activity operationally.
- Disclosure. We are committed to making clear disclosures in offering documents.
- Documentation. We are committed to timely communication and transmission of relevant information and documents to our clients.
- Post-Transaction Engagement. Our responsibility to work with our clients does not end when we execute a transaction. We expect to engage with clients after the execution of a transaction, particularly when market developments occur that could materially impact the transaction and the client.

C. DISCUSSION AND RECOMMENDATIONS

The Committee's recommendations fall under the following four headings: (i) identifying complex transactions, designated structured transactions and strategic transactions; (ii) client suitability; (iii) pre- and post-transaction sales practices; and (iv) disclosure and origination standards.

C-1. Identifying Complex Transactions, Designated Structured Transactions and Strategic Transactions

The task of identifying structured products is complex. While certain factors such as leverage, lack of liquidity and lack of price transparency frequently characterize these products, there is often no simple mechanism for determining on which side of the line a particular structured product falls. Once a product has been identified as a structured product, the review and approval process for that product must consider the client segments investing in the product. Certain structured products that are suitable for one set of clients (e.g., professional investors) will not be suitable for others (e.g., retail).

Mindful of these challenges, we propose a framework for identifying those structured products that should be subject to heightened review and approval. We recognize that, as products and markets evolve, the framework will need to evolve and that a framework can never fully replace good judgment.

The Business Standards Committee recommends establishing a global, consistent process for determining which transactions will be subject to enhanced review, approval and documentation. Specifically, the Committee recommends a three step identification process for designated structured, strategic and complex transactions as follows:

15. Designated Structured Transactions. The Structured Products Committee (SPC) will continue to review and approve all transactions that meet the requirements of a "designated structured transaction" under the charter of the SPC. Designated structured transactions are transactions, series of transactions or products where: (i) one of the client's principal objectives appears to be to achieve a particular legal, regulatory, tax, or accounting treatment, including transferring assets off balance sheet; (ii) the proposed legal, regulatory, tax, or accounting treatment is materially uncertain; (iii) the product or transaction (or series of transactions) have substantially offsetting legs or lack economic

substance,[8] or (iv) the product or transaction (or series of transactions) could be characterized as a financing, but is structured in another manner. This recommendation reflects our objectives of strengthening client relationships and reputational excellence.

16. Strategic Transactions. All strategic transactions will be subject to heightened review and approval. For this purpose, "strategic transactions" are transactions that are sufficiently large and important to a client or sufficiently large in the context of the market that they warrant heightened scrutiny. These transactions are often characterized by several of the following factors: (i) losses or gains from the transaction could reasonably be expected to materially impact the client's financial position or have an adverse reputational impact on the firm; (ii) the transaction is likely to have a material impact on the market; (iii) the transaction requires the approval of the client's Chief Financial Officer, Chief Executive Officer or Board of Directors; (iv) the transaction hedges a material acquisition, disposition or other business combination transaction by the client, and the hedge is material; (v) the transaction requires separate disclosure in the client's financial statements or will otherwise be disclosed through a public filing; or (vi) the transaction represents a large financing commitment by the client. Strategic transactions may not involve complexity or unique structural features, but nevertheless merit heightened review because of these factors. This recommendation reflects our objectives of strengthening client relationships and reputational excellence.

17. Complex Transactions. Complex transactions will also be subject to heightened review and approval. While not an exhaustive list, the following factors indicate complexity: (i) leverage; (ii) illiquidity; (iii) the potential for losses in excess of initial investment; (iv) lack of price transparency; and (v) non-linear payouts. The Committee has identified these factors to guide salespeople[9] in deciding which transactions are complex and merit heightened review and approval. Not every transaction exhibiting these factors is complex – in fact these factors may be present in relatively simple transactions. Identifying complex transactions requires judgment. When in doubt, salespeople will seek guidance from their supervisor or the chairs of the Firmwide Suitability Committee (or their designees).

[8] "Offsetting legs" refers to cash flows under different parts of a transaction (or group of related transactions) which from an economic perspective cancel each other out. Transactions with offsetting legs may lack economic substance. Transactions without economic substance have not been and will not be approved by the SPC.

[9] References to salespeople include, where the context requires, marketers, structurers and other members of the Goldman Sachs business team that work on structured products.

The Committee recommends the creation of new due diligence procedures. As part of the heightened review of complex and strategic transactions, salespeople will be required to complete a due diligence questionnaire that discusses the factors detailed above. The Firmwide New Activity Committee will also analyze these factors when reviewing a proposed new product or activity. This recommendation reflects our objectives of strengthening client relationships and reputational excellence.

C-2. Client Suitability

The firm's policies and procedures must take into account the client segments to which products and transactions are being distributed. The level of scrutiny will depend partly on the client and partly on the specific role that Goldman Sachs is performing. Even where the firm does not have any legal responsibility to evaluate the suitability of a structured product, we believe the firm should nonetheless conduct suitability reviews as part of our pre-transaction approval process. We believe that this does not alter the fundamental nature of the client relationship or create additional legal duties or responsibilities.[10]

18. To strengthen client relationships and reputational excellence, the Business Standards Committee recommends redefining the firm's approach to segmenting clients for suitability purposes into one of the following three segments:

    - professional investors (e.g., banks, broker-dealers, investment advisers and hedge funds);
    - other institutional accounts (e.g., municipalities, sovereigns, sub-sovereigns, pension funds, corporations, charities, foundations and endowments); and
    - high net worth accounts (e.g., natural persons, family offices).

Clients will be classified in one of these three segments; the classification will form part of their client profile, which is described below, and will be incorporated into the suitability analysis for transactions executed by that client.

As a general rule, the sale of structured products to other institutional or high net worth accounts will be subject to heightened suitability review. Professional investors will be presumed eligible to enter into most types of transactions without specific heightened review unless the

[10] For example, in jurisdictions where the firm has a suitability obligation only when it recommends transactions to a client, the firm nonetheless may choose to conduct a suitability-type review on other transactions.

transaction is flagged as a designated structured transaction (Recommendation 15) or strategic transaction (Recommendation 16).

We recognize that some clients do not fit easily into any particular segment.[11] Moreover, the designation of a client as belonging to any particular segment is not a prejudgment on that client's level of sophistication or ability to transact in particular types of instruments; on the contrary, we believe that there is no substitute for a specific review of each individual client in making determinations about suitability. We concluded that our segmentation of institutional investors into two segments is consistent with recent regulatory developments and will improve our assessments of suitability.

For retail and high net worth investors, Goldman Sachs has policies addressing the distribution of structured products through Goldman Sachs PWM and third-party distributors. These policies are part of a Global Framework for the Distribution of Structured Investment Products, which sets forth the approval standards and review processes for certain products (including structured products) that are sold or re-sold (or used to create a product that is re-sold) to these investors. The Structured Investment Products Committee oversees this framework. In the Business Standards Committee's view, the Global Framework is consistent with the firm's overall approach to the issue of suitability in relation to structured products.

C-3. Pre- and Post-Transaction Sales Practices

Pre-Transaction Sales Practices

The Committee analyzed the firm's pre-transaction sales practices, particularly in relation to structured products. This analysis builds on work previously conducted by the BPC on trading derivatives with municipal, sub-sovereign, sovereign and corporate clients. The following changes were made following the BPC's work:

- The firm introduced heightened suitability procedures and other enhanced controls for derivatives in 2008. These procedures and controls were expanded in 2009 and 2010 as part of a broad new suitability policy.
- The firm enhanced its review process for routine U.S. municipal bond underwritings.

[11] For example, some professional investors may themselves distribute products to retail and high net worth individuals. The firm has a separate process specifically designed to evaluate the suitability of the products distributed to retail or high net worth investors as discussed further below.

- The firm enhanced pre-transaction due diligence, disclosure and documentation procedures in 2009. The firm is now required to provide certain prospective clients with sensitivity analyses and mark-to-market scenarios for relevant transactions.
- The firm introduced new escalation and approval procedures, including a requirement that transactions with specified features (e.g., large in size or complex) receive approval by the supervisor for the applicable desk and, in certain cases, the appropriate Regional Suitability Committee.[12]

19. To strengthen client relationships and reputational excellence, the Business Standards Committee recommends the following additional enhancements to the firm's overall pre-transaction sales practices:

A client profile will be maintained for each client in the form of a matrix (a Transaction Class Matrix or TCM) which reflects the types of transactions (e.g., cash, options, contingent liabilities) and underliers (e.g., equities, commodities, rates, credit) in which the client is pre-approved to transact from a suitability perspective. The TCM must be reviewed and approved by the relevant sales manager and Compliance officer before becoming effective and before being amended.

A heightened suitability review and approval will be required for any transaction or transaction class that falls outside a client's TCM. The level of review and approval required will generally be based on: (i) the maximum probable exposure (MPE) for the transaction; (ii) the segment classification of the client determined as outlined in Recommendation 18 above; and (iii) the factors for determining complexity as outlined in Recommendation 17 above (collectively, Due Diligence Review Criteria). These Due Diligence Review Criteria will be included in the Due Diligence Questionnaire that sales professionals will complete when they seek approval for transactions with clients who have not been preapproved for those transactions.

All designated structured and strategic transactions will require heightened review even when a client is eligible to execute a transaction based on its TCM.

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[12] As described in Section VI of this report, the Regional Suitability Committees are being replaced by a Firmwide Suitability Committee.

Post-Transaction Sales Practices

Our responsibilities to clients do not end on the execution date of a transaction. Post-transaction monitoring and follow-up will create greater sales force accountability, greater transparency to clients and a better client experience overall. As part of the BPC review noted above, the firm has already implemented several new post-transaction enhancements for derivative transactions with specific clients, including (i) tighter documentation standards (including reporting and escalation procedures for unexecuted confirmations); (ii) sending monthly valuation reports on specified transactions to certain clients; and (iii) improved ongoing monitoring (and internal review) of transactions through quarterly meetings with business supervisors and the Credit, Legal and Compliance Departments. The purpose of these meetings is to review high exposure levels and MPEs for certain clients.

20. To strengthen client relationships and reputational excellence, the Business Standards Committee recommends the following post-transaction sales practices for structured products:

The firm will establish processes to monitor relevant metrics (e.g., mark-to-market) for clients. Sales managers will be responsible for reviewing the results of this monitoring and taking appropriate actions on relevant transactions. There will be a mechanism for escalating issues to sales leadership and the Credit, Legal and Compliance Departments. Sales professionals will also be required to monitor the actual mark-to-market for transactions selected for heightened review and compare that mark-to-market against any previously analyzed stress test results that were provided to the client. In addition, divisional management will consider practices for monitoring the fulfillment by sales professionals of these post-transaction responsibilities for clients.

C-4. Disclosure and Origination Standards

Financial intermediaries like Goldman Sachs play many different roles in structured products, including acting as issuer, underwriter / arranger, derivatives counterparty, index sponsor, collateral agent and calculation agent. Depending on the roles the firm undertakes and the form and structure of the instrument we ultimately transact, the firm can encounter different legal and reputational risks. The Committee examined a broad cross section of the structured product securities underwritten and sold by the firm to identify ways to enhance Goldman Sachs' origination and disclosure practices. The resulting recommendations, all designed to improve transparency, are outlined below.

21. The Business Standards Committee recommends that each business unit that originates securities products[13] be subject to consistent policies and standards, approval processes, disclosure requirements and oversight as contemplated by Recommendation 8. These controls will include the following: (i) each business unit will be required to have written policies and procedures incorporating minimum disclosure standards; (ii) the appropriate firmwide transaction oversight committee will review and approve the policies and procedures governing origination activities of each business unit; and (iii) each business unit will be required to designate a business supervisor who is responsible for its origination activities and compliance with applicable policies and procedures. This recommendation reflects our objectives of strengthening client relationships and reputational excellence.

22. To strengthen client relationships, reputational excellence and enhance transparency of communication and disclosure, the Business Standards Committee recommends as follows:

    (i) The offering documents for securities products should include appropriate disclosure of risk factors, including risks arising from the instrument structure, underlying assets, market risks and counterparty credit risks. Where appropriate, investors will be provided with scenario analyses and stress test results. The firm will formalize disclosure standards to cover instances when the firm is underwriting a securities product that is collateralized by securities issued by Goldman Sachs (including when the securities product is issued by a special purpose vehicle). In those cases, the firm will disclose any material risks, including liquidity and credit concentration risks, associated with the collateral securities.

    (ii) Business units must disclose to the relevant personnel responsible for approving a securities product any specific benefits to Goldman Sachs, in addition to underwriting fees.

    (iii) The firm will continue to undertake appropriate due diligence reviews of issuers of securities products (including third-party issuers) and third-party managers. The business unit's policies and procedures will address when, and under which circumstances, the firm should review existing due diligence of third-party issuers or managers. For any issuance involving a third-party issuer or manager, the business

[13] "Securities products" refers to new issue securities sold by means of an offering document; it does not include bilateral derivative transactions.

unit responsible for the transaction will confirm that it has followed the firm's due diligence procedures.

C-5. Training and Professional Development in the Area of Structured Products

The Committee's recommendations outlined above will require substantial training and professional development.

23. To strengthen training and professional development, the Business Standards Committee recommends the development of cross-divisional training and professional development programs to implement the structured products recommendations. These programs will apply to all sales and trading personnel worldwide.

SECTION V: TRANSPARENCY AND DISCLOSURE

A. INTRODUCTION AND OVERVIEW

The Committee evaluated the firm's public financial disclosures[14] with the objective of improving our standards of transparency and disclosure with clients, investors, market participants, regulators and the public. As part of our work, we analyzed the feedback provided through the client survey and by the investor and analyst communities. We focused on explaining more clearly our business activities and performance, and how they relate to serving clients. We also wanted to address certain concerns and perceptions.

Our recommendations should be set in context. First, the firm does not have complete flexibility in communicating its financial condition and results. A U.S. public company's financial disclosures are framed by the requirements of the Securities and Exchange Commission (SEC) and the Financial Accounting Standards Board (FASB). Indeed, our recommendations on disclosure will be subject to review by the SEC.

Second, any proposed new disclosure must be evaluated against the backdrop of disclosure provided by peers and competitors. It is important to our investors, regulators, and other constituencies that our disclosure be as comparable as practical to that provided by peers and competitors. In addition, the disclosure we provide should not competitively disadvantage the firm. Finally, improving disclosure is an ongoing process that will continue after the recommendations of the Committee have been implemented.

B. GUIDING PRINCIPLES

In making its recommendations, the Committee followed these principles:

- The firm's business activities should be described and presented in a way that clearly identifies the drivers of performance and revenues.
- The relationship between the firm's balance sheet and its business activities should be understandable and the firm's liquidity management practices clearly explained.

[14]The Committee concentrated its work on the firm's SEC disclosures, including the Form 10-K, Form 10-Q, and the firm's quarterly earnings release, which are filed on Form 8-K.

- The firm's risk management practices and philosophies should be transparent and quantitative, and qualitative disclosure on credit risk exposures should be strengthened.
- The entirety of the firm's financial disclosure and business descriptions should be presented simply and clearly.

C. DISCUSSION AND RECOMMENDATIONS

We have made recommendations addressing (i) Business Segment Reporting; (ii) Balance Sheet and Liquidity; (iii) Risk and Risk Management; and (iv) Clarity and Overall Disclosure. Each of these recommendations reflect our objective of enhancing transparency of communication and disclosure.

C-1. Business Segment Reporting

Because many of Goldman Sachs' businesses are complex and integrated, we must articulate clearly the drivers of our financial performance. The client survey and overall public scrutiny suggest that we must improve our description of the firm's businesses, distinguishing between our client franchise activities and our investing and lending activities.

24. The Business Standards Committee recommends reorganizing the firm's three existing business segments into four business segments. The reorganized segment disclosure will provide more clarity as to the nature of the firm's business activities, particularly the activities currently aggregated in the "Trading and Principal Investments" segment. This change will better demonstrate the importance of client franchise activities and client facilitation to our revenues. The four proposed business segments are:

    - **Investment Banking**: This segment will include the firm's revenues from its activities as an advisor together with its debt and equity underwriting activities and revenues associated with derivative transactions directly related to an advisory or underwriting assignment.

    - **Institutional Client Services**: This new segment will include the firm's revenues from client execution activities related to making markets in various products, which form an important part of the firm's client franchise businesses. These activities are currently included in the Trading and Principal Investments segment. Institutional Client Services will also include the firm's Securities Services business, which, under the existing segment construct, is aggregated into the "Asset Management and Securities Services" segment.

- **Investing & Lending**: This new segment will include the firm's revenues from investing and lending activities across various asset classes, primarily including debt and equity securities, loans, private equity and real estate.[15] These activities include both direct investing and investing through funds. Under the existing segment construct, these activities are currently included in the Trading and Principal Investments segment.

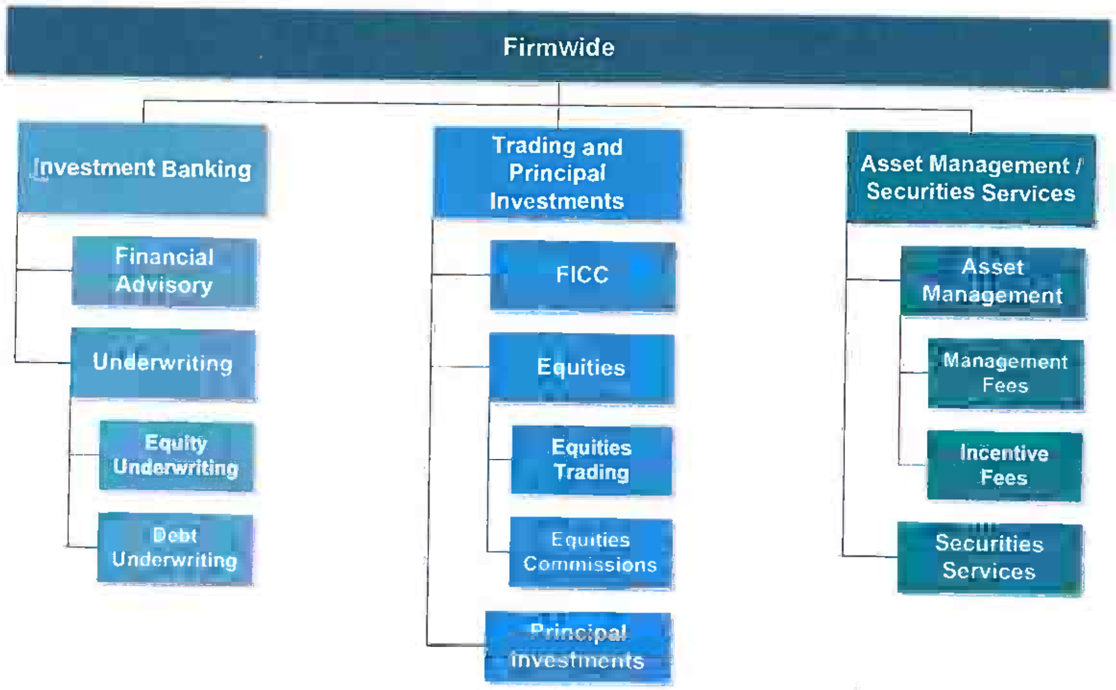
- **Investment Management**: This new segment will include the firm's fee revenues earned in connection with its asset and wealth management businesses, including Goldman Sachs Asset Management (GSAM), Private Wealth Management and the firm's merchant banking funds. In addition to management and incentive fee revenues, this segment will also include transaction revenues related to the firm's Private Wealth Management business, including commissions and spreads.

This change in the firm's business segments will require a three-year reorganization of the firm's segment disclosures.

[15] In the years through 2010, this segment also included the results of the firm's proprietary trading business, "Principal Strategies." The assets related to these activities were substantially liquidated during 2010.

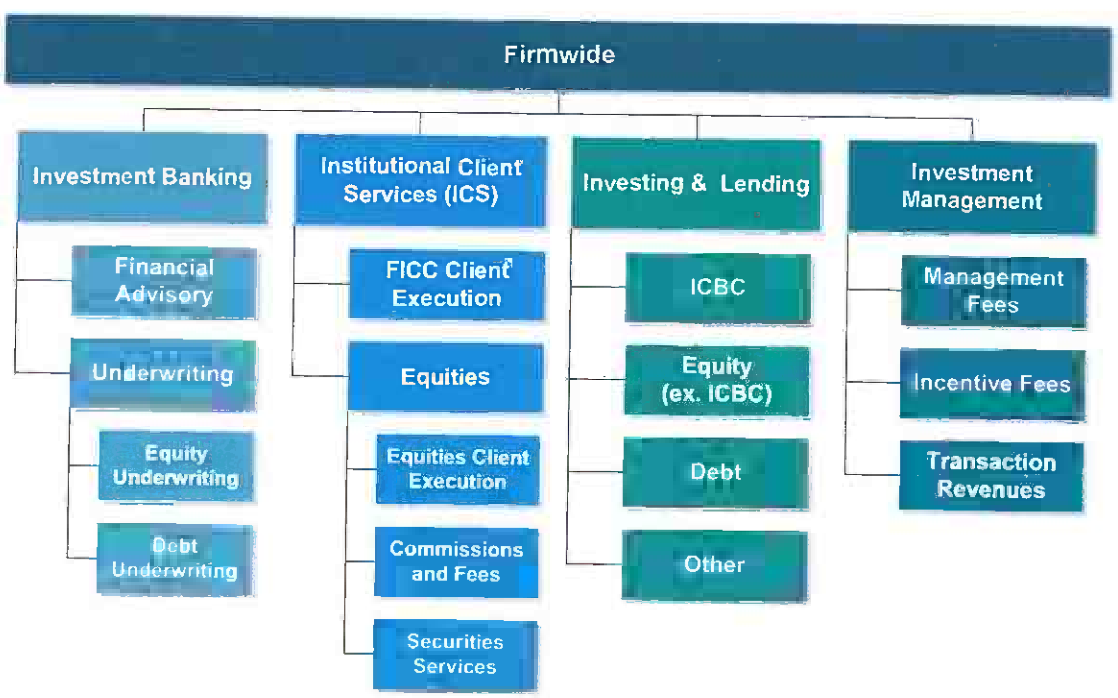
Existing Business Segments

The following diagram illustrates the firm's existing three business segments:



Proposed Business Segments

The following diagram illustrates the firm's proposed four business segments:



C-2. Balance Sheet and Liquidity

Balance Sheet

The firm's balance sheet disclosure provides another opportunity to describe more clearly the nature of the firm's business activities and the importance of the client franchise and client facilitation. In addition, balance sheet disclosure provides an opportunity to demonstrate the highly liquid nature of significant portions of the firm's balance sheet.

Our business model requires that we maintain a substantial balance sheet to facilitate client trades, provide financing to clients and make investments alongside clients. Current generally accepted accounting principles (GAAP) disclosure does not clearly identify the balance sheet impact of these client facilitation activities, nor does it explain the asset contribution of the firm's other activities and businesses.

25. The Business Standards Committee recommends that the firm disclose a simplified balance sheet showing assets by business unit / activity, including:

   - **Excess Liquidity**: the amount of available cash and highly liquid securities the firm maintains over and above its day-to-day liquidity needs;
   - **Secured Client Financing**: the assets related to secured funding provided to clients in the firm's prime brokerage, matched book and futures businesses, as well as client margin lending positions;
   - **Institutional Client Services**: the inventory related to the firm's client facilitation business, secured financing agreements and trading-related receivables;
   - **Investing & Lending**: the assets related to the firm's investing and lending activities, primarily including debt and equity securities, loans, private equity and real estate investments. These investments may be held directly or through funds; and
   - **Other Assets**: primarily includes the firm's goodwill, intangibles and physical property.

As required by U.S. accounting standards, the firm will continue to accord prominence in its disclosure to the GAAP balance sheet. It will also provide a detailed reconciliation of the GAAP balance sheet and the proposed simplified balance sheet.

Liquidity

The financial crisis underscored the need for financial institutions to maintain sufficient liquidity. Our liquidity policies are an important tool for ensuring that the firm maintains sufficient liquidity and we believe that additional disclosure on the mechanics and assumptions behind these liquidity policies will better describe our robust liquidity management framework.

26. The Business Standards Committee recommends that the firm (i) enhance disclosure with respect to liquidity stress tests by including details on both scenario assumptions and modeling parameters, as well as to provide substantial qualitative detail on the contractual and contingent cash and collateral outflows considered by the firm's Modeled Liquidity Outflow[16] and (ii) provide incremental qualitative detail on how the firm sizes its excess liquidity.

C-3. Risk and Risk Management

The financial crisis also demonstrated the critical importance of rigorous risk monitoring and management. We believe the firm should enhance the disclosure of risk management policies and practices, including details on our daily risk management process and overall credit risk.

27. The Business Standards Committee recommends that the firm implement the following:

- Describe, in greater detail and in plain language, the firm's risk management structure, culture and processes. This description will include detail on (i) the firm's risk management governance structure, including the interaction between business units and independent control functions; (ii) how the firm uses committees to assist in managing risk, including a description of the relevant committees' specific mandates and membership; and (iii) the firm's risk management processes, including its use of mark-to-market, risk limits, price verification and active position management, and robust systems to ensure the timely delivery of comprehensive and reliable data.
- Substantially enhance the discussion of Operational Risk, reflecting its increasing importance to the firm.

[16] Modeled Liquidity Outflow (MLO) is the firm's internal liquidity model that identifies and quantifies potential contractual and contingent cash and collateral outflows during both a market-wide and Goldman Sachs-specific stress situation.

- Provide additional qualitative disclosure regarding the Internal Capital Adequacy Assessment Process[17] (ICAAP) to explain more clearly this aspect of how the firm manages capital.
- Expand the description of credit risk to (i) include additional credit risks, such as loans and other non-derivative exposures, in our quantitative disclosure; (ii) provide increased granularity on credit exposures by industry and region; and (iii) qualitatively describe the firm's recent credit experiences.

C-4. Clarity and Overall Disclosure

Effective disclosure begins with describing the activities of a business in plain language. We identified areas where our disclosure could be clearer, where similar information could be synthesized in one place and where redundancy of information could be eliminated.

28. To improve the clarity of our overall disclosure, the Business Standards Committee recommends that the firm (i) rewrite its business description in the Form 10-K and its Annual Report to shareholders in plain language to better explain our business activities, our performance and how it relates to serving clients and (ii) reorganize its financial disclosure to consolidate related topics to remove, where possible, repetitive information described in both the Management Discussion and Analysis (MD&A) and financial statements, and to improve the overall clarity of the disclosure.

[17] The firm's Internal Capital Adequacy Assessment Process (ICAAP) ensures that the firm is appropriately capitalized relative to the risks of its businesses. ICAAP incorporates an internal risk based capital (IRBC) assessment designed to identify and measure risks associated with the firm's business activities, including market risk, credit risk and operational risk. Capital adequacy is evaluated based on the result of this IRBC assessment as well as using the results of stress tests which measure the firm's performance under various market conditions.

SECTION VI: COMMITTEE GOVERNANCE

A. INTRODUCTION AND OVERVIEW

Goldman Sachs relies heavily on committees to coordinate and apply consistent business standards, practices, policies and procedures across the firm. The firm's committee governance structure should serve to enhance our reputation, business practices and client service. In this way, committees serve as a vital control function.

In light of these objectives, the Business Standards Committee conducted a thorough review of certain of Goldman Sachs' firmwide operating committees with a particular focus on enhancements designed to achieve greater accountability for reputational risk management and client service.

B. GUIDING PRINCIPLES

In making its recommendations, the Committee followed these principles regarding the firm's committee governance structure:

- The structure must enhance accountability for business standards and practices, especially reputational risk management and client service.
- The structure must provide a clear roadmap for identifying, escalating and resolving reputational and client matters.

Summary of Process

We considered several factors and sources of information in reaching our conclusions and recommendations, including: (i) analysis of committee charters, agendas and meeting materials; (ii) interviews with committee chairs and observations of committee meetings and deliberations; (iii) analysis of committee membership and composition; (iv) analysis of processes and work flows, especially those involving new products approval and suitability review; (v) guidance from external consultants on governance, benchmarking and other areas; (vi) analysis of changing regulatory requirements and their impact, if any, on the firm's committee structure; (vii) detailed mapping of historical committee agenda items to the recommendations set forth below; and (viii) meetings with companies both within and outside the financial services industry to understand

and benchmark different practices and procedures, including those for managing reputational risk and responding to significant incidents.

C. DISCUSSION AND RECOMMENDATIONS

Our recommendations fall into three main categories: (i) establishing new committees or groups to enhance the firm's current committee governance structure; (ii) enhancing or restructuring existing firm committees to clarify roles, responsibilities and accountability; and (iii) enhancing the policies, procedures and infrastructure of committees to ensure greater consistency, efficiency and dissemination of best practices.

The recommendations of the Committee address the following objectives:

- Reinforce ownership and accountability for reputational risk management and client service;
- Reinforce ownership and accountability for decision-making and management of key risks by the leadership of divisions and business units;
- Clarify committee authority, roles and responsibilities;
- Reduce redundancy and potential gaps in committee responsibilities;
- Harmonize, where appropriate, cross-divisional practices to ensure consistency and comprehensive assessment of significant matters;
- Ensure that committees have membership from key risk disciplines, control functions and businesses;
- Formalize a process for reviewing events or incidents;
- Establish clear reporting lines of committees; and
- Ensure a transparent process for appeals of decisions and escalation of issues.

A diagram of the new committee structure and committee reporting lines is included at the end of this section.

C-1. Creation of Firmwide Client and Business Standards Committee

The Business Standards Committee recommends the creation of a Firmwide Client and Business Standards Committee (CBSC) that will assume the responsibilities of the existing Business Practices Committee and have additional focus on the primacy of client interests and reputational risk. This is an important change in the firm's committee structure, which is designed to show the interrelationship between client service, business practices and reputational risk management.[18]

29. The Business Standards Committee recommends that the following changes be made:

Establish a "Firmwide Client and Business Standards Committee." The Client and Business Standards Committee will function as a high-level committee that assesses and makes determinations regarding business practices, reputational risk management and client relationships. This committee will initially be chaired by the firm's President and Chief Operating Officer and will report to the Management Committee. Its responsibilities will include:

- designing and implementing a comprehensive firmwide program to enhance our client franchise;
- overseeing cross-divisional client coordination and annual client strategy reviews by division;
- regularly reviewing the operational and reputational risks of the producing divisions and certain control functions;
- resolving cross-divisional business practices and business selection matters;
- resolving appeals of business practices, suitability and reputational matters from other firm committees;
- periodically soliciting and assessing client views of the firm and addressing client concerns and incidents;
- overseeing divisional and regional Client and Business Standards Committees – formerly divisional and regional Business Practices Committees – and the newly formed Firmwide Suitability Committee and Firmwide New Activity Committee;
- commissioning cross-divisional committee reviews to identify best practices and / or to address emerging themes;
- overseeing the implementation of Business Standards Committee recommendations, where appropriate; and
- overseeing the Conflicts Resolution and Business Selection Group.

[18] The BPC recently conducted a self-assessment that resulted in several findings and recommendations that are consistent with the views and recommendations of the Business Standards Committee.

Establish a "Committee Operating Group" of the Client and Business Standards Committee. A Committee Operating Group will be established to assist the Client and Business Standards Committee in carrying out its functions. The Committee Operating Group will be headed by a senior leader reporting into the Chair of the Client and Business Standards Committee.

This recommendation reflects our objectives of strengthening client relationships, reputational excellence and committee governance.

C-2. Divisional and Regional Client and Business Standards Committees

The Client and Business Standards Committee will be supported by the divisional and regional CBSCs. These committees will be accountable for clients, business standards and reputational risk management at the divisional and regional levels.

The Business Standards Committee recommends:

30. Strengthen Procedures of Divisional and Regional Client and Business Standards Committees. The operating procedures of the divisional and regional CBSCs will strengthen accountability for reputational risk management and client relationships as follows:

    - appropriate senior leadership from divisions and regions will chair each divisional and regional CBSC. The Chairs of these regional and divisional committees will coordinate with the Chair of the CBSC in selecting members;
    - membership also will include senior control function leaders and, where appropriate, senior advisors such as retired PMDs. These members will help identify and elevate cross-divisional matters;
    - the divisional and regional CBSCs will be responsible for providing regular substantive reports to the Firmwide CBSC; and
    - unresolved matters and appeals will be escalated to the Firmwide CBSC.

    This recommendation reflects our objectives of strengthening reputational excellence and committee governance.

C-3. Suitability and New Activity

We analyzed how the firm makes product, client and transaction suitability determinations and how it reviews and approves new activities. Today, suitability determinations are made by different firm committees and at different levels. For instance, Regional Suitability Committees consider suitability for certain strategic transactions. The Structured Investment Products Committee considers suitability for certain products for high net worth or retail investors. The Capital and Commitments Committees consider suitability in connection with capital commitments and underwritings.

While various committees consider suitability, there is no single committee that acts as the central point of escalation for suitability matters arising from different committees. We believe one committee should set standards for client suitability across the firm's activities.

In addition, unless reviewed by a transaction oversight committee, the current approval process for new activities and products is primarily focused on operational and control matters. In other words, the approval process is focused primarily on answering the question of "<u>can we</u>" engage in the activity or product rather than also formally considering the question of "<u>should we</u>" engage in the activity or product, taking into account reputational, client, suitability or other concerns. Most of the work of regional and divisional New Products Committees focuses on the "can we" question. We believe that a firm committee should be required to formally ask and resolve the question of whether the firm "should" engage in any significant new product or activity, taking into account the factors above.

Any new product or activity must have the support of the leadership of the relevant division before it is brought before the appropriate firmwide committee. Each divisional CBSC will establish a formal process to consider and approve new products and activities from a reputational point of view before they are submitted to a transaction oversight committee for review.

The Business Standards Committee recommends that the following enhancements be made to the suitability and new activity review processes:

31. <u>Establish a "Firmwide Suitability Committee."</u> A Firmwide Suitability Committee will be established, reporting to the Client and Business Standards Committee. This new committee will replace the existing Regional Suitability Committees. In addition, to address time zone practicalities, an Asia Suitability Committee will be formed, which will

report to the Firmwide Suitability Committee. The Firmwide Suitability Committee will have the following responsibilities:

- review transactions originating in EMEA and the Americas that require review as set forth in Section IV of this report relating to Structured Products;
- set standards and policies for product, transaction and client suitability and provide a forum for more consistency across divisions, regions and products on suitability assessments;
- review suitability matters escalated from other firm committees; and
- oversee the activities of the Asia Suitability Committee, Structured Products Committee and Structured Investment Products Committee.

To facilitate consistent firmwide standards and practices for suitability assessments, the charters of the Firmwide Suitability Committee and the Asia Suitability Committee will require: (i) certain membership overlap; (ii) regular reports by the Asia Suitability Committee to the Firmwide Suitability Committee; and (iii) escalation of significant Asia-specific suitability matters by the Asia Suitability Committee to the Firmwide Suitability Committee.

Establish a "Firmwide New Activity Committee." A Firmwide New Activity Committee will be established, replacing the existing Firmwide New Products Committee. The Firmwide New Activity Committee will report to the Client and Business Standards Committee and will have the following responsibilities:

- for significant matters, answer the critical question of "should we" engage in the new activity (considering reputational, client, suitability and other concerns) as well as a detailed "can we" review, recognizing that divisional and regional business leadership must analyze both questions prior to sponsoring a matter;
- oversee the activities of the Regional New Products Committees, Acquisition Review Committee and Physical Commodity Review Committee; and
- establish a process to identify and review previously approved new activities that are significant and that have changed in complexity and / or structure or present different reputational and suitability concerns over time to consider whether these activities remain appropriate.

Considering the similarity of issues that may arise in the review of suitability matters related to transactions and new activities, the Business Standards Committee expects that the Firmwide Suitability Committee and Firmwide New Activity Committee will coordinate regularly to harmonize best practices and ensure a consistent approach. The two committees will have certain overlapping members.

This recommendation reflects our objectives of strengthening reputational excellence and committee governance.

C-4. Event Reviews

The Business Standards Committee recognizes the importance of learning from events or incidents that raise key risk concerns (e.g., reputational, business practices, client franchise or financial risks). These events can occur at the firm or in the market more broadly. The financial crisis further highlighted the importance and benefit of communicating this learning broadly throughout the firm along with targeted training and remediation following an event or incident. To facilitate "event reviews," it is important that senior management and select firmwide committees have a resource available to rapidly review incidents that raise key risks. The recommendation below is not intended to impact existing independent, internal functions, although event reviews should be coordinated with Internal Audit and other control functions where appropriate.

32. <u>Establish the "Event Review Group."</u> The Business Standards Committee recommends that an Event Review Group be on call to senior management and select firmwide committees to perform time-sensitive, high-profile targeted reviews of incidents or other business or industry matters of concern. The Event Review Group will comprise a rotating group of seasoned firm leaders. They will have the ability to assemble resources and work closely with the Legal and Compliance Departments and other relevant control groups. The Event Review Group will document and disseminate its findings to the appropriate constituents, and develop remediation, training and education initiatives. This recommendation reflects our objectives of strengthening reputational excellence, committee governance and training and professional development.

C-5. Enhancements to Committee Procedures

The charters of certain committees lack clarity and in some cases overlap with the jurisdiction of other committees. In addition, committees have different practices and procedures. To address these issues, the firm will improve the consistency of practices and procedures of firm committees, improve oversight and reporting lines and ensure that committees have the appropriate representation across key risk disciplines, control functions and businesses.

The Business Standards Committee recommends the following improvements to committee procedures:

33. Reputational Risk Ownership. Committee charters will reinforce the committees' ownership and accountability for, among other things, reputational risk management.

Firmwide Risk Committee Reporting. The Finance Committee and its subcommittees will report to the Firmwide Risk Committee, and the Firmwide Risk Committee will report to the Management Committee.

Capital and Commitments Committees. The Capital Committee will report to the Firmwide Risk Committee, and the Commitments Committees will report to the Client and Business Standards Committee. On reputational risk issues, both committees will engage with the Client and Business Standards Committee. On capital commitments issues, both committees will work with the Firmwide Risk Committee.

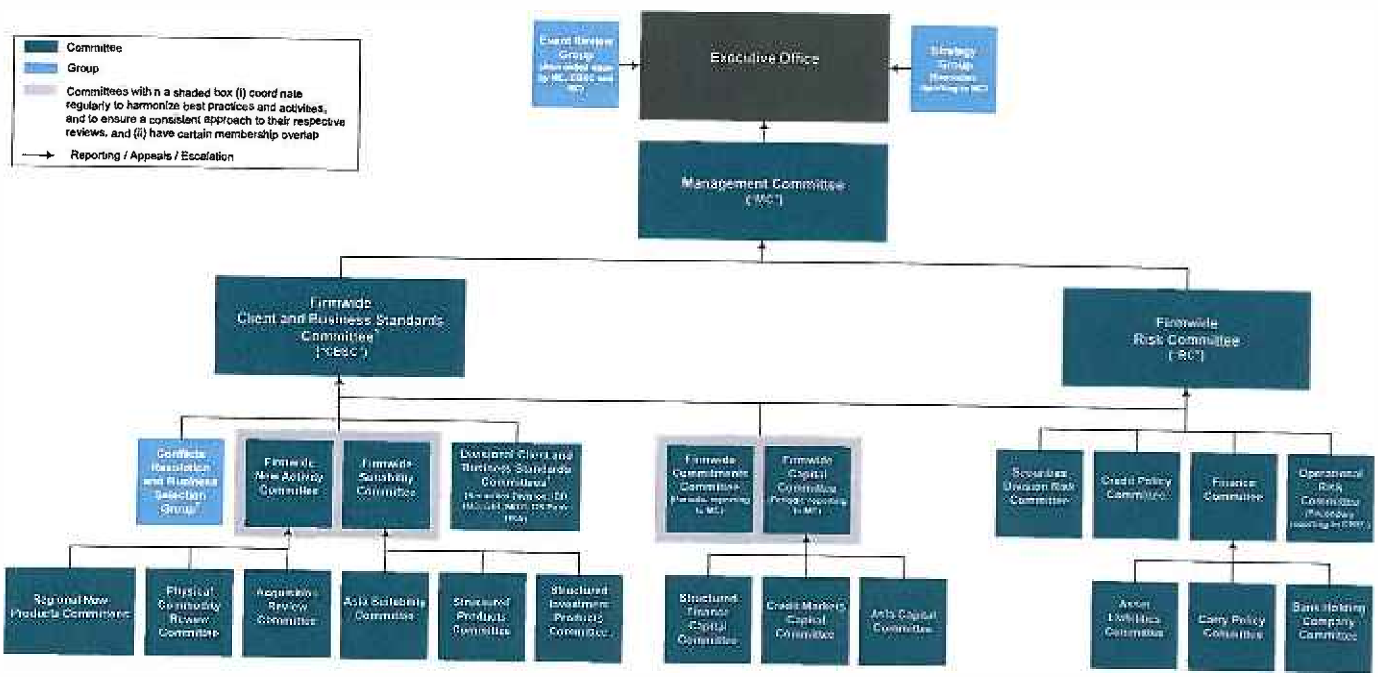
Both the Capital and Commitments Committees play significant roles in reviewing underwritings and firm capital commitments. Accordingly, each of these committee's charters will be amended to require certain membership overlap to ensure a consistent approach to reputational risk management and best practices.

Formal Committee Process Framework. The Committee Operating Group of the Client and Business Standards Committee will be responsible for establishing and maintaining a formal policy framework for committee best practices, processes and procedures governing all aspects of committee operations, including charters, regular meeting agendas, minutes and statements of action. The Committee Operating Group will require formal, periodic self assessments by committees of their activities and effectiveness, including member participation. These results will be presented to their supervising committee. The Client and Business Standards Committee and the Management Committee will be able to review these self assessments.

This recommendation reflects our objectives of strengthening reputational excellence and committee governance.

Recommended Committee Structure

The following chart reflects the new committee governance structure for the firm.



[1] Regional Client and Business Standards Committees report to executive leadership in the region and to the Firmwide Client and Business Standards Committee (coordinating with Divisional Client and Business Standards Committees as appropriate)
[2] Day-to-day responsibility to Division Heads; reporting / appeals / escalation to Firmwide Client and Business Standards Committee

SECTION VII: TRAINING AND PROFESSIONAL DEVELOPMENT

A. INTRODUCTION AND OVERVIEW

The success of the Business Standards Committee's efforts will be measured by how effectively our people act on its recommendations. Over time, effective training and development will enrich our corporate culture and strengthen the values of client service and our focus on reputational risk management.

Corporate culture is hard to define, but easy to recognize. We believe our culture is central to our ability to be successful. Yet even strong corporate cultures must evolve and adapt to changes in the business environment. In the aftermath of the financial crisis it is especially important for Goldman Sachs to adapt and evolve.

The Committee's implementation of recommendations will begin immediately in January 2011, starting with a meeting of all partners and followed by a meeting of all extended managing directors. In addition, the orientation in January 2011 for new PMDs and EMDs will include sessions related to the Committee's recommendations.

The goal of these efforts will be for top leadership to set the right tone and galvanize the firm into action. We will focus on the observations and recommendations of the Committee's report, and what the recommendations mean for our employees. This will serve as a guide for how we expect our employees to embrace and act upon the Committee's recommendations.

Over the next year, the firm's Chairman and CEO will lead a global program involving the firm's 2,200 PMDs and EMDs to reinforce the most important attributes of our culture. We will roll out a comprehensive program of communication and training to ensure that the critical themes and messages of the Committee are disseminated throughout each division and region of the firm. In addition, we will design and implement training and professional development to implement each of the recommendations in the report.

B. GUIDING PRINCIPLES

Our recommendations reflect the following guiding principles:

- Culture. The strength of Goldman Sachs' culture is critical to the firm's continued success. That culture must maintain its core values while continuing to evolve and adapt to changes in the market, regulation and the competitive and macro-economic environment.
- Leadership. Culture starts at the top of an organization. People must see their leaders and managers embodying the values and behaviors that exemplify the Goldman Sachs culture.
- Training and Professional Development. All training and professional development programs will emphasize the importance of our culture and reinforce the values embedded in our Business Principles.
- Communication. The firm's leaders should regularly communicate, both formally and informally, about our culture and values to ensure that they are part of every person's professional behavior.
- Recognition. Recognition includes compensation, promotion, assignments and mobility opportunities. The firm must make clear the link between the behavior expected of its people and the recognition used to encourage it. This is critically important because it signals broadly the way we expect people to behave and conduct business.

C. DISCUSSION AND RECOMMENDATIONS

C-1. Culture and Leadership

For more than 140 years, Goldman Sachs professionals have been building a culture based upon shared values that guide behavior and business dealings. These values – including client focus, excellence, integrity and teamwork – must inform how every person at Goldman Sachs behaves, interacts with clients and otherwise fulfills his or her daily responsibilities. These values are fundamental to earning the trust of clients, the confidence of stakeholders and the respect of the public at large.

Our culture – and employee confidence in and commitment to it – has remained strong following the financial crisis and the intense scrutiny of the industry and Goldman Sachs. That said, the events of the last several years and the results of both our external client survey and our internal culture survey[19] indicate that we need to reinforce certain aspects of our culture. We are committed to providing professional development programs that will strengthen key aspects of our culture, including:

- Client Orientation
- Reputational Excellence
- Personal Accountability
- Teamwork
- Long-Term Focus
- Professional Excellence

To ensure that our values are embedded in the activities and decision-making of our employees, we must repeatedly emphasize the importance of the firm's culture. We expect the firm's leaders to emphasize our values to our people at conferences, townhalls, other group meetings and in their day-to-day business activities. This is especially important given the firm's growth over the last decade. A majority of our people have been at the firm for less than five years. Instilling a sense of shared values across the firm requires that we constantly and rigorously emphasize, both formally and informally, our culture and each individual's responsibility for it.

The Business Standards Committee makes the following recommendations on our culture and leadership:

34. The firm will initiate professional development and training, beginning with its senior leaders, to immediately focus those leaders on reinforcing the firm's culture and on strengthening client relationships and reputational excellence. In addition, the firm will use milestones in people's careers as opportunities for targeted training on the Goldman Sachs culture. This recommendation reflects our objectives of strengthening client relationships, reputational excellence and training and professional development.

35. Our Chairman and CEO will lead the new Chairman's Forum on Clients and Business Standards, a global program engaging all of the firm's 2,200 PMDs and EMDs. This initiative will represent a large investment of time of our senior management team over the course of 2011 and will reinforce the most important attributes of our culture through in-depth discussions and case studies. The significant involvement of the CEO and other

[19] The firm regularly conducts an online culture survey of its employees. The Committee accelerated the timing and expanded the scope of the survey to have employee feedback for consideration in developing recommendations.

senior management communicates the importance of the program and its messages. This recommendation reflects our objectives of strengthening client relationships, reputational excellence and training and professional development.

These programs will (i) emphasize the firm's Business Principles and the client service values in order to reinforce the key cultural attributes identified above; (ii) provide early opportunities to review in detail the Committee's recommendations with the firm's senior leaders; (iii) reflect and incorporate key elements of our culture; and (iv) promote dialogue on the application of the Committee's recommendations to our businesses and the conduct of our people.

The major elements of the 2011 training and professional development programs are shown below:

C-2. Personal Accountability

Events during the financial crisis underscored the importance of managing reputational risk. Each employee of Goldman Sachs has responsibility for protecting the firm's reputation; an employee can do more to harm the firm's reputation through a single poor judgment than he or she can do to enhance it throughout an entire career. We believe that we must manage reputational risk with the same rigor as financial risk, and that each employee must focus on reputational risk.

36. To strengthen reputational excellence, the Business Standards Committee recommends that the firm emphasize the following criteria in the annual performance review process: (i) adherence to reputational risk management and (ii) reputational judgment and compliance. These enhancements were implemented for the 2010 performance review process.

C-3. Training and Professional Development

The implementation of the Committee's recommendations will require extensive training and a considerable investment of time and resources as discussed in greater detail in Section VIII, Implementation. The Committee believes that this training should emphasize the firm's culture and the firm's expectations for conduct and behavior. The better employees understand *why* we have certain expectations about behavior and conduct, the more likely they are to make good judgments.

37. To strengthen training and professional development, the Business Standards Committee recommends that the firm and each affected division design and implement training and professional development programs which address the Committee's specific recommendations.

C-4. Recognition

Recognition can powerfully communicate and reinforce expectations about appropriate behavior, when it is applied visibly and consistently. It can motivate people to behave in accordance with the highest standards of the firm. The converse is also true: when recognition is given to those who fail to meet the expected standard of behavior, or when deserved recognition is not given consistently, it can have a negative impact on employee behavior, and ultimately weaken the firm's culture.

In evaluating performance, the firm needs to give appropriate weight to leadership, culture and values along with commercial productivity. The firm will continue to focus on behaviors that exemplify client orientation, reputational excellence, personal accountability, teamwork, long-term focus and professional excellence and better link them to the firm's overall recognition programs, including promotion, compensation, assignments and mobility opportunities.

38. The Business Standards Committee recommends that the firm strengthen its focus on the importance of leadership, culture and values in the PMD and EMD promotion process by communicating to all involved their responsibility to thoroughly evaluate candidates on these attributes. This was accomplished in the 2010 PMD and EMD promotion process.

Communications during performance reviews, promotion and compensation conversations must be clear and specific so that our employees understand the correlation between recognition and behavior, particularly behavior related to leadership, culture and values.

This recommendation reflects our objective of strengthening reputational excellence.

C-5. Business Principles and Code of Business Conduct and Ethics

Acting with integrity and maintaining high ethical standards are critical values embedded in our Business Principles. Similarly, the firm's Code of Business Conduct and Ethics is intended to embody the commitment of the firm to conduct its business in accordance with all applicable laws, rules and regulations and with the highest ethical standards. While the Business Principles contain a set of core values, the firm's Code of Business Conduct and Ethics provides more specific guidance requiring amendment or updating from time to time. Both of these documents serve to maintain and encourage the compliance culture of the firm, a crucial element of our continued success.

39. To strengthen reputational excellence and training and professional development, the Business Standards Committee recommends that the firm update and strengthen the Code of Business Conduct and Ethics. Through that process, we will signal its importance and articulate the need for every employee to operate in accordance with the code. The firm should reinforce the importance of the Code of Business Conduct and Ethics by requiring employees to certify their compliance with the Code, highlighting it in orientation and training sessions and posting it more prominently on the firm's external and internal websites.

SECTION VIII: IMPLEMENTATION

A. INTRODUCTION

This final section of the Business Standards Committee report discusses the overall plan for implementing our recommendations. We view the recommendations as an integrated and complementary package of initiatives, each of which is concrete, realistic and achievable. Senior management and the Board of Directors are unequivocally committed to the implementation of all of the recommendations and expect our people to dedicate themselves to this effort. Finally, the Committee recognizes that the ultimate impact of its work will not be determined by what is written in this report but rather on how well the people of Goldman Sachs adapt their values and behavior to reflect the recommendations in the report.

An Oversight Group, consisting of senior leaders, will oversee the overall implementation effort. The Oversight Group will provide senior management and the Board of Directors with progress reports on the implementation effort and, more importantly, on how effective the changes are in achieving the Committee's larger goals. Below, we provide an overview of how the firm plans to execute these commitments.

The implementation plan has three basic principles. The first is ownership. One or more leaders of the firm have been assigned primary or secondary responsibility for the implementation of each of the Committee's recommendations. The second principle is accountability. Implementation leaders and their teams – through the Oversight Group – will report to senior management and the Board of Directors on their progress. The third, and more complex principle, is evaluation – is the implementation process yielding the desired results in promoting strengthened core values and culture across the firm?

The Committee's recommendations require major initiatives in training and professional development and substantial written documentation. Fulfilling these objectives requires a "plan within a plan" of implementation, which is discussed in parts C and D below.

B. IMPLEMENTATION FRAMEWORK

The key elements of implementation are: (i) Ownership and Oversight; (ii) Written Implementation Plans; (iii) Timing Commitments; (iv) Communication; and (v) Follow-Up and Evaluation.

- Ownership and Oversight. The Oversight Group will lead and oversee the implementation effort. As noted in Recommendation 29, one of the formal responsibilities of the newly formed Client and Business Standards Committee is overseeing implementation of the Business Standards Committee's recommendations. Accordingly, the Oversight Group will report to the Client and Business Standards Committee, to senior management and to the Board of Directors.

  Each recommendation has primary and secondary owners (Implementation Owners). The Implementation Owners include senior leaders from revenue producing divisions as well as the support and control side of the firm, reflecting the cross-divisional efforts required.

  For example, for structured products, the Implementation Owners have created separate workstreams including technology build outs, documentation, new policies and procedures and training materials. The Securities Division, the Technology Division, the Legal and Compliance Departments and other control functions are all committing substantial resources to this effort.

- Written Implementation Plans. A written implementation plan has been prepared for each of the Committee's recommendations and includes the following information:
  - the Implementation Owners;
  - a description of the implementation plan, including the concrete steps required and the defined outcome and goals;
  - a description of training and professional development required;
  - a list of critical items that are essential to determining overall timing;
  - a list of new documentation and documentation updates;
  - a description of any technology resources needed as well as any other special resources (such as external training experts) needed; and
  - a timetable for completion.

These written implementation plans are not intended to be static documents. They are tools to facilitate meeting deadlines and milestones, and Implementation Owners will review and update them regularly.

The complexity of the implementation plans varies by topic. The implementation of the recommendations related to structured products is especially complex. It will require a considerable amount of work including major technology build outs to implement the pre- and post-transaction sales practices and to standardize procedures with respect to origination and disclosure. Similarly, the implementation plan for Committee Governance in Section VI will require a large effort, since the charters for new firmwide committees must be created and those for existing committees must be updated.

- Timing Commitments. Given the amount and complexity of the work to be done, the Committee has avoided fixed deadlines and instead established targets by calendar quarters. Successful implementation is a beginning, not an end. For example, our success in reemphasizing the client service values can only be measured over time.

  A few recommendations have already been implemented. For example, the enhancements to our Information Barrier and wall crossing procedures outlined in Recommendation 7 are in effect. The firm has also completed the move of certain origination activities from the Securities Division to the Financing Group as contemplated by Recommendation 8.

  We recognize that timeframes cannot be rigid. The firm may need to adjust priorities in response to changing circumstances, including external events that impact our business and are beyond our control. The Committee is also acutely aware of the regulatory reform efforts underway in the United States and around the world that are certain to place enormous demands on our employees and resources. In certain cases, we have prioritized the implementation of the Committee's work to address the most critical changes first.

- Communication. One of the five broad priorities that run through the Committee's recommendations is enhancing transparency of communication and disclosure. For example, as noted in Recommendation 4, the new Client and Business Standards Committee will oversee a firmwide client franchise enhancement program. This program will include dialogue with our clients about the work of the Business Standards Committee. We also expect to have dialogue with our shareholders and the investor community about certain changes we are making, such as the changes in our financial disclosures. In addition, we will continue to post our regulators on the progress of our implementation of the recommendations.

- Follow-Up and Evaluation. The real test of success of the Business Standards Committee process will be whether the recommendations bring about the desired improvements in business standards and behavior. Accordingly, as implementation occurs over the next year and beyond, we will need to develop mechanisms to realistically evaluate how well we are meeting our underlying objectives.

C. TRAINING AND PROFESSIONAL DEVELOPMENT

For our business standards to adapt and change, our people need to adapt and change. Training and professional development is the essential tool in that process of adaptation and change because it reaches our people directly and in a strong and meaningful way.

The recommendations in this report have substantial training requirements. These requirements are in some cases firmwide initiatives and, in others, divisional and business-specific initiatives. For many firmwide initiatives, the training will have to reach all our people. For division or business-specific initiatives, the training will also have to reach large audiences. For example, we anticipate that the training on structured products, which will be highly specialized and intensive, will be rolled out globally to over 2,100 professionals in the Securities and Investment Management Divisions.

In light of the scale of this effort, we have created a Training Oversight Group consisting of senior business leaders. Each training initiative has a "Training Owner" responsible for roll out and for overseeing the development of the training curriculum for their programs. In areas such as Structured Products and Conflicts of Interest where significant changes are being introduced, the training materials will be very detailed and time consuming to develop. As necessary, Training Owners will work with outside vendors to develop the curriculum and content.

In developing a roll out plan for the training initiatives, we have analyzed a number of different factors. For example, we considered whether the training program needs to address a change in our organizational structure (e.g., the movement of a business unit), a change in our policies and procedures (e.g., updated written communication guidelines), or a change to our technology. The firm has also considered whether the training initiative should apply firmwide (e.g., training regarding the client service values) or should be targeted to a specific division or business unit (e.g., training regarding new disclosure and origination standards for newly issued securities products). We also identified a target audience for each training program. These audiences can include employees with specific titles and levels of seniority as well as employees with specific experience levels (e.g., experienced new employees versus recent graduate employees).

D. DOCUMENTATION

Written policies and procedures are an essential component of the compliance culture at Goldman Sachs. A critically important part of implementing the work of the Business Standards Committee involves updating and / or writing new policies, procedures and other key documents. The Committee places great importance on documentation because it is a key element in ensuring accountability. While long-standing business practices may develop without formal codification, there is a significant risk that good practices may not endure without documentation, particularly given employee turnover, and that accountability will be lost.

The Committee's recommendations will require a number of new documents as well as updating and revision of existing policies, procedures and documentation. An inventory of documentation updates and new documentation requirements (Documentation Inventory) has been created and a senior leader from either the Legal Department or the Compliance Department (or individual business units as necessary) has been assigned ownership as the document owner of each item included in the Documentation Inventory.

As part of the written implementation plans, a proposed timeframe has been identified for each item on the Documentation Inventory, recognizing that document owners will need the flexibility to adjust schedules and prioritize items which mitigate the greatest risks and are responsive to regulatory developments.

E. THE BUSINESS STANDARDS COMMITTEE EFFORTS IN PERSPECTIVE

In every case, we expect to verify when the implementation, training initiatives and documentation updates relating to the Business Standards Committee effort are complete. However, the critical, long term question is whether implementation of the recommendations as a whole has had a meaningful and sustained impact on our business standards and culture, particularly with respect to client service and reputational excellence. Looked at in that light, the ultimate success of the Business Standards Committee effort will need to be judged over an extended period of time through a combination of self-evaluation and feedback from our clients and our other stakeholders.

Membership

Board Committee Overseeing the BSC

William W. George, Chair
Professor of Management Practice at Harvard Business School and Former Chairman & Chief Executive Officer at Medtronic

James J. Schiro
Former Chief Executive Officer of Zurich Financial Services

Lois D. Juliber
Former Vice Chairman and Chief Operating Officer, the Colgate-Palmolive Company

H. Lee Scott, Jr.
Chairman of the Executive Committee of the Board of Directors, Wal-Mart Stores, Inc.

Business Standards Committee

E. Gerald Corrigan, Co-chair
Managing Director, Executive Office

J. Michael Evans, Co-chair
Vice Chairman of Goldman Sachs, Chairman of Goldman Sachs Asia

Alan M. Cohen
Global Head of Compliance

Gwen R. Libstag
Head of the Firmwide Business Selection and Conflicts Clearance Group

Edith W. Cooper
Global Head of Human Capital Management

Timothy J. O'Neill
Co-Head of the Investment Management Division

Michael D. Daffey
Global Head of Equities Sales and Securities Distribution Europe

John F. W. Rogers (ex officio)
Chief of Staff and secretary to the Board of Directors

Edward C. Forst
Co-Head of the Investment Management Division

Harvey M. Schwartz
Global Co-Head of the Securities Division

Richard J. Gnodde
Co-CEO of Goldman Sachs International

Sarah E. Smith
Controller and Chief Accounting Officer

David B. Heller
Global Co-Head of the Securities Division

David M. Solomon
Co-Head of the Investment Banking Division

Kevin W. Kennedy
Head of Latin America

John S. Weinberg
Vice Chairman of Goldman Sachs, Co-Head of the Investment Banking Division

Honorable Arthur Levitt, Jr.
Senior Advisor to Goldman Sachs and Former Chairman of SEC

Matthew Westerman
Global Head of Equity Capital Markets

Of Counsel: David J. Greenwald, Esq.
Deputy General Counsel and International General Counsel

COO: Jeffrey W. Schroeder
Chief Administrative Officer

H. Rodgin Cohen, Esq.
Senior Chairman, Sullivan & Cromwell
Outside Counsel

EXHIBIT E

FEDERAL RESERVE BANK *of* NEW YORK

33 LIBERTY STREET, NEW YORK, NY 10045-0001

DAVID L. GROSS
COUNSEL AND VICE PRESIDENT

October 10, 2013

VIA ELECTRONIC MAIL (Abrams_NYSDChambers@nysd.uscourts.gov)

Hon. Ronnie Abrams, U.S.D.J.
United States District Court
for the Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square, Room 2203
New York, NY 10007

Re: Carmen Segarra v. Federal Reserve Bank of New York
Civil Action No.: 13-CV-7173

Dear Judge Abrams:

I represent Defendant Federal Reserve Bank of New York (the "New York Fed") in the above-referenced matter, and respectfully submit this application for an expedited protective order under Rule 26(c) of the Federal Rules of Civil Procedure. Earlier today, plaintiff filed a Complaint in the above-referenced matter, which contains Confidential Supervisory Information ("CSI") that is protected from public disclosure by federal law. See 12 C.F.R. Part 261. The New York Fed seeks (1) an order removing the Complaint from the Court's public, electronic docket pending further proceedings to determine the extent of redactions or sealing required; and (2) a hearing at the Court's earliest convenience to discuss the nature of the CSI included in the Complaint.

By way of background, Plaintiff Carmen Segarra was an employee of the New York Fed from October 2011 until May 2012, when she was terminated for cause. Ms. Segarra has brought a lawsuit against the New York Fed alleging unlawful termination and seeking reinstatement and damages. At various paragraphs in her Complaint, Plaintiff has summarized the work she conducted as part of the New York Fed's supervision of financial institutions. For example, meetings with a supervised financial institution are pleaded at paragraphs 22 to 28, 75 to 76, and 79; deliberations within the New York Fed are pleaded at paragraphs 63 to 68; and discussions with a different banking regulator are pleaded at paragraph 77. Plaintiff also attached a number of exhibits that she obtained during her work at the New York Fed, including meeting notes, document requests, correspondence with a supervised financial institution, and examination summaries. Several of the attachments are stamped "Restricted FR" and "Confidential Supervisory Information."

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Plaintiff's allegations regarding the New York Fed's supervisory work and all of the attachments to her Complaint are CSI. Under federal law, CSI is confidential and privileged property of the Board of Governors of the Federal Reserve System (the "Board"), and its use is subject to authorization by the General Counsel of the Board. See 12 C.F.R. §§ 261.2(c)(1)(i) and (iii) (defining "[c]onfidential supervisory information" to include "any information derived from [or] related to" "reports of examination, inspection and visitation, confidential operating and condition reports" or "[a]ny documents prepared by, on behalf of. or for the use of . . . a Federal Reserve Bank"); 261.22(a) ("It is the Board's policy regarding confidential supervisory information that such information is confidential and privileged. Accordingly, the Board will not normally disclose this information to the public."); 261.22(e) ("All confidential supervisory information made available under this section shall remain the property of the Board. Any person in possession of such information shall not use or disclose such information for any purpose other than that authorized by the General Counsel of the Board without his or her prior written approval.") (emphasis added).

The New York Fed is not aware that Plaintiff has obtained, much less sought, permission from the Board's General Counsel to publish the CSI contained in her Complaint. (Nor did Plaintiff seek or obtain permission to possess any CSI after she was terminated in May 2012.) Plaintiff's counsel did not discuss the incorporation of CSI into the Complaint with any attorney from the New York Fed prior to filing. Indeed, the New York Fed only became aware of Plaintiff's unauthorized disclosure late this afternoon, when it was served with the Complaint and when various news outlets began reporting its contents. On behalf of the New York Fed, I called Plaintiff's counsel to seek her consent to remove the Complaint from the Court's docket pending further proceedings. As of the writing of this letter, I have not received a response.

Rule 26(c) provides that a "court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). In this instance, there is good cause for removing the Complaint from the Court's public docket pending a hearing: to prevent the unlawful public dissemination of CSI. The confidentiality of supervisory information is critical to free communication between the New York Fed and supervised financial institutions; the unauthorized disclosure of CSI harms the mandate of this institution to conduct examinations for the safety and soundness of the nation's financial system. Supervised financial institutions will be less inclined to share sensitive information if they cannot rely on the guarantee that the New York Fed will keep that information confidential. By contrast, the burden on Plaintiff for removing the Complaint from the public docket pending further proceedings is minimal. Plaintiff will have an opportunity to argue in favor of publication, which the Court can then decide to grant in whole or with appropriate redactions. But in the meantime, the harm to the New York Fed, the other banking regulator mentioned in the Complaint, and the supervised financial institution at issue will be great and cannot be undone.

Under all these circumstances, the New York Fed respectfully requests: (1) an order removing the Complaint from the Court's public, electronic docket pending further proceedings to determine the extent of redactions or sealing required; and (2) a hearing at the Court's earliest convenience to discuss the nature of the CSI included in the Complaint.

Thank you for your consideration.

Respectfully submitted,

David Gross

David Gross
Counsel and Vice President

cc: Linda J. Stengle, Esq., Counsel for Plaintiff (via e-mail to linda@lindastengle.com)
Thomas C. Baxter, Jr., Esq., General Counsel, Federal Reserve Bank of New York
Thomas M. Noone, Esq., Attorney, Federal Reserve Bank of New York

FEDERAL RESERVE BANK *of* NEW YORK

33 LIBERTY STREET, NEW YORK, NY 10045-0001

DAVID L. GROSS
COUNSEL AND VICE PRESIDENT

October 11, 2013

FILED ON ECF AND SENT VIA ELECTRONIC MAIL
(Abrams_NYSDChambers@nysd.uscourts.gov)

Hon. Ronnie Abrams, U.S.D.J.
United States District Court
for the Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square, Room 2203
New York, NY 10007

Re: Carmen Segarra v. Federal Reserve Bank of New York
Civil Action No.: 13-CV-7173 (RA)

Dear Judge Abrams:

The Federal Reserve Bank of New York (the "New York Fed") respectfully submits this letter in the above-referenced matter in support of our emergency application for a protective order. The New York Fed's position is that portions of the complaint and attachments should not be publicly filed because they contain Confidential Supervisory Information ("CSI") under 12 C.F.R. Part 261 and must therefore be removed from public access. The New York Fed also requests that the Court order Plaintiff and her counsel not to publish any other CSI without further order of the Court.

The Second Circuit enumerated the steps a district court must take when deciding whether documents may be removed from public access in *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006). Under the Second Circuit's framework, the first step is to determine whether the documents at issue are "judicial documents." *Id.* at 119. "Judicial documents" are those documents filed with the court that are "relevant to the performance of the judicial function and useful in the judicial process." *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("Amodeo I"). If the court determines that the documents are "judicial documents," the court must assess the weight to be given to the presumption in favor of public access to the documents. *Lugosch*, 435 F.3d at 119. The weight assigned must be "governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts. Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance." *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995) ("Amodeo II"). Finally, "after determining the weight of the

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presumption of access, the court must balance competing considerations against it. . . . Such countervailing factors include but are not limited to the danger of impairing law enforcement or judicial efficiency and the privacy interests of those resisting disclosure." *Lugosch*, 435 F.3d at 120 (quoting *Amodeo II*, 71 F.3d at 1050) (internal quotation marks omitted).

The Second Circuit has held that "the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access." *Amodeo I*, 44 F.3d at 145. The documents filed in the appendices to the complaint in this matter are not judicial documents; they are bank supervisory materials that fall into two categories: (i) internal New York Fed e-mails and memoranda evaluating an institution that the New York Fed supervises; and (ii) documents provided to the New York Fed by Goldman Sachs, a supervised institution. These documents are all CSI. *See* 12 C.F.R. §§ 261.2(c)(1)(i) and (iii) (defining "[c]onfidential supervisory information" to include "any information derived from [or] related to" "reports of examination, inspection and visitation, confidential operating and condition reports" or "[a]ny documents prepared by, on behalf of, or for the use of . . . a Federal Reserve Bank"). These documents show that at the time she left the employ of the New York Fed, she purloined property of the Board of Governors of the Federal Reserve System. *See* 12 C.F.R. 261.22(e) ("All confidential supervisory information made available under this section shall remain the property of the Board. <u>Any person in possession of such information shall not use or disclose such information for any purpose other than that authorized by the General Counsel of the Board without his or her prior written approval.</u>") (emphasis added).

But assuming that the Court finds that these documents are "judicial documents," and the common law presumption of access attaches, the competing considerations against public disclosure in this matter outweigh the presumption. There is no question that the documents in the appendices are CSI: several of them are stamped as "Confidential Supervisory Information." Memos that were written by Plaintiff are designated by her as "Restricted FR," meaning that she understood how sensitive they were and that they were both: (i) never to be disclosed to the public; and (ii) property of the Federal Reserve System. ("Restricted FR" is the Federal Reserve System's second-highest classification level. Documents containing that designation may not be publicly disclosed without authorization.) By publishing these documents with the Complaint, Plaintiff has engaged in a flagrant and clear violation of Federal law.

Even under the *Lugosch* First Amendment analysis, "the presumption of access . . . can be overcome . . . by specific, on-the-record findings that higher values necessitate a narrowly tailored sealing." *Lugosch*, 435 F.3d at 126. In fact, the Second Circuit acknowledged that something like the attorney-client privilege might well be a sufficiently compelling reason to warrant a narrow sealing order like the one we seek here. *Id.* at 125. The bank examination privilege has been widely acknowledged. *See In re Bankers Trust Co.*, 61 F.3d 465, 471 (6th Cir.

1995); *In re Subpoena Served Upon Comptroller of Currency*, 967 F.2d 630, 633-34 (D.C. Cir. 1992); *Linde v. Arab Bank, PLC*, No. 04 Civ. 2799, 2009 WL 3055282, at *1 (E.D.N.Y. Sept. 21, 2009); *Bank of China v. St. Paul Mercury Ins. Co.*, No. 03 Civ. 9797, 2004 WL 2624673, at *4 (S.D.N.Y. Nov. 18, 2004). The bank examination privilege, like the attorney-client privilege, exists so that supervised institutions (the equivalent of clients) share their most sensitive, confidential information with their supervisor (the equivalent of an attorney). In fact, the Congress amended Federal law by passing the Regulatory Relief Act of 2006, Section 607 of which enables supervised institutions to share information protected by the attorney-client privilege with their supervisors without the sharing constituting a waiver. 12 U.S.C. § 1828. The obvious policy reason is to encourage such a communication between the supervised and the supervisor. The current law shows the convergence between the attorney-client privilege and the bank examination privilege.

Federal law is very clear on the subject. CSI may not be communicated by any Federal Reserve employee without the permission that is required by the regulation. Ms. Segarra had no permission. She purloined CSI when she was discharged by the New York Fed, and now seeks to use the Court as an enabler of further wrongful communication of that information. In effect, her complaint is a vehicle for that further wrong. The incantation of a "public right to know" cannot ever be a license to discharged employees that they may violate Federal law simply by filing a complaint in Federal court.

Moreover, the Federal Reserve has shown zero tolerance for employee disrespect of the rules of Federal law that protect bank examination material. We attach an allocution before Judge Pauley of a former New York Fed employee who pleaded guilty to a criminal information for stealing confidential supervisory information. *United States v. Garzon*, 98-CR-1500, at 14-17 (S.D.N.Y June 4, 1999). Judge Pauley's acceptance of the plea in *Garzon* shows that this court recognizes such conduct as criminal. *See* Exhibit 1. We cannot turn a blind eye to Ms. Segarra's substantially similar conduct here.

Before concluding, the New York Fed must address one piece of material information that was omitted from Ms. Stengle's letter of October 11, 2013. In that letter, Ms. Stengle "opened the door" on settlement discussions that began with a letter sent to the New York Fed's General Counsel on behalf of Ms. Segarra. While Ms. Segarra has now publicly communicated some of those discussions, she has not communicated her demand that the New York Fed pay her over $7 million. Obviously, she believes that the "right to know" has a multi-million-dollar price tag. She is incorrect that the New York Fed never met with her prior counsel: I met with him on several occasions. But she is correct that we had no interest in that kind of "settlement" proposal.

FEDERAL RESERVE BANK *of* NEW YORK

Hon. Ronnie Abrams, U.S.D.J.
October 11, 2013
4

Ms. Segarra has a right to have her case adjudicated in this Court, and we are ready and willing to litigate and prove she was discharged for good reason. We are not saying that she cannot put on proof of her claim. But the case must be litigated within the bounds of Federal law, and Ms. Segarra does not get to decide what law she will and will not follow. We ask the Court to instruct the parties as to what Federal law says, and to issue a narrow sealing order protecting the bank examination privilege by sealing the parts of the complaint that contain it, paragraphs 16, 17, 20-34, 36-39, 41-43, 46-52, 59-90, 95, 97, 105, and 107, and all of the appendices. Finally, we request that the Court order Plaintiff and her counsel not to publish any other CSI without further order of the Court.

Thank you for allowing us to be heard earlier today, and thank you for your consideration of our application.

Respectfully submitted,

David Gross

David Gross
Counsel and Vice President

cc: Linda J. Stengle, Esq., Counsel for Plaintiff (via e-mail to linda@lindastengle.com)
Thomas C. Baxter, Jr., Esq., General Counsel, Federal Reserve Bank of New York
Thomas M. Noone, Esq., Attorney, Federal Reserve Bank of New York

Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
------------------------------x

UNITED STATES OF AMERICA,

v. 98 Cr. 1500

MAURICIO GARZON,

Defendant.

------------------------------x

June 4, 1999
9 a.m.

Before:

HON. WILLIAM H. PAULEY, III,

District Judge

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
DAVID GREENWALD,
Assistant United States Attorney

MARK R. HELLERER, ESQ.
Attorney for Defendant

Case 1:13-cv-07173-RA Document 4 Filed 10/11/13 Page 7 of 25

(Case called)

THE COURT: Would counsel give their appearances for the record.

MR. GREENWALD: David Greenwald for the government.

MR. HELLERER: Mark Hellerer from Winthrop Stimson for the defendant, Mr. Garzon.

THE COURT: Good morning, Mr. Hellerer.

I am informed, Mr. Hellerer, that the defendant has an application in this matter. What is that application?

MR. HELLERER: It's not actually an application, your Honor. We are here on a misdemeanor information that was filed with the court on our last appearance and Mr. Garzon is prepared today to plead guilty to that misdemeanor information.

THE COURT: All right.

Very well. Is this plea pursuant to a plea agreement?

MR. GREENWALD: Yes, your Honor.

THE COURT: Would you hand up an executed copy, Mr. Greenwald, and I will ask my deputy to mark it as Court Exhibit 1, and then pass it up to me for my inspection.

All right, at this time I am going to ask my courtroom deputy to administer the oath to the defendant,

Mr. Garzon.

(Defendant sworn)

BY THE COURT:

Q. Mr. Garzon, do you understand that you are now under oath and that if you answer any of my questions falsely your false or untrue answers may later be used against you in another prosecution for perjury or making a false statement?

A. I do, your Honor.

Q. Mr. Garzon, what is your full name?

A. Mauricio Garzon.

Q. How old are you?

A. 35.

Q. How far did you go in school?

A. Graduate program in business.

Q. From what college or university?

A. New York University.

Q. Did you obtain a degree?

A. Masters in business administration.

Q. Are you able to read, write, speak and understand English?

A. Yes.

Q. Are you now or have you recently been under the care of a doctor or a psychiatrist?

A. No, sir.

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Q. Have you ever been treated or hospitalized for any mental illness or any type of addiction, including drug or alcohol addiction?

A. No, sir.

Q. In the past 24 hours have you taken any drugs, medicine or pills or have you drunk any alcohol?

A. No, sir.

Q. Is your mind clear today, Mr. Garzon?

A. Yes, it is, your Honor.

Q. Are you feeling all right today?

A. Yes.

Q. Are you represented by counsel?

A. Yes, sir.

Q. And who is that?

A. Mr. Mark Hellerer.

THE COURT: Mr. Hellerer, do you have any doubt as to Mr. Garzon's competence to plead at this time?

MR. HELLERER: No, your Honor.

Q. Now, Mr. Garzon, your attorney has informed me that you wish to enter a plea of guilty. Do you wish to enter a plea of guilty?

A. Yes, sir.

Q. Have you had a full opportunity to discuss your case with your attorney and to discuss the consequences of entering a plea of guilty?

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A. Yes, sir.

Q. Are you satisfied with your attorney, Mr. Hellerer, and his representation of you in this matter?

A. Yes, sir.

THE COURT: On the basis of Mr. Garzon's responses to my questions and my observations of his demeanor here in my courtroom this morning, I find that he is fully competent to enter an informed plea at this time.

Q. Mr. Garzon, before I accept any plea from you I am going to ask you certain questions. My questions are intended to satisfy me that you wish to plead guilty because you are guilty and that you fully understand the consequences of your plea. I am now going to describe to you certain rights that you have under the Constitution and laws of the United States which rights you will be giving up if you enter a plea of guilty. Please listen carefully.

If you do not understand something I am saying or describing, stop me and either I or your attorney, Mr. Hellerer, will explain it to you more fully.

Under the Constitution and the laws of the United States you have the right to a speedy and public trial by a jury on the charges against you which are contained in the misdemeanor information. Do you understand that?

A. Yes, sir, I do.

Q. If there were a trial, Mr. Garzon, you would be

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presumed innocent and the government would be required to prove you guilty by competent evidence and beyond a reasonable doubt. You would not have to prove that you were innocent at a trial. Do you understand that?

A. Yes, sir.

Q. If there were a trial a jury composed of 12 people selected from this district would have to agree unanimously that you were guilty. Do you understand that, Mr. Garzon?

A. Yes, sir.

Q. If there were a trial you would have the right to be represented by an attorney and if you could not afford one an attorney would be provided to you free of cost, do you understand that?

A. Yes, I do.

Q. If there were a trial, Mr. Garzon, you would have a right to see and hear all of the witnesses against you and your attorney could cross examine them. You would have a right to have your attorney object to the government's evidence and offer evidence on your behalf if you so desired and you would have the right to have subpoenas issued or other compulsory process used to compel witnesses to testify in your defense. Do you understand that?

A. Yes, sir.

Q. If there were a trial, Mr. Garzon, you would have

the right to testify, if you wanted to, but no one could force you to testify if you did not want to. Further, no inference or suggestion of guilt could be drawn if you chose not to testify at a trial. Do you understand that?

A. Yes, sir.

Q. Do you understand that by entering a plea of guilty today you are giving up each and every one of the rights that I have described, that you are waiving these rights and that you will have no trial?

A. I do, sir.

Q. Do you understand that you can change your mind right now and refuse to enter a plea of guilty?

A. Yes, sir.

Q. You do not have to enter this plea if you do not want to for any reason. Do you understand this fully, Mr. Garzon?

A. Yes, I do.

Q. Now, Mr. Garzon, have you received a copy of the misdemeanor information?

A. Yes, I have.

Q. And have you read it?

A. Yes.

Q. And did your attorney, Mr. Hellerer, discuss the information with you?

A. Yes, he did, sir.

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Q. Do you waive my reading of the information word for word here in open court?
A. Yes, sir.
Q. Now, do you understand that the information charges you with, while being an assistant bank examiner, unlawfully taking property of value in possession of banks that were members of the Federal Reserve system in violation of Title 18 of the United States Code, Section 655?
A. I do, sir.
Q. And do you understand that you have a constitutional right to be charged by an indictment rather than by an information?
A. Yes, sir.
Q. An indictment, Mr. Garzon, would be from a grand jury and not like the information, simply a charge by the prosecutor. Do you understand that you have waived the right to be charged by an indictment and that you have consented to being charged by an information of the government?
A. Yes, sir.
Q. And do you waive this right voluntarily and knowingly?
A. Yes, I do.
Q. Mr. Garzon, do you understand that if you did not plead guilty the government would have to prove each and

every part or element of the charge in the information beyond a reasonable doubt at a trial?

A. Yes, I do.

Q. And do you understand that the government would be required to prove that you were a bank examiner or an assistant bank examiner, that you had stolen or unlawfully taken or unlawfully concealed money, notes, drafts, bonds or securities, or any other property of value from a bank or banking institution which is a member of the Federal Reserve system or insured by the Federal Deposit Insurance Corporation or a branch or agency of a foreign bank or an organization operating under Sections 25 or 25(a) of the Federal Reserve Act, do you understand that?

A. Yes, sir.

Q. Do you understand that the maximum possible penalty of the crime to which you are entering a plea of guilty is one year of imprisonment, plus a maximum fine of the greatest of $100,000, twice the gross pecuniary gain derived from the offense or twice the gross pecuniary loss to persons other than yourself resulting from the offense, do you understand that?

A. Yes, sir, I do.

Q. And do you also understand that you would be subject to a special assessment of $25?

A. Yes, sir.

Q. And supervised release of a maximum term of one year?

A. Yes, sir.

Q. And supervised release, Mr. Garzon, means that you will be subject to monitoring when you are released from prison, the monitoring to be under terms and conditions which could lead to reimprisonment without a jury trial for all or part of the term of supervised release without credit for time previously served on post-release supervision if you violated the terms and conditions of supervised release, do you understand that?

A. I do.

Q. Do you understand that if I accept your guilty plea and adjudge you guilty that adjudication may deprive you of valuable civil rights, such as the right to vote, the right to hold public office, the right to serve on a jury and the right to possess any kind of firearm?

MR. HELLERER: Your Honor, I think for a misdemeanor information that is not accurate.

THE COURT: I think you are correct on that, Mr. Hellerer, and I withdraw that statement, Mr. Garzon, recognizing that this information supersedes the prior information and only charges you with a misdemeanor.

Q. Under current law, Mr. Garzon, there are sentencing guidelines that judges must follow in determining

your sentence.
Have you talked with your attorney, Mr. Hellerer, about the sentencing guidelines?
A. Yes, sir.
Q. Do you understand that the court will not be able to determine your guideline sentence until after a presentence report has been completed by the U.S. Probation office and you and the government have had a chance to challenge any of the facts reported by the probation office?
A. Yes, sir.
Q. Do you further understand that even after it is determined what guideline range applies to your case I have the authority in some circumstances to impose a sentence that is higher or lower than the sentence called for by the guidelines?
A. Yes, sir.
Q. Do you understand that if you are sentenced to prison parole had been abolished and you will not be released any earlier on parole?
A. Yes, sir.
Q. Do you understand that if your attorney or anyone else has attempted to estimate or predict what your sentence will be, that their estimate or prediction could be wrong?
A. Yes, sir.
Q. No one, Mr. Garzon, not even your attorney or the

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government, can nor should give you any assurance of what your sentence will be. Your sentence cannot be determined until after the probation office report is completed and I have ruled on any challenges to the report and determined whether I believe there are grounds to depart up or down from the guideline range, do you understand this?

A. I do.

Q. Do you also fully understand that even if your sentence is different from what your attorney or anyone else told you it might be or if it is different from what you expect, you will still be bound to your guilty plea and you will not be allowed to withdraw your plea of guilty?

A. I do, your Honor.

Q. Now, I have been given a plea agreement dated May 20, 1999 which has been marked as Court Exhibit 1.

Have you signed this plea agreement, Mr. Garzon?

A. Yes, sir.

Q. Did you read this agreement prior to signing it?

A. I did.

Q. Did you discuss it with your attorney, Mr. Hellerer, prior to the time you signed it?

A. I did.

Q. And did you read it at the time you signed it?

A. Yes, I did.

Q. Did you fully understand this agreement before

you signed it?
A. Yes, sir.
Q. Does this letter agreement, Court Exhibit 1, constitute your complete and total understanding of the entire agreement between the government, your attorney and you?
A. Yes, sir.
Q. Is everything about your plea and sentence contained in this agreement?
A. Yes, sir.
Q. And has anything been left out?
A. No, sir.
Q. Has anyone offered you any inducements or threatened you or forced you to plead guilty or to enter into this plea agreement which is Court Exhibit 1?
A. No, sir.
Q. Do you understand that as part of this plea agreement you are giving up or waiving your right to appeal if I sentence you within the guidelines range?
A. I do, sir.
Q. Do you understand that I am completely free to disregard any position or recommendation by your attorney or by the government as to what your sentence should be and that I have the ability to impose whatever sentence I believe is appropriate under the circumstances and

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guidelines and you will have no right to withdraw your plea?

A. I do.

THE COURT: Mr. Hellerer, do you know of any valid defense that would prevail at trial or do you know of any reason why your client should not be permitted to plead guilty?

MR. HELLERER: No, your Honor.

THE COURT: Is there an adequate factual basis to support this plea of guilty, Mr. Hellerer?

MR. HELLERER: We believe so, your Honor. I think the government believes so as well.

THE COURT: Mr. Greenwald, in the government's view, is there an adequate factual basis to support this plea of guilty?

MR. GREENWALD: Absolutely, your Honor.

Q. Mr. Garzon, please tell me what you did in connection with the crime to which you are entering a plea of guilty?

A. Yes, sir. While I worked at the Federal Reserve Bank as part of my job responsibilities I took certain documents home to work on them and kept --

Q. You have to speak up. I am having trouble hearing you.

A. While working for the Federal Reserve Bank as part of my job responsibilities I took certain documents

home to work on them and kept those documents after I left the Federal Reserve and some of those documents were of a confidential nature.

Q. And when did you do this?

A. I worked at the Federal Reserve between 1995 and 1997.

Q. And where did you work at the Federal Reserve Bank, what branch of the Federal Reserve Bank did you work at?

A. The Federal Reserve Bank of New York.

Q. Here in the Southern District of New York in lower Manhattan?

A. Yes, sir.

Q. And at that time what was your position at the Federal Reserve Bank?

A. It was assistant bank examiner.

Q. And did you know at the time that you were taking these documents home that that was unlawful?

MR. HELLERER: One moment, your Honor.

(Pause)

A. The taking of the documents it was my understanding it was illegal to take the documents and to keep them after I left. I understand it was illegal.

Q. So is it your testimony that you took documents home while employed and after you left the Federal Reserve

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Bank you never returned those documents to the Federal Reserve Bank?

A. Yes, sir.

Q. Is that correct?

A. That is correct.

Q. And when you failed to return those documents to the Federal Reserve Bank, did you know that that was wrong?

A. I knew it was wrong.

MR. GREENWALD: If your Honor can just confirm that among the documents the defendant failed to return were documents that belonged to banks that were members of the Federal Reserve system.

Q. What kind of documents did you fail to return to the Federal Reserve Bank upon your departure from the employ of the Federal Reserve Bank?

A. Internal policies and procedures, some documentations for pricing model testing, just internal manuals for procedures written by the banks.

Q. What banks were these?

A. They were Chase Manhattan Bank, Bankers Trust, Chemical Bank and J.P. Morgan, sir.

Q. And you knew those institutions to be members of the Federal Reserve system?

A. I did.

THE COURT: Would the government please summarize

its evidence against the defendant?

MR. GREENWALD: Yes.

The government's evidence against the defendant would consist primarily of the introduction of documents seized pursuant to a search warrant from the defendant's home and from his workplace that the government would prove by competent evidence came from examinations that the defendant had worked on.

Q. Mr. Garzon, how do you now plead to the charge in the information, guilty or not guilty?

A. Guilty, sir.

Q. Are you pleading guilty because you are guilty?

A. Yes, sir.

Q. Are you pleading guilty voluntarily and of your own free will?

A. I am.

THE COURT: Mr. Hellerer, do you wish me to make any further inquiries of Mr. Garzon?

MR. HELLERER: No, your Honor, I don't think any further inquiry is required.

THE COURT: Does the government wish me to make any further inquiries of the defendant?

MR. GREENWALD: No, your Honor.

THE COURT: Mr. Garzon, because you acknowledge that you are guilty as charged in the information and

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because I find you know your rights and are waiving them knowingly and voluntarily, and because I find your plea is entered knowingly and voluntarily and is supported by an independent basis in fact containing each of the essential elements of the offense, I accept your guilty plea and adjudge you guilty of the offense to which you have pleaded.

Now, the U.S. Probation office will next prepare a presentence report to assist me in sentencing you. You will be interviewed by the probation office. It is important that the information you give the probation officer be truthful and accurate. The report is important in my decision as to what your sentence will be. You and your attorney have a right and will have an opportunity to examine the report, challenge or comment upon it, and to speak on your behalf before sentencing.

I am going to fix September 10, 1999 at 2:30 as the date and time for sentencing in this matter.

Do either counsel have any applications with respect to or requests to alter any bail conditions?

MR. HELLERER: If I may just have a moment, your Honor.

THE COURT: Certainly.

(Pause)

MR. HELLERER: Your Honor, since the intervening period between now and the sentencing is over the summer

months, Mr. Garzon would like to have his bail geographical limitations extended so that he can visit family in California and in Massachusetts over the course of the summer and I don't believe that the government has any objection to that request.

THE COURT: Mr. Greenwald.

MR. GREENWALD: No objection.

THE COURT: Very well. I am going to modify the geographic limitations on Mr. Garzon's bail conditions to extend them to include California and Massachusetts for the purpose of Mr. Garzon visiting with members of his family who reside in those states and I will note that Mr. Garzon has appeared here on each occasion when the court has required his appearance and I have previously allowed Mr. Garzon to travel outside of the United States for a business purpose with the consent of both counsel in this matter.

So I am modifying his bail conditions to that extent.

Now, Mr. Garzon, do you understand that if you fail to return to my courtroom for sentencing on the day and time set that you will be guilty of a criminal act for which you could be sentenced to imprisonment separate and apart from and in addition to any other sentences you might receive for the crime to which you have just pleaded guilty?

THE DEFENDANT: I do, sir.

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THE COURT: And do you further understand that all of the conditions on which you were released up to now continue to apply except that I have extended the geographic limitations and a violation of any of those conditions can be severe?

THE DEFENDANT: Yes, sir.

THE COURT: Then I will fully expect to see you in my courtroom on the date of sentencing and I will at this time advise counsel and you, Mr. Garzon, that when the date of sentencing comes around we will not be in this courtroom but we will be in courtroom 618 in this building, just four floors above where we are presently sitting. So I will expect to see you in courtroom 618 on September 10, 1999.

Is there anything further that we need to address at this time?

MR. HELLERER: I don't believe so, your Honor.

MR. GREENWALD: No, your Honor.

THE COURT: Very well.

Thank you, gentlemen.

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EXHIBIT F

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The New York Times

March 6, 2012 Tuesday
Late Edition - Final

SECTION: Section B; Column 0; Business/Financial Desk; DEALBOOK; Pg. 1

LENGTH: 1088 words

HEADLINE: As an Adviser, Goldman Sachs Guaranteed Its Payday

BYLINE: By ANDREW ROSS SORKIN

BODY:

Lloyd C. Blankfein had a script for his phone call.

"Hello, Doug - it's been a long time since we have had the chance to visit," say the notes prepared for his call with Doug Foshee, the chief executive of El Paso, the big energy company that last fall was in talks to be sold to Kinder Morgan. "I was very pleased you reached out to us on this most recent matter," the script goes, thanking Mr. Foshee for using Goldman as El Paso's adviser in the transaction. Mr. Blankfein added that he knew Mr. Foshee was aware of Goldman's investment in Kinder Morgan "and that we are very sensitive to the appearance of conflict."

Somewhat awkwardly, Goldman had a 19.1 percent stake in Kinder Morgan, the pipeline and energy storage company, and two seats on its board. So the script went on, "We have asked our board members to recuse themselves and I know you have taken on a second adviser." He added, "Really just wanted to reach out and say thank you."

About a month later, Kinder Morgan announced it had agreed to acquire El Paso for $21.1 billion in cash and stock.

When the deal was announced, buried at the end of the news release was a list of Wall Street banks that had advised on the deal, including Goldman Sachs. Goldman received a $20 million fee for playing matchmaker for El Paso. The fee, of course, was not disclosed, nor was the Kinder Morgan stake owned by Goldman Sachs's private equity arm, worth some $4 billion. Nor did the release disclose that the Goldman banker who advised El Paso to accept Kinder Morgan's bid owned $340,000 worth of Kinder Morgan stock.

Now, however, a court ruling in a shareholder lawsuit has laid bare the truth: Goldman was on every conceivable side of the deal. As a result, El Paso may have unwittingly sold itself far too cheaply. Mr. Blankfein may have said he was "very sensitive to the appearance of conflict," but the judge's order ruling "reluctantly" against a motion to block the merger made it clear that Goldman's conflicts went far beyond mere appearances.

Here's just one example: In an effort to help mitigate its clear conflict, Goldman Sachs recommended that El Paso hire an additional adviser so that El Paso would be able to say that it had received completely impartial advice. Goldman did not say it would step down, and lose its fee, it simply suggested that El Paso hire one more bank - in this case, Morgan Stanley.

But then came this: "When a second investment bank was brought in to address Goldman's economic incentive for a deal with, and on terms that favored, Kinder Morgan, Goldman continued to intervene and advise El Paso on strategic alternatives, and with its friends in El Paso management, was able to achieve a remarkable feat: giving the new investment bank an incentive to favor the merger by making sure that this bank only got paid if El Paso adopted the strategic option of selling to Kinder Morgan," Chancellor Leo E. Strine Jr. of Delaware's Court of Chancery wrote last week in a must-read opinion that has been whizzing around the in-boxes of Wall Street.

"In other words," Chancellor Strine continued, "the conflict-cleansing bank only got paid if the option Goldman's financial incentives gave it a reason to prefer was the one chosen."

Goldman denied that it was involved with the structure of Morgan Stanley's fee.

It must be noted that Chancellor Strine's irritation was not just reserved for Goldman. He lambasted El Paso's chief, Mr. Foshee, for what he described as his "velvet glove negotiating strategy," which he said was "influenced by an improper motive" to enrich himself through the deal because he planned to later buy El Paso's exploration and production unit from Kinder Morgan.

Goldman's brazenness in this deal is nothing short of breathtaking. It is just another example of why Goldman's reputation has been dented as questions have circled about the firm's loyalty to its clients over itself. Other firms have conflicts, but rarely do you hear about them being so incestuous. A Morgan Stanley banker involved in the deal wrote in an e-mail at the time: "This is GS at its most shameless."

What's even more surprising about Goldman's role working for El Paso is that it came just six months after the firm issued a new set of guidelines by its "business standards committee." The firm had just agreed to a $550 million settlement with the Securities and Exchange Commission over allegations that it knowingly sold its clients financial instruments meant to fail. In the guidelines, the firm pledged that its most important principle is that "our clients' interests always come first."

In the case of El Paso, that's now debatable. The company on Monday delayed its shareholder vote on the deal for a few days, until Friday, to give its investors time to digest Mr. Strine's rebuke of the process.

In fairness to Goldman, the firm was completely upfront with El Paso about its conflict and the company chose to continue working with Goldman. (The firm, however, did not disclose the personal stock ownership in Kinder Morgan by its banker, Steve Daniel.) Perhaps that would have been disclosure enough several years ago. But in this environment, why would Goldman take the chance? After all, the firm's $4 billion investment in Kinder Morgan meant that it had much more on the line on the other side of the negotiating table. Compare that to a $20 million advisory fee.

In a statement, Goldman said, "We respect the judge's opinion but want to be clear that we stood by our client through this process, encouraging them to get independent views from another adviser. We were also transparent with El Paso about our relationship with Kinder Morgan and the related issues."

Even if Goldman had perfect Chinese walls, as the firm has said, it stretches the mind to believe that the conflict could truly be contained - or could be worth the trouble it has created.

"I am unwilling to view Goldman as exemplifying an Emersonian nonfoolishly inconsistent approach to greed, one that involves seeking lucre in a conflicted situation while simultaneously putting the chance for greater lucre out of its 'collective' mind," Chancellor Strine wrote. "At this stage, I cannot readily accept the notion that Goldman would not seek to maximize the value of its multibillion-dollar investment in Kinder Morgan at the expense of El Paso, but, at the same time, be so keen on obtaining an investment banking fee in the tens of millions."

This is a more complete version of the story than the one that appeared in print.

URL: http://www.nytimes.com

GRAPHIC: PHOTO: Lloyd Blankfein of Goldman Sachs, which advised El Paso in its sale to Kinder Morgan, in which Goldman owns a stake. (PHOTOGRAPH BY ANDREW HARRER/BLOOMBERG NEWS) (B5)

LOAD-DATE: March 6, 2012

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
------------------------------x

CARMEN M. SEGARRA,

Plaintiff,

v. 13 Civ. 7173 (RA)

THE FEDERAL RESERVE BANK OF
NEW YORK; MICHAEL SILVA;
MICHAEL KOH; and JONATHON KIM,

Defendants.

------------------------------x

New York, N.Y.
October 11, 2013
12:40 p.m.

Before:

HON. RONNIE ABRAMS,

District Judge

APPEARANCES (by telephone)

KENNEY & KEARNEY
Attorneys for Plaintiff
BY: LINDA J. STENGLE

DAVID GROSS
Attorneys for Defendants

ALSO PRESENT: THOMAS C. BAXTER

(In chambers)

THE COURT: Hi, this is Judge Abrams.

MS. STENGLE: Linda Stengle. I'm for plaintiff Carmen Segarra and my understanding is David Gross is on the line.

MR. GROSS: I'm here, your Honor. I'm also with Tom Baxter, our general counsel at the Federal Reserve Bank of New York.

THE COURT: I should let you know I have a court reporter here, and I am just here in my chambers.

I have defendant's letter of October 10 seeking an order removing the complaint from the Court's public docket. The complaint had not yet been put on the public docket and I think you saw my order of just maybe two hours ago indicating that it should not be put on ECF until this issue is resolved, until we held that this telephone conference. However, my understanding is that members of the press already have the complaint in its entirety.

So my first question to defendants, and I'll hear you out, is, in light of the fact that news entities are already in possession of the complaint, what is it that you're seeking at this point and why would that make a difference?

MR. GROSS: Your Honor, I want to thank you, first, for having this hearing today. Thank you kindly.

We are asking that the Court not post this publicly, even though I understand that it has been given to the press by plaintiff and/or her attorney. The heart of bank supervision is that these financial institutions feel comfortable sharing very sensitive confidential information with their bank examiners, with their bank supervisors, and the only way that can work is if they feel comfortable that it will not be shared with the public.

Now, I understand that this has already been shared, but there are regulations in the CFR that prevent or prohibit just that sharing. And so because the way we read the regulations, we believe it's clear that this is confidential supervisory information that has now been put in the public eye. We don't want the Court to be a party to this unlawful conduct by plaintiff and her attorney in sharing this with the public.

THE COURT: Ms. Stengle, what's your position?

MS. STENGLE: Yes. I'm sorry, your Honor. I sent a letter a little after 12 today. I'm sorry. I was faced with a motion when I came in this morning and I dashed off a letter. Let me give you the outline of that.

Plaintiff has an explicit statutory right to bring the complaint in the United States District Court for defendant's retaliation against her for her protected conduct, that of her bank examination duties. The statute is 12 U.S.C. 1831(j). There is nothing in that statute that says she has got to file it under seal or that she has got to somehow limit her complaint.

The complaint says this kind of conduct is itself unlawful and she should be able to detail that on the public -- it doesn't mention the public document. It doesn't say the information should be brought under seal. She was terminated 18 months ago from the Federal Reserve. She was examining Goldman Sachs' conflict of interest policies and practices that were in place on or before November 1, 2011. We don't believe that there is any deliberative purpose that the defendants can cite that means that they should have some sort of protective order issued in this case. My client, when she was terminated, was, in fact, finalizing language for a May 2012 supervisory letter and annual report. So all this is old information, at least in terms of Goldman Sachs.

As far as the information itself, Goldman Sachs on conflict of interests, policies, and procedures, we would have hoped that information would have been widely distributed to Goldman Sachs employees at least. And some of the transactions that she was charged with examining were things that were the subject of numerous press articles and in one case a Delaware court action. That action was finalized in December of 2012. We don't see any purpose that countervails her right to bring the action, her obligations to meet her burden of proof, or that countervails the public's interest in seeing what happens with the complaint.

MR. GROSS: Your Honor, may I respond?

THE COURT: You may.

MR. GROSS: Judge, we are not trying to abridge plaintiff's right to bring a lawsuit. We understand that she has the right to bring a lawsuit. There is no conflict there.

All we are saying is, there are parts of the complaint which contain confidential supervisory information and literally the entire appendix is confidential supervisory information. Under the applicable regulations it is not the property of Ms. Segarra or Ms. Stengle. It is the property of the board of governors of the Federal Reserve system. She has taken it. It is like an associate at a law firm who took documents from the law firm after the associate was terminated.

The regulations are clear that it is the property of the board of governors. We are not arguing that it's the property of Goldman Sachs. It contains minutes of meetings that were held internally here at the New York Fed and also with the supervised institution. It also contains ratings of the institution. Some of the documents themselves are marked confidential supervisory information. So there can be no sort of doubt about this.

Also, she herself, Carmen Segarra, wrote some of these memos and noted that they were "restricted FR" and that is a term that we use here. It is our second highest level of designation of documents in that they should be kept confidential. They are very sensitive. So it is not for any of us to determine whether these have been "declassified" because time has passed. They are the property of the board of governors and it is up to them to decide if and when they should ever be released to the public.

THE COURT: Ms. Stengle, anything else from you?

MS. STENGLE: I don't believe that there is anything in the statutes that are cited that give the Federal Reserve any sort of blanket pass to operate in secret. My understanding of the purpose underlying this statute is that they need to protect their deliberative process and they need to protect, they believe, a relationship with the government and ongoing supervisory issues.

The examination is over. It has been over for a long time. Ms. Segarra has got First Amendment rights. She has got obligations to carry the burden of persuasion and proof here. When you fire somebody for protected conduct she has got to prove that she was engaging in protected conduct and that's what she does. I don't see anything here that countervails Ms. Segarra's obligations and rights or the public's rights to know what's going on.

THE COURT: Mr. Gross, as you're aware, the Lugosh case in the Second Circuit creates a strong presumption in favor of access. And that presumptive right of access prevails unless it's overcome by specific on-the-record findings that sealing is necessary to preserve higher values, and only if the sealing order is narrowly tailored to achieve that aim. Your letter does not address Lugosh at all.

What I am going to do, I am going to give you one more opportunity to submit to me a letter as to why I should either seal this complaint or redact portions of the complaint, and then I am going to also ask Ms. Stengle to address the same issue. Because that's the issue that I have to address. It is not just the plaintiff's right, but also the public's right to access information, judicial documents.

How much time do you need? I want to decide this quickly. Can you submit a letter to me by the end of the today addressing the public right to access issue?

MR. GROSS: Yes, I can, your Honor.

THE COURT: And Ms. Stengle, can you do the same?

MS. STENGLE: Yes, I can.

THE COURT: And why don't we have a conference in court on Tuesday morning because the Court is closed on Monday. Because, as I said, I do want to address this as soon as possible.

How about 10 a.m. on Tuesday morning?

MS. STENGLE: That works for me, your Honor.

MR. GROSS: Yes, your Honor.

THE COURT: And among other things, Mr. Gross, I'd like you to address, if you can, if there are any cases in which there are situations like this one in which news outlets already have this information. And so what's the harm to having it remain on the complaint which is publicly filed. So I'd like you to address that as well as just the general presumption in favor of access under Lugosh. Okay?

MR. GROSS: Okay, your Honor.

THE COURT: I look forward to getting those letters today, and I'll see you Tuesday morning in court.

MR. BAXTER: Your Honor, can I address the Court?

THE COURT: You may.

MR. BAXTER: A question I have relates not so much to the positions of the plaintiff and the defendant, but the position of the supervised institution here, Goldman Sachs, who also might have an interest in the outcome of your Honor's disposition, particularly if sensitive Goldman Sachs information is made available in Pacer, which would mean it's accessible electronically not only here but all over the globe. And I just wonder with respect to the rights of the third party whether we also should contemplate notifying them.

THE COURT: I'm happy to hear Goldman Sachs' position on this. I would be interested in your views on how we should go about doing that. I am going to issue an order that will be on the docket indicating that we will have this hearing on Tuesday morning and asking for letters on your position by the end of the day, essentially reiterating what we discussed at this conference, which, as you know, is on the record. But I would be perfectly comfortable with having you reach out to Goldman Sachs, if that's what you'd like to do, and I'm perfectly willing to hear their position.

MR. BAXTER: Your Honor, our ordinary course of proceeding would be, in a situation where information had been inadvertently disclosed, would be to notify the party affected, whether that party be an individual or a supervised institution. So we would be following the ordinary course of our procedure here. We just didn't want in any way to interfere with the orderly process that the Court envisioned.

THE COURT: I think it's fine for you to follow that procedure and notify them of that. I think you should just make clear that I have set a very expedited schedule on this. It's Friday now at almost 1:00. I am going to get your letters by the end of the day. The court is closed on Monday and I am going to hear from the parties on Tuesday morning. If they would like to be heard as well, I would be happy to hear them, but they should adhere to the same schedule.

MR. BAXTER: Understood, your Honor. We will make that clear.

THE COURT: Good. Anything else?

MS. STENGLE: No. Thank you.

THE COURT: Thank you so much.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARMEN M. SEGARRA,	
Plaintiff,	: ECF CASE
v.	: 13-CV-07173 (RA)
FEDERAL RESERVE BANK OF NEW YORK, MICHAEL SILVA, MICHAEL KOH, and JOHNATHON KIM,	: ORAL ARGUMENT REQUESTED
Defendants.	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

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Defendants Federal Reserve Bank of New York (the "New York Fed") and Michael Silva, Michael Koh, and Johnathon Kim (collectively, the "Individual Defendants") respectfully submit this memorandum of law in support of their motion to dismiss Plaintiff Carmen Segarra's Amended Complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

PRELIMINARY STATEMENT

Each of Plaintiff's six causes of action fails to state a claim for the following reasons.

Federal "whistleblower" statute. This claim remains unchanged from the original Complaint and fails for the same reasons. The Individual Defendants are not liable because 12 U.S.C § 1831j creates no liability for individual employees of a Federal Reserve Bank. As for the New York Fed, Plaintiff's claim fails for two reasons. *First*, Plaintiff has not alleged a protected activity. As it applies to this case, Section 1831j requires Plaintiff to allege that she was fired because she reported information about a violation of "any law or regulation" by a "depository institution." Plaintiff, however, alleges that she was fired for reporting that Goldman Sachs—a *holding company*, not a "depository institution"—violated an *advisory letter*, not a "law or regulation," by not having a "firmwide conflict of interest policy." More fundamentally, Section 1831j protects the provision of information about wrongdoing, not disagreements between a junior bank examiner and more senior colleagues over the supervisory consequences of that information. *Second*, Plaintiff's "whistleblower" claim is implausible owing to numerous contradictions within her pleading. Most glaringly, the allegation that Goldman Sachs did not have any conflict of interest policy is belied by Plaintiff's own exhibits, which show that the "nonexistent" policies were, in fact, available on Goldman Sachs's public website. Considered in its entirety, the gravamen of the Amended Complaint is a non-actionable disagreement between a supervised employee and more senior colleagues, not a "whistleblower" claim.

New York "consumer protection" statute. New York's consumer protection law does not apply because it regulates consumer-oriented, commercial conduct, not government supervision of financial institutions by a federal instrumentality like the New York Fed.

Breach of Contract. Under federal law, Plaintiff was an "at will" employee and was not employed by contract. Plaintiff's new theory that Defendant Kim, her direct supervisor, breached an oral contract to help her fails because Plaintiff has not alleged consideration.

Wrongful Termination. Apart from the fact that New York does not recognize the tort of wrongful termination in "at will" employment arrangements, this claim fails against the Individual Defendants because they did not employ Plaintiff and, *a fortiori*, did not fire her. It fails against the New York Fed because the authority under the Federal Reserve Act to hire and fire employees "at will" supersedes any state law right to continued employment.

Negligence in Employment. In addition to being trumped by federal law, the New York tort of negligent supervision fails because Plaintiff does not and cannot allege that the New York Fed had knowledge that the Individual Defendants had a propensity for the conduct that caused her injuries, a glaring omission from the Amended Complaint.

Conspiracy. Because this claim rests entirely on Plaintiff's other claims of illegal and tortious conduct, it fails for the same reasons.

Remedies. Plaintiff is not entitled to reinstatement or front pay because she violated New York Fed policies and federal law when she retained and published confidential supervisory information without permission—an independent ground for termination that, under settled law, precludes an equitable right to future employment or front pay. Finally, the New York Fed is not liable for punitive damages because, as part of the Nation's central bank, it may not be punished absent clear authorization from Congress, which is lacking in this case.

STATEMENT OF FACTS

The New York Fed is one of twelve regional reserve banks that, along with the Board of Governors and the Federal Open Market Committee, make up the Federal Reserve System, the nation's central bank. Pursuant to authority delegated by the Board of Governors, the New York Fed supervises numerous financial institutions located within the Second District of the Federal Reserve System, which includes New York State.

The Individual Defendants were, at all relevant times, employees of the New York Fed who worked in its supervisory department. Mr. Silva served as the Senior Supervisory Officer of the New York Fed team conducting an examination of Goldman Sachs, and Mr. Koh served as the Deputy Supervisory Officer. Mr. Kim was Plaintiff's immediate supervisor in the Legal & Compliance group within the New York Fed's supervisory department.[1] The combined tenure of the three Individual Defendants at the New York Fed exceeds 45 years.

Plaintiff, by contrast, worked at the New York Fed for not quite seven months—from October 31, 2011 through May 23, 2012. (AC ¶ 14.)[2] Although she is an attorney and worked previously at a number of financial institutions, this was her first position as a bank examiner. Her first (and only) assignment was to the Goldman Sachs examination team led by Mr. Silva and Mr. Koh, where she was one of approximately 30 examiners.

According to the Amended Complaint, Plaintiff examined several aspects of Goldman Sachs's compliance function and concluded that the firm "*does not have a conflicts of interest policy*, not firmwide, and not for any divisions. I would go so far as to say they have *never* had a policy on conflicts . . . ." (AC Ex. at 56-57 (emphases added).) This, apparently, was not news:

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[1] The Legal & Compliance group, which participates in examinations of supervised financial institutions, is not part of the Legal function, which represents the bank in lawsuits.

[2] As used herein, "AC" refers to the Amended Complaint filed on December 4, 2013, and "Compl." refers to the original Complaint filed on October 10, 2013.

Plaintiff alleges that "Goldman's lack of a firmwide conflict of interest policy" was "frequently discussed" among her colleagues (AC ¶ 49), and that Goldman Sachs repeatedly admitted its lack of a firmwide conflict of interest policy (AC ¶ 48). One such admission occurred at meeting on December 8, 2011—approximately one month after Plaintiff was hired—which was attended by several of Plaintiff's colleagues including Mr. Silva and Mr. Kim. (AC ¶¶ 49, 51 and Ex. at 39.) Plaintiff further alleges that the Individual Defendants predicted that news of Goldman Sachs's lack of a firmwide conflict of interest policy would cause that firm to "explode" and would trigger a "run off" of "consumers and clients." (AC ¶¶ 57-58.) Just how the results of a confidential examination would ever become public is, however, left to the imagination.

In Plaintiff's view, Goldman Sachs's lack of a conflict of interest policy violated "SR 08-8," an advisory letter published in 2008 by the Board of Governors' Division of Bank Supervision and Regulation (hence, "SR").[3] SR 08-8 contains "clarification as to the Federal Reserve's views" regarding "a firmwide approach to compliance risk management and oversight." (Declaration of David Gross ("Gross Decl.") Ex. A at 2.) The letter advises, among other things, that supervised financial institutions "should have effective compliance risk management programs that are appropriately tailored to the organizations' risk profiles," which may "vary considerably." (*Id* at 3.) Especially for "[l]arger, more complex banking organizations" (*id.*), SR 08-8 recommends "compliance policies," a defined term with two components: (1) a firmwide policy applicable to "all employees throughout the organization," and (2) more tailored policies for "specific business lines." (Gross Decl. Ex. A at 11-12 n.4.)

[3] According to the Board of Governors' website, SR Letters "address significant policy and procedural matters related to the Federal Reserve System's supervisory responsibilities" and are "a means of disseminating information to banking supervision staff at the Board and the Reserve Banks, as well as to supervised banking organizations." (Gross Decl. Ex. B ("About SR Letters," *available at* http://www.federalreserve.gov/bankinforeg/srletters/about.htm).)

Plaintiff's "finding" about a lack of conflict of interest policies allegedly received attention from many others at the New York Fed, including the two most senior officers in charge of the Goldman Sachs supervisory team (Mr. Silva and Mr. Koh) and colleagues in the Legal & Compliance group (including Mr. Kim). Many meetings were held to discuss her findings, both internally and with Goldman Sachs. (*See, e.g.*, AC ¶¶ 50, 56, 77, 81, 98, 114, and 119.) The issue was even vetted with the Operating Committee ("OC"), a system-wide committee for large institution oversight established by the Board of Governors. (AC Ex. at 55.) In the end, however, the Defendants disagreed with Plaintiff's conclusions in two respects. *First*, Plaintiff had not analyzed Goldman Sachs' conflict of interest policies sufficiently to support her conclusions. For example, according to the exhibits appended to the Amended Complaint, Mr. Kim and Mr. Silva wrote to Plaintiff in May 2012 that it was premature to jump to a conclusion about Goldman Sachs's policies because "due diligence has not been completed" (*id.* at 56) and "we have not even submitted our . . . follow-up questions" (*id.* at 55). *Second*, written conflict of interest policies—including eponymous sections of a firmwide "Code of Business Conduct and Ethics" (Gross Decl. Ex. C at 4-5) and "Report of the Business Standards Committee" (Gross Decl. Ex. D at 16-25)—were available on Goldman Sachs's public website. (AC Ex. at 55-56.) As Mr. Silva wrote to Plaintiff, those public documents raised "serious questions in my mind as to your judgment in reaching and communicating conclusions without a sound basis in the supervisory process and before the due diligence and vetting process is complete." (*Id.* at 55.)

Soon after this exchange of email in May 2012, the New York Fed fired Plaintiff for cause. Plaintiff was *not* fired because she identified a possible violation of law or regulation. Her pleadings demonstrate on their face that her concerns about Goldman Sachs had the attention of very senior management, who investigated her concerns but disagreed with her conclusions. Indeed, Mr. Silva *agreed* that Goldman Sachs's policies could be improved:

> [A]s examiners, we can and should point out ways the firm's [Conflict of Interest] policy needs to be improved, or be better organized, or be better documented in the event that, after conducting appropriate due diligence and vetting of our conclusions, we find it to be deficient in any of these respects. Perhaps [Goldman Sachs's Conflict of Interest] policies should be more like the ones for [other banks] that you mention. (*Id.* at 55.)

Approximately 17 months after she was fired, Plaintiff filed this lawsuit for wrongful termination,[4] which is divided into six purported causes of action: (1) a violation of the Federal Deposit Insurance Corporation Improvement Act of 1991, as amended and codified at 12 U.S.C. § 1831j; (2) a violation of New York's "consumer protection" law, N.Y. Gen. Bus. Law § 349; (3) breach of two employment contracts; and common law torts for (4) wrongful termination in violation of public policy, (5) negligent supervision, and (6) conspiracy. Not one of these purported claims is cognizable, for the reasons addressed below.

ARGUMENT

Under Rule 8 of the Federal Rules of Civil Procedure, a complaint must be "facially plausible" and "give fair notice to the defendants of the basis for the claim." *Barbosa v. Continuum Health Partners, Inc.*, 716 F. Supp. 2d 210, 215 (S.D.N.Y. 2010) (quotation marks omitted). A claim is facially plausible when it contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). On a motion under Rule

[4] The original Complaint, the Amended Complaint, and the exhibits to each contain confidential supervisory information, which is protected from public disclosure by federal regulations. *See* Gross Decl. Ex. E (Letters to the Court dated October 10, 2013 and October 11, 2013.) Notwithstanding these regulations, Plaintiff published unredacted copies of her original Complaint, including the attachments, to members of the news media before filing her pleading.

12(b)(6) of the Federal Rules of Civil Procedure, a court need not credit legal conclusions, as opposed to factual allegations, *Iqbal*, 556 U.S. at 678, or factual allegations that are "contradicted . . . by statements in the complaint itself or by documents upon which its pleadings rely," *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 405 (S.D.N.Y. 2001).

I. Plaintiff Has Failed to State a Claim Under Section 1831j.

A. Section 1831j does not create liability for the Individual Defendants.

The Individual Defendants may not be sued under Section 1831j because that statute does not create liability for individual employees of a Federal Reserve Bank. *See Cosgrove v. Fed. Home Loan Bank*, No. 90 Civ. 6455, 1999 U.S. Dist. LEXIS 7420, at *24 (S.D.N.Y. Mar. 22, 1999) ("Section 1831j has no provision imposing liability upon individuals or permitting remedies against individuals."). Instead, Section 1831j prohibits federal bank supervisors—specifically, a "Federal banking agency, Federal home loan bank, [or] Federal reserve bank"—from firing an employee for reporting "any possible violation of any law or regulation." 12 U.S.C. § 1831j(a)(2). Former employees who were terminated in violation of Section 1831j(a)(2) may sue their former employers to enforce their right against unlawful discrimination, *see id.* at § 1831j(b), and seek relief from the employer "[that] committed the violation," *id.* at § 1831j(c).[5] So far as Defendants are aware, every court to consider the issue has concluded, as Judge Patterson did in *Cosgrove*, that there is no individual liability under Section 1831j. *See, e.g.*, *Fasano v. Fed. Reserve Bank of New York*, 457 F.3d 274, 283 n.11 (3d

[5] The lone exception concerns "*any person* who is performing, directly or indirectly, any function or service on behalf of the [*Federal Deposit Insurance*] *Corporation* ["FDIC"]," 12 U.S.C. § 1831j(a)(2), an amendment that reflects the FDIC's use of contractors to meet the temporarily increased need for supervisors of thrifts after the "savings and loan crisis." *See* 139 Cong. Rec. H10162, 103rd Cong. (1st Sess. 1993) (discussing liability for FDIC contractors). The inclusion of this singular exception, however, demonstrates that Congress chose *not* to create liability for "any person" working for a Federal Reserve Bank.

Cir. 2006) (collecting cases); *Nowlin v. Resolution Trust Corp.*, 33 F.3d 498, 502-03 (5th Cir. 1994) (observing that Section 1831j applies to only "two types of actors," depository institutions and federal bank supervisors); *Hicks v. Resolution Trust Corp.*, 767 F. Supp. 167, 172 (N.D. Ill. 1991) (dismissing claims under Section 1831j against "individual defendants in both their official and individual capacities"). Indeed, *Hicks* observed that 12 U.S.C. § 1813, which defines the terms used in Section 1831j, includes a defined term for "institution-affiliated party" that included "directors, officers, employees or controlling stockholders." *Hicks*, 767 F. Supp. at 172. Congress, however, did not include that class of defendants in Section 1831j.

B. Plaintiff has not alleged a protected activity.

As it applies to the instant case, activity protected by Section 1831j occurs where "any employee [of a Federal Reserve Bank] . . . provid[es] information . . . regarding any possible violation of any law or regulation . . . by . . . any depository institution." 12 U.S.C. § 1831j(a)(2).[6] As in her original Complaint, Plaintiff asserts that the New York Fed fired her for two reasons: "[1] finding Goldman did not have a firmwide conflicts of interest policy in compliance with SR 08-8 and [2] refusing to change her examination findings." (AC ¶ 151; *see also* AC ¶ 133 (same), Compl. ¶ 97 (same).) Neither reason constitutes protected activity.[7]

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[6] Although Plaintiff now accuses the New York Fed of "gross mismanagement" by not making reporting lines clear to her (AC ¶ 78), she does not and cannot allege "gross mismanagement" by Goldman Sachs. *See White v. Dep't of the Air Force*, 391 F.3d 1377, 1381-1382 (Fed. Cir. 2004) (defining "gross mismanagement" under the Whistleblower Protection Act to exclude "differences of opinion between an employee and his agency superiors as to the proper approach to a particular problem").

[7] In her Amended Complaint, Plaintiff includes a litany of "Goldman's compliance problems . . . [that] violated other federal laws, rules, and regulations," each of which she claims to have uncovered during her brief tenure at the New York Fed. (AC ¶ 139.) She does not allege, however, that she was fired for reporting violations of any of these authorities, most of which fall under the primary jurisdiction of the U.S. Securities and Exchange Commission in any event.

The first alleged basis for Plaintiff's termination—"finding Goldman did not have a firmwide conflicts of interest policy in compliance with SR 08-8" (AC ¶ 151)—does not constitute protected activity for two reasons: SR 08-8 is an advisory letter, not a "law or regulation"; and Goldman Sachs is a holding company, not a "depository institution."

First, SR 08-8 is an *advisory letter*, not a regulation, as asserted in the Amended Complaint (AC ¶ 149). "[T]he promulgation of . . . regulations must conform with any procedural requirements imposed by Congress," which are ordinarily found in the Administrative Procedures Act ("APA"). *Chrysler Corp. v. Brown*, 441 U.S. 281, 303 (1979). The basic procedural prerequisites for exercising regulatory authority under the APA are that an agency (1) "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," (2) consider those views, (3) publish a statement of purpose, and (4) provide an opportunity to petition for the "issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(c)-(e). Valid, properly promulgated regulations have the force and effect of law, the same as a statute, because of the opportunity for public notice and comment, characterized by the Supreme Court as a "quasi-legislative" element. *Chrysler Corp.*,441 U.S. at 302.

By contrast, "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," are exempt from public notice and comment requirements, 5 U.S.C. § 553(b), and are not legally binding. *Compare Fidelity Fed. Sav. and Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 153 (1982) (concluding that *regulations* of a federal banking agency may override and preempt any inconsistent state law), *with Rinaldi v. United States*, 434 U.S. 22, 29 (1977) (requiring courts to be "receptive, not circumspect" of a Department of Justice *policy* on duplicative prosecutions). Agency policy and guidance, therefore, is *not* published in the Code of Federal Regulations, which is reserved for regulations with "legal effect." *See* 44 U.S.C. § 1510 (authorizing a "complete codification[] of the documents of each agency of the Government having general applicability and *legal effect*") (emphasis added); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986) (Scalia, J.) ("The real dividing point between regulations and general statements of policy is publication in the Code of Federal Regulations . . . .").[8]

SR 08-8 was not promulgated according to APA procedures or published in the Code of Federal Regulations. It is an important statement of policy because it reflects the expectations of the department within the Board of Governors responsible for the supervision of financial institutions, but it is not a binding rule enacted by a federal agency following a period of public notice and comment.[9] A quick survey of SR 08-8 confirms its forward-looking, advisory nature. *See Brock*, 796 F.2d at 538 (examining the language used in a Department of Labor policy to assess the intent of the agency, such as the use of "may" versus "will"). SR 08-8 "encourages" large financial institutions to devote adequate resources to compliance, states "expectations" for compliance with Basel Committee "principles," and provides "clarification as to the Federal Reserve's views" regarding related matters. (Gross Decl. Ex. A at 2.) SR 08-8 recommends that

[8] The bright-line distinction between regulations and policies was illustrated in a recent decision from the District of New Jersey interpreting a federal criminal statute that had, as a statutory predicate, a "violation of *any law or regulation* of any State." *United States v. Reeves*, 891 F. Supp. 2d 690, 691 (D.N.J. 2012), quoting 16 U.S.C. § 3372(a)(2)(A) (emphasis added). The defendant had been indicted for the unlawful interstate transportation of oysters, and the predicate was a violation of New Jersey's oyster harvest quota. The quota and related "Terms and Conditions" appeared in an official state publication, but were not included in a regulation enacted pursuant to the procedural requirements of New Jersey's Administrative Procedures Act. *Id.* at 704-06 (outlining the notice, comment, publication, and response requirements to enact regulations in New Jersey). Because the oyster quota was not contained in a regulation, the charges predicated on the oyster quota were dismissed. *Id.* at 706-07.

[9] Indeed, the Board of Governors report quoted by Plaintiff in her Amended Complaint (AC ¶¶ 27-30) describes SR Letters generally, and SR 08-8 in particular, as "supervisory guidance" or "guidance." (Gross Decl. Ex. F at 3, 6, and 9 ("Operations Review Report, Federal Reserve Bank of New York, Bank Supervision Group, December 2009").) Although stamped "Restricted FR," Congress released this report publicly through the Financial Crisis Inquiry Commission.

large, complex banking organizations "*should* generally implement firmwide compliance risk management programs," and supplies an illustrative list of the topics that these programs "*should* include." (*Id.* at 4 (emphases added).) These supervisory expectations are important, but SR 08-8 does not contain agency rules to which financial institutions "must" or "shall" adhere. Plaintiff, therefore, cannot maintain her Section 1831j claim—which requires a violation of "law or regulation"—on the basis of an alleged violation of agency guidance like SR 08-8.

Second, "Goldman Sachs"—the "firm" in Plaintiff's search for a "firmwide" conflict of interest policy—is not a "depository institution" as defined in Title 12, Chapter 16 of the United States Code. As a financial institution holding company, The Goldman Sachs Group, Inc. is a "depository institution *holding company*," a separately defined term. 12 U.S.C. § 1813(w)(1) (emphasis added). By contrast, a "depository institution" means "any bank or savings association," *id.* at 1813(c)(1), and neither of those terms is defined to include a holding company, *see id.* at 1813(a)(1) ("bank") and (b)(1) ("savings association"). Because "firmwide" means across all divisions of The Goldman Sachs Group, Inc., Plaintiff has failed to state a claim.[10]

Plaintiff's other alleged basis for termination—"refusing to change her examination findings" (AC ¶ 151)—is not actionable because the statute protects the *provision of information*, not a disagreement between an employee and other more senior officials over the supervisory

[10] The limitation to "depository institutions" makes sense in historical context. Section 1831j, which was an amendment to the Federal Deposit Insurance Act and originally covered only employees of "federally insured depository institution[s]," *see* 101 P.L. 73, 103 Stat. 183, was one of Congress's responses to the "savings and loan crisis" of the 1980s, in which hundreds of thrifts failed across the country. Certain deposit liabilities of these depository institutions, unlike the debt of a bank holding company, receive protection in the form of federal deposit insurance from the Federal Deposit Insurance Corporation. Although amended in 1991 to extend "whistleblower" protection to employees of federal banking regulators, Congress's original focus on rooting out illegal conduct at "depository institutions," which receive federal deposit insurance, remained untouched.

consequences of that information. *See* 12 U.S.C. 1831j(a)(2) (prohibiting dismissal or discrimination "because the employee . . . provided information"). Were it otherwise, a "whistleblower" statute could be invoked anytime a supervised employee disagrees with the judgment of his supervisors and thereafter feels the supervisors are holding the disagreement against the employee. Moreover, Plaintiff lacks any legal basis to assert that the responsibility for the New York Fed's conclusions regarding a supervised financial institution belonged to her. Despite acknowledging that the decisions on "supervisory action" and "specific language" belonged to the New York Fed (AC ¶ 128), Plaintiff persists in referring to "*her* examination," "*Carmen's* examination," or "*her* multiple ongoing examinations" of Goldman Sachs (*see, e.g.*, AC ¶¶ 73-75, 77-79, 85-86, 99, 117, 124, 126, 133, and 138), appropriating for herself what is rightfully the prerogative of the Board of Governors and the New York Fed, *see* 12 U.S.C. §§ 248(a), 483. *Cf. Cosgrove*, 1999 U.S. Dist. LEXIS 7420 at *48-49 ("It is the examiner-in-charge who decides what findings are . . . put in the Report of Examination, not the individual examiners working under his or her supervision. As part of a team of individual examiners, plaintiff had no authority to insist that the Report of Examination be prepared in any specific manner.") (summary judgment).

C. Plaintiff's allegations are implausible.

The Amended Complaint repeats the many contradictions in the original Complaint, which—each and together—undermine the plausibility of Plaintiff's claims. Most glaringly, Plaintiff alleges that, in December 2011, Goldman Sachs admitted that it "had no firmwide conflict of interest policy." (AC ¶ 51.) Goldman Sachs apparently made the same statement—that "it had no firmwide conflict of interest policy"—"on several occasions from November [*sic*][11] 8, 2011, through May 23, 2012." (AC ¶ 48.) Indeed, in May 2012, Plaintiff transmitted the same information to the Individual Defendants: "Just to confirm, Goldman Sachs does not have a conflicts of interest policy, not firmwide, and not for any divisions. I would go so far as to say they never had a policy on conflicts, based on the dates of the documents provided to us for review." (AC Ex. at 56-57.) Yet, an exhibit to the Amended Complaint shows that Goldman Sachs had a firmwide conflict of interest policy, the components of which were published on the firm's public website. Mr. Silva's email of May 13, 2012 contains hyperlinks to and excerpts from Goldman Sachs's (1) "Code of Business Conduct and Ethics," which addresses personal conflict of interests, and (2) "Report of the Business Standards Committee," which summarizes the conflict of interest policies for particular business divisions. (AC Ex. at 55-56; Gross Decl. Exs. C at 4-5 & D at 16-25.) The Court may note that SR 08-8 recommends precisely this type of program for large, complex financial institutions:

> Compliance policies refer to both: (1) firmwide compliance policies that apply to *all employees* throughout the organization as they conduct their business and support activities; and (2) the more detailed, *business-specific policies* that are further tailored to, and more specifically address, compliance risks inherent in specific business lines and jurisdictions of operation, and apply to employees conducting business and support activities for the specific business line and/or jurisdiction of operation. (Gross Decl. Ex. A at 11-12 n.4 (emphases added).)

The existence of Goldman Sachs's conflict of interest policies is not a trivial inconsistency. It belies the core allegation of the Complaint: that Goldman Sachs "had no firmwide conflict of interest policy" (AC ¶¶ 51), not at any time, and neither firmwide nor "for any divisions" (AC Ex. at 57). And, for the purpose of a motion to dismiss, the pleading

[11] It is unclear from the pleadings whether there was a separate meeting on November 8, 2011 (AC ¶ 49), which was approximately one week after Plaintiff was hired (AC ¶ 14), or whether Plaintiff is referring to the December 8, 2011 meeting convened at the direction of the Individual Defendants (AC ¶ 50). The same ambiguity appeared in the first Complaint. (Compl. ¶¶ 22, 24.)

contains on its face a coherent reason for why Plaintiff was dismissed: She rushed to judgments that even her own evidence refuted.

At best, Plaintiff can allege that she was fired for concluding that Goldman Sachs's conflict of interest policies were *inadequate*. Such a theory, however, is inconsistent with other allegations within the pleadings. Most notably, on May 13, 2012, a few days before Plaintiff was fired, Mr. Silva wrote to Plaintiff that the New York Fed should continue to "point out ways the firm's COI policy needs to be improved, or be better organized, or be better documented," and should consider adopting another firm's policies as a model. (AC Ex. at 55.) Although plaintiff now characterizes this position as "pretext" (AC ¶ 123), that description makes little sense: Mr. Silva *agreed* that the policy should be improved. More fundamentally, a disagreement between a supervised employee and more senior colleagues over the adequacy of a conflict of interest policy is not whistleblowing activity—*i.e.*, the provision of information regarding illegal activity. Under Plaintiff's view of Section 1831j, any such disagreement in the context of a bank examination would become a federal "whistleblower" case. In the context of organizational employment, however, it is normal for more experienced and seasoned officials to substitute their judgment for that of less experienced employees. The plain meaning of the words that Congress used in Section 1831j—a violation of any "law or regulation"—reveals that Congress did not intend to treat a mere substitution of judgment as a cognizable whistleblower claim.

Plaintiff's theory of motive—that the New York Fed wanted to protect Goldman Sachs from the "implications of Goldman's failure to properly manage conflicts of interest, should those failures become known to consumers and clients" (AC ¶ 57, *see also* AC ¶20)—suffers from several other contradictions and inconsistencies. These contradictions cast doubt on whether the Amended Complaint makes "common sense." *Iqbal*, 556 U.S. at 679.

First, in May 2012, just ten days before she was fired, Mr. Silva wrote to Plaintiff that he had personally raised Plaintiff's "finding" at a "vetting session with the [Operating Committee]." (AC Ex. at 55.) If the Defendants sought to protect Goldman Sachs, why would Mr. Silva *elevate* Plaintiff's finding to a committee of the Board of Governors or, as noted above, recommend to Plaintiff that Goldman Sachs's policies be reviewed further?

Second, Plaintiff alleges that, during the six months that followed Goldman Sachs's alleged admission, she worked exclusively on that firm's management of conflicts of interest, sending three document requests (AC ¶¶ 46-47) and attending many meetings, both internally and with Goldman Sachs (*see, e.g.*, AC ¶¶ 50, 56, 74, 77, 81, 98, and 114). She also appears to have had regular and direct contact with the most senior examiner on the supervisory team, Mr. Silva (AC ¶ 77), and free communication with the Legal & Compliance group (AC ¶ 100). If the Defendants actually sought to protect Goldman Sachs, it would not make common sense that they assigned Plaintiff to examine Goldman Sachs's conflict of interest policies, which they allegedly knew to be deficient (AC ¶49). Nor would it make sense to have allowed Plaintiff to pursue the matter for *six months*, much less to end the inquiry by firing her.

Third, Plaintiff alleges that the Fed pressured her to change "her finding" that Goldman Sachs "had no conflict of interest policy" (AC ¶ 126), yet also pleads that the lack of such a policy was an open secret at the New York Fed (AC ¶ 49). Indeed, she alleges that Goldman Sachs repeatedly admitted this compliance gap—not only to Plaintiff, but simultaneously to a group of her colleagues and supervisors. (AC ¶¶ 48, 50-51, and Ex. at 39.) Plaintiff cannot have it both ways: She cannot claim she was discriminated against for being a "whistleblower" if the information contained in "her findings" was "frequently discussed" within the New York Fed (AC ¶ 49) and, indeed, was reported directly to other bank examiners.

Fourth, the state of Goldman Sachs's conflict of interest policies was well known to its "consumers and clients," and so it defies reason to speculate that Federal Reserve officials were helping Goldman Sachs hide its publicized business conduct. For one thing, Goldman Sachs's conflict of interest policies were available for public inspection on the firm's website. (AC Ex. at 55-56.) For another, each of the deals "investigated" by Plaintiff—in particular, the Kinder Morgan transaction—received extensive public attention in the mainstream media before, during, and after Plaintiff's employment at the New York Fed. (*See, e.g.*, AC ¶ 93.) Investors or clients could review these policies and news stories about the firm's deals and determine for themselves whether the firm had adequate safeguards to avoid conflicts of interest.

Fifth, it is unclear how the "run off" allegedly forecast by Mr. Silva and Mr. Koh (AC ¶ 58) would come to pass if the New York Fed's supervisory conclusions about Goldman Sachs's conflict of interest policies were *confidential* supervisory information.

These contradictions do not merely render Plaintiff's claim unlikely. They cast significant doubt on whether her claim makes common sense. Because Plaintiff has not pleaded a plausible theory to explain the alleged retaliation, her Section 1831j claim must be dismissed.

II. Plaintiff Has Failed to State a Claim under New York's Consumer Protection Law.

Plaintiff's state law "consumer protection" claim must be dismissed because the exercise of government supervisory responsibilities is not "consumer-oriented conduct," which is the touchstone of the New York statute. *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 25 (1995). Section 349(a) of the New York General Business Law prohibits "[d]eceptive acts or practices in the conduct of any *business, trade or commerce or in the furnishing of any service* in this state." (Emphasis added.) On its face, the statute does not apply to employment disputes, much less to the governmental supervision of financial institutions. Instead, "[t]he typical violation contemplated by the statute involves an individual consumer who falls victim to misrepresentations made by a seller of consumer goods usually by way of false and misleading advertising." *Genesco Entm't, Div. of Lymutt Indus., Inc. v. Koch*, 593 F. Supp. 743, 751 (S.D.N.Y. 1984) (Weinfeld, J.). The critical nexus is to some consumer-oriented conduct, "consumer" being the operative word. *See Cruz v. NYNEX Info. Resources*, 263 A.D.2d 285, 289 (1st Dep't 2000) ("In New York law, the term 'consumer' is consistently associated with an individual or natural person who purchases goods, services or property for personal, family or household purposes." (quotation marks omitted)). Thus, Section 349 did not provide a cause of action against the Triborough Bridge and Tunnel Authority for overcharges to plaintiff's E-ZPass account because the defendant was "performing an essential governmental function"—the collection of a toll—not a "consumer oriented transaction." *Kinopf v. Triborough Bridge & Tunnel Auth.*, 6 Misc. 3d 73, 74 (N.Y. App. Term, 2d Dep't 2004). For the same reason, an employment dispute arising out of government supervision of a financial institution cannot give rise to a claim for consumer protection. Indeed, the entity that Plaintiff alleges offered "consumer" services (Goldman Sachs) is not even a party to this lawsuit.

Plaintiff's consumer protection claim against the New York Fed must also be dismissed because it is barred by the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, cl. 2. As part of the central bank of the United States, the New York Fed is an instrumentality of the federal government.[12] The scope of its liability for employment lawsuits is

[12] Federal courts routinely characterize Federal Reserve Banks as "instruments" or "instrumentalities" of the United States because of their important governmental functions. *See, e.g.*, *Fasano*, 457 F.3d at 281-82 (summarizing "strong arguments" in favor of recognizing a Federal Reserve Bank as an instrumentality of the federal government); *Starr International Co. v. Fed. Reserve Bank of New York*, 906 F. Supp. 2d 202, 231 (S.D.N.Y. 2012) (listing the tests for instrumentality status and concluding that the New York Fed "satisfies all of these standards, including the most stringent"). *See also McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 422

established by the Federal Reserve Act of 1913, 12 U.S.C. §§ 221 *et seq.*, and federal anti-discrimination statutes. In order for states or municipalities to superimpose additional liability on a federal instrumentality, Congress must provide "clear and unambiguous" authorization for such regulation. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 180 (1988) ("It is well settled that the activities of federal installations are shielded by the Supremacy Clause from direct state regulation unless Congress provides 'clear and unambiguous' authorization for such regulation."). No provision of federal law suggests, much less clearly and unambiguously provides, that state consumer protection laws should govern the employment or supervisory practices of Federal Reserve Banks, which would be antithetical to the concept of an independent central bank.[13] Without such authorization, Plaintiff cannot state a claim against the New York Fed under this state statute.

(1819) (describing the Second Bank of the United States, then the Nation's central bank, and its branches as a "convenient, a useful, and essential instrument in the prosecution of [the Nation's] fiscal operations").

[13] Plaintiff's characterizations of the New York Fed as "a private corporation" and a "private bank" (AC ¶¶ 15, 17) are inaccurate because these descriptions fail to take account of the New York Fed's public purpose. The New York Fed is organized in the form of a federally chartered corporation. Although it performs some banking activities (it accepts deposits, makes loans, and buys and sells securities), its purpose is exclusively public, not private, in accordance with the responsibilities delegated by Congress through the Federal Reserve Act, several of which are enumerated in the Constitution. These responsibilities include (1) issuing and circulating Federal Reserve Notes, the Nation's currency, each of which bears the mark of the issuing Federal Reserve Bank; (2) regulating the value of that currency through national monetary policy, principally through the trading desks located at the New York Fed; (3) serving as the fiscal agent of the United States in borrowing money and satisfying debt; (4) supervising financial institutions on behalf of the Board of Governors; and (5) administering an independent federal law enforcement force to protect its installations. *Cf.* U.S. Const. Art. I, Sec. 8 (enumerating Congress's power to "borrow Money on the credit of the United States" and "coin Money [and] regulate the Value thereof"). *See also Fed. Reserve Bank of Boston v. Comm'r of Corps. & Taxation*, 499 F.2d 60, 62 (1st Cir. 1974) ([F]ederal reserve banks . . . are plainly and predominantly fiscal arms of the federal government. Their interests seem indistinguishable from those of the sovereign . . . .").

III. Plaintiff Has Failed to State a Claim for Breach of Contract.

Plaintiff now asserts that *two* contracts were breached when she was fired from the New York Fed. *First*, she pleads that the New York Fed breached an "implied in fact employment contract" with her. This claim fails as a matter of law because Plaintiff was an "at will" employee who was not subject to an employment contract. The Federal Reserve Act provides that "officers and employees" of Federal Reserve Banks may be "dismiss[ed] at pleasure," 12 U.S.C. § 341 (Fifth), which is synonymous with "at will" employment. *See Moodie v. Fed. Reserve Bank of New York*, 831 F. Supp. 333, 336-37 (S.D.N.Y. 1993) (describing Federal Reserve Banks as "employers at will"); *Scott v. Fed. Reserve Bank of New York*, 704 F. Supp. 441, 447 (S.D.N.Y. 1989) ("The words 'at pleasure' have been interpreted to mean that no officer or employee of a Federal Reserve Bank has any enforceable contract or other property right to his or her employment."). The statutory right to dismiss employees "at pleasure" is fundamentally inconsistent with a contractual employment relationship, in which an employee has a contractual right to retain employment. *See Mele v. Fed. Reserve Bank of New York*, 359 F.3d 251, 255 (3d Cir. 2004) ("[T]he Federal Reserve Act precludes enforcement against a Federal Reserve Bank of an employment contract that would compromise its statutory power to dismiss at pleasure, and prevents the development of a reasonable expectation of continued employment."); *Jaffe v. Fed. Reserve Bank of Chicago*, 586 F. Supp. 106, 107-08 (N.D. Ill. 1984) ("Courts uniformly hold that [the Federal Reserve Act] precludes the enforcement of any employment contract against a Federal Reserve Bank and prevents the development of any reasonable expectation of continued employment.").

Plaintiff asserts that Section 1831j impliedly altered the "at will" employment arrangement created by the Federal Reserve Act and created a "property right" to employment.

(AC ¶ 175.) Yet nothing on the face of that statute—which amended the Federal Deposit Insurance Act, not the Federal Reserve Act, *see supra* n.10—supports Plaintiff's view. Section 1831j does not alter the fundamental right of an employee to "walk away" from a job, or the general right of a Federal Reserve Bank to fire the employee with or without cause. It merely prohibits firing for certain causes. To the extent that Plaintiff also asserts that any of the New York Fed's employee policies create an implied employment contract (AC ¶ 176), the possibility of abrogating the Federal Reserve Act by private contract was long ago considered and rejected. *See Obradovich v. Fed. Reserve Bank of New York*, 569 F. Supp. 785, 790 (S.D.N.Y. 1983) (Weinfeld, *J.*) ("The Court holds, therefore, that the 'dismiss at pleasure' provision of the Federal Reserve's corporate powers statute restricts the Federal Reserve's power to contract with *all employees*. Any implied contract based upon the Federal Reserve's personnel rules would exceed the Federal Reserve's authority, and be unenforceable."); *Bollow v. Fed. Reserve Bank of San Francisco*, 650 F.2d 1093, 1098 (9th Cir. 1981) (same).

Second, Plaintiff asserts that Mr. Kim created an oral contract with Plaintiff "to personally help her with her employment." (AC ¶ 173.) Setting aside that this is the ordinary function of a supervisor, not an exceptional contract, Plaintiff's claim fails as a matter of law because she has not alleged any consideration, a necessary element in the formation of any contract. *See* Restatement (Second) of Contracts § 71 (requiring a bargained-for exchange). All that is pleaded is a bare offer to help (AC ¶ 83), which does not create an enforceable contract. Moreover, in light of Plaintiff's new allegations regarding Mr. Kim's repeated offers to help her (AC ¶¶ 43, 83) and efforts to "commiserate[]" with her (AC ¶¶ 44, 87), it is altogether surprising that she has chosen to subject him to the obloquy of being named as a defendant in this lawsuit.

IV. Plaintiff Has Failed to State a Claim for Wrongful Termination in Violation of Public Policy.

Plaintiff's claim for the tort of wrongful termination in violation of public policy must be dismissed because "New York does not recognize a tort of wrongful discharge for at-will employment." *Caruso v. City of New York*, No. 06 Civ. 5997, 2013 U.S. Dist. LEXIS 138643, at *77 (S.D.N.Y. Sept. 26, 2013) (Abrams, *J.*). *See also Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 301 (1983) (declining, in the context of an "at will" employment arrangement, to recognize a tort for "abusive discharge . . . where employees have been discharged for disclosing illegal activities on the part of their employers"). As explained above, Plaintiff was unquestionably an "at will" employee, and the status of her employment arrangement is fixed by federal law, which supersedes any state law right to continued employment, *see Goodyear Atomic Corp.*, 486 U.S. at 180. This claim must be dismissed against the Individual Defendants for the independent reason that Plaintiff could only be fired by her employer, the New York Fed, not by any of her co-employees. The Individual Defendants did not employ Plaintiff and, *a fortiori*, did not fire her.

V. Plaintiff Has Failed to State a Claim for Negligence in Employment.

Assuming *arguendo* that a state tort could limit an employment arrangement created by federal statute, Plaintiff's new claim for "negligence in employment" fails for three reasons. *First*, the New York tort of negligence in hiring, retention, and supervision "arises when an employer places an employee in a position to cause *foreseeable harm*," meaning a "propensity for the conduct which caused the injury." *Bouchard v. New York Archdiocese*, 719 F. Supp. 2d 255, 260 (S.D.N.Y. 2010) (emphasis added). Plaintiff, however, does not and cannot allege any such propensity or foreseeability. *Second*, this tort provides an alternative to vicarious liability where a plaintiff could not otherwise sue an employer owing to *ultra vires* actions by a colleague or supervisor. *Id.* Here, by contrast, Plaintiff has asserted several direct claims against her employer, the New York Fed, which is the only party that could have caused the injury for which plaintiff seeks redress (unlawful termination). *Third*, the claim rests on the erroneous legal assumption that Plaintiff had some entitlement to conduct an examination of Goldman Sachs free from supervision by more senior examiners, such that any intervention by her superiors was unlawful interference. Plaintiff, however, fails to cite any legal support for this theory—nor can she; the statutory right to conduct a supervisory examination belongs to the Board of Governors and to the New York Fed, not to Plaintiff. *See* 12 U.S.C. §§ 248, 483.

VI. Plaintiff Has Failed to State a Claim for Conspiracy.

Plaintiff alleges that the Defendants participated in a conspiracy to commit "unlawful and tortious acts"—a non-descript and open-ended goal that merely recites an element of the claim. (AC ¶189.) Defendants allegedly advanced this "conspiracy" in three ways: (1) interfering with "*Carmen Segarra's* examination of Goldman," (2) firing her for not "chang[ing] *her* preliminary bank examination findings," and (3) accusing her of criminal conduct in retaliation for filing this lawsuit. (AC ¶¶ 190-92 (emphases added).) The first two allegations are entirely duplicative of other claims and fail for the same reasons. The third allegation is irrelevant because raising a defense against reinstatement in a legal proceeding *initiated by Plaintiff* is not tortious conduct and therefore cannot be a basis for inferring a pre-existing conspiracy.[14]

VII. Plaintiff is Not Entitled to Reinstatement or Front Pay.

Plaintiff is not entitled to reinstatement or front pay because of her own wrongdoing, which was discovered after the New York Fed fired her. Although reinstatement is a remedy available under many federal employment statutes, the Supreme Court held in *McKennon v.*

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[14] In addition, Plaintiff fails to explain how Defendant Kim, who allegedly sympathized with Plaintiff and offered to help her (AC ¶¶ 83, 87), was part of this conspiracy to harm Plaintiff.

Nashville Banner Publishing Company, 513 U.S. 352 (1995), that where a defendant discovers an independent reason to fire a former employee, neither reinstatement nor front pay is an appropriate remedy. In that case, a former employee who sued her employer under a federal anti-discrimination statute admitted during the litigation that she had "copied several confidential documents bearing upon the company's financial condition" during the last year of her employment as a form of "insurance and protection" against being fired on an impermissible basis. *Id.* at 355. The defendant promptly informed the plaintiff that her actions violated company policies, were independent grounds for termination, and precluded any right to reinstatement. *Id.* The Supreme Court agreed. Because reinstatement is a form of equitable relief, an employer's "lawful prerogative[]" to terminate an employee for misconduct "in the usual course of its business" weighs heavily against compulsory reinstatement. *Id.* at 361 (quotation marks and citation omitted). Indeed, "*as a general rule in cases of this type, neither reinstatement nor front pay* is an appropriate remedy. It would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds." *Id.* at 361-62 (emphasis added).

The instant case, which is squarely governed by *McKennon* on the facts, concerns not only a violation of internal policies, but also a violation of law. Confidential supervisory information is the property of the Board of Governors and may not be used without permission from the Board. (*See* Gross Decl. Ex. E.) Without even seeking—much less actually receiving—permission from the Board of Governors, Plaintiff misappropriated and published unredacted confidential supervisory information in her Complaint, both in substantive pleadings and as attached exhibits. And, prior to initiating this lawsuit, Plaintiff circulated her Complaint, including its confidential attachments, to the news media. Plaintiff's actions violate federal criminal law, *see* 18 U.S.C. §§ 641 (theft of government property) and 655 (theft of property of value by bank examiner), and federal regulations (*see* Gross Decl. Ex. E). It would be, in the Supreme Court's words, "inequitable and pointless" to order that she be reinstated, or to compel the New York Fed to bear the cost (in the form of front pay) for Plaintiff's reckless conduct. In this regard, it is important to note that Plaintiff could have obtained the same information lawfully through discovery with appropriate protective measures. But she did not. To the extent that Plaintiff might have been entitled to reinstatement and front pay under Section 1831j or any common law claim, she has forfeited that right.

VIII. The New York Fed is Not Liable for Punitive Damages.

Finally, Plaintiff cannot recover punitive damages from the New York Fed because she has not pointed to any Congressional authorization for a civil penalty, which is required where a defendant is a federal instrumentality. *See Missouri Pacific R.R. Co. v. Ault*, 256 U.S. 554, 563 (1921) (stating that "Congress is not to be assumed to have adopted the method of fines paid out of public funds to insure obedience to the law," and establishing the presumption that "[t]he purpose for which the government permitted itself to be sued was compensation, not punishment"). Courts in virtually every federal circuit have applied *Ault*'s presumption that federal agencies or instrumentalities are not liable for punishment without Congress's clear approval—a sensible presumption avoiding the absurd effect of inflicting punishment on the taxpayer.[15] The New York Fed is unquestionably a federal instrumentality owing to its role as

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[15] *See, e.g.*, *Reconstruction Fin. Corp. v. J. G. Menihan Corp.*, 111 F.2d 940, 942 (2d Cir. 1940) (stating that, under *Ault*, a "sue and be sued" provision did not "sanction the recovery of penalties" against a federal instrumentality); *Bank One, Texas, N.A. v. Taylor*, 970 F.2d 16, 33-34 (5th Cir. 1992) (no punitive damages liability for the FDIC absent unequivocal Congressional authorization); *Commerce Fed. Sav. Bank v. Fed. Deposit Ins. Corp.*, 872 F.2d 1240, 1247-48 (6th Cir. 1989) (same); *Smith v. Russellville Production Credit Ass'n*, 777 F.2d 1544, 1550 (11th Cir. 1985) ("[A] federal agency or instrumentality of the United States cannot be liable for

an important component of the Nation's central bank. *See supra* n.12. Moreover, its earnings after the deduction of expenses are paid to the United States Treasury. *See* 12 U.S.C. § 290. Congress expressly authorized only *remedial* relief in Section 1831j(c), which never mentions punishment. Accordingly, the New York Fed is not liable for punitive damages under that statute or any of Plaintiff's other causes of action.[16]

CONCLUSION

For the reasons set forth herein, the Amended Complaint should be dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Dated: January 3, 2014
New York, New York

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punitive damages unless Congress makes a special provision permitting such damages."); *Rohweder v. Aberdeen Production Credit Ass'n.*, 765 F.2d 109, 113 (8th Cir. 1985) (same); *In re Sparkman*, 703 F.2d 1097, 1100-01 (9th Cir. 1983) (same); *Mays v. Tennessee Valley Auth.*, 699 F. Supp. 2d 991, 1030 (E.D. Tenn. 2010) (same); *Harrison v. Fed. Deposit Ins. Corp.*, No. 92-CV-0304E, 1993 U.S. Dist. LEXIS 18924, at *1 (W.D.N.Y. Apr. 16, 1993) ("FDIC, as an instrumentality of the United States, is immune from punitive damages."); *United States v. Halpin*, No. 88-0215, 1989 U.S. Dist. LEXIS 1051, at *4 (E.D.N.Y. Jan. 12, 1989) ("[F]ederal courts have long held that neither a penalty nor punitive damages may be recovered against the United States and its agencies and instrumentalities absent express Congressional approval."); *Massachusetts v. Hills*, 437 F. Supp. 351, 354 (D. Mass. 1977) (same).

[16] Plaintiff asserts that, under federal law, Defendants are liable for all forms of damages (AC ¶ 13), but cites a provision of the Federal Reserve Act that establishes liability for "directors and officers of any *member bank*," meaning a supervised commercial bank. *See* 12 U.S.C. § 503 (emphasis added). *See also id.* at § 221 (defining "member bank").

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARMEN M. SEGARRA, Plaintiff, v. FEDERAL RESERVE BANK OF NEW YORK, MICHAEL SILVA, MICHAEL KOH, and JOHNATHON KIM, Defendants.	ECF CASE 13-CV-07173 (RA)

DECLARATION OF DAVID GROSS IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT

Pursuant to 28 U.S.C. § 1746, DAVID GROSS declares as follows:

1. I am an attorney admitted to practice before this Court and am currently employed by the Federal Reserve Bank of New York in the Enforcement, Litigation, and Investigations Division of the Legal Department, where my title is Counsel and Vice President.

2. Attached hereto as Exhibit A is a true and correct copy of "SR 08-8," an advisory letter published by the Board of Governors of the Federal Reserve System dated October 16, 2008.

3. Attached hereto as Exhibit B is a true and correct excerpt from the Board of Governors' website entitled "About SR Letters," available at http://www.federalreserve.gov/bankinforeg/srletters/about.htm.

4. Attached hereto as Exhibit C is a true and correct copy of Goldman Sachs's "Code of Business Conduct and Ethics," available at http://www.goldmansachs.com/investor-relations/corporate-governance/corporate-governance-documents/revise-code-of-conduct.pdf.

5. Attached hereto as Exhibit D is a true and correct copy of Goldman Sachs's "Report of the Business Standards Committee," available at http://www.goldmansachs.com/who-we-are/business-standards/committee-report/business-standards-committee-report-pdf.pdf.

6. Attached hereto as Exhibit E are true and correct copies of letters that I wrote to the Court on October 10, 2013 and October 11, 2013, respectively.

7. Attached hereto as Exhibit F is a true and correct copy of the Operations Review Report, Federal Reserve Bank of New York, Bank Supervision Group, dated December 2009, available at http://fcic-static.law.stanford.edu/cdn_media/fcic-testimony/2009_FRBNY_ Operations_ Review_Report.pdf.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: January 3, 2014
New York, New York

David Gross

David Gross

EXHIBIT A

BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D. C. 20551

DIVISION OF BANKING
SUPERVISION AND REGULATION

DIVISION OF CONSUMER
AND COMMUNITY AFFAIRS

SR 08-8 / CA 08-11

October 16, 2008

TO THE OFFICER IN CHARGE OF SUPERVISION AND APPROPRIATE SUPERVISORY AND EXAMINATION STAFF AT EACH FEDERAL RESERVE BANK AND CERTAIN ORGANIZATIONS SUPERVISED BY THE FEDERAL RESERVE

SUBJECT: **Compliance Risk Management Programs and Oversight at Large Banking Organizations with Complex Compliance Profiles**

In recent years, banking organizations have greatly expanded the scope, complexity, and global nature of their business activities. At the same time, compliance requirements associated with these activities have become more complex. As a result, organizations have confronted significant risk management and corporate governance challenges, particularly with respect to compliance risks that transcend business lines, legal entities, and jurisdictions of operation.[1] To address these challenges, many banking organizations have implemented or enhanced firmwide compliance risk management programs and program oversight.

While the guiding principles of sound risk management are the same for compliance as for other types of risk, the management and oversight of compliance risk presents certain challenges. For example, quantitative limits reflecting the board of directors' risk appetite can be established for market and credit risks, allocated to the various business lines within the organization, and monitored by units independent of the business line. Compliance risk does not lend itself to similar processes for establishing and allocating overall risk tolerance, in part because organizations must comply with applicable rules and standards. Additionally, existing compliance risk metrics are often less meaningful in terms of aggregation and trend analysis as compared with more traditional market and credit risk metrics. These distinguishing characteristics of compliance risk underscore the need for a firmwide approach to compliance risk management and oversight for large, complex organizations. A firmwide compliance function that plays a key role in managing and overseeing compliance risk while promoting a strong culture of compliance across the organization is particularly important for large, complex organizations that have a number of separate business lines and legal entities that must comply with a wide range of applicable rules and standards.

The Federal Reserve has, primarily through the examination process, emphasized the need for effective firmwide compliance risk management and oversight at large, complex banking organizations. While firmwide compliance risk management programs and oversight at the largest supervised banking organizations have generally improved, the level of progress at individual banking organizations varies and opportunity for improvement remains. The Federal Reserve strongly encourages large banking organizations with complex compliance profiles to ensure that the necessary resources are dedicated to fully implementing effective firmwide compliance risk management programs and oversight in a timely manner.[2]

The Federal Reserve's expectations for all supervised banking organizations are consistent with the principles outlined in a paper issued in April 2005 by the Basel Committee on Banking Supervision, entitled *Compliance and the compliance function in banks* (Basel compliance paper). The principles in the Basel compliance paper have become widely recognized as global sound practices for compliance risk management and oversight, and the Federal Reserve endorses these principles. Nevertheless, some banking organizations have sought clarification as to the Federal Reserve's views regarding certain compliance risk management and oversight matters. This SR/CA letter clarifies Federal Reserve views applicable to large banking organizations with complex compliance profiles in the following areas where guidance has been requested:

I. Organizations that should implement a firmwide approach to compliance risk management and oversight;
II. Independence of compliance staff;
III. Compliance monitoring and testing; and
IV. Responsibilities of boards of directors and senior management regarding compliance risk management and oversight.

I. Firmwide Compliance Risk Management and Oversight

Overview

Organizations supervised by the Federal Reserve, regardless of size and complexity, should have effective compliance risk management programs that are appropriately tailored to the organizations' risk profiles.[3] The manner in which the program is implemented and the type of oversight needed for that program can vary considerably depending upon the scope and complexity of the organization's activities, the geographic reach of the organization, and other inherent risk factors. Larger, more complex banking organizations tend to conduct a wide range of business activities that are subject to complex compliance requirements that frequently transcend business lines and legal entities and, accordingly, present risk management and corporate governance challenges. Consequently, these organizations typically require a firmwide approach to compliance risk management and oversight that includes a corporate compliance function. In contrast, smaller, less-complex banking organizations are not generally confronted with the types of compliance risks and challenges that require a comprehensive firmwide approach to effectively manage and oversee compliance risk. The following discussion, therefore, is *not* directed at smaller, less-complex banking organizations.

Firmwide compliance risk management refers to the processes established to manage compliance risk across an entire organization, both within and across business lines, support units, legal entities, and jurisdictions of operation. This approach ensures that compliance risk management is conducted in a context broader than would take place solely within individual business lines or legal entities. The need for a firmwide approach to compliance risk management at larger, more complex banking organizations is well demonstrated in areas such as anti-money laundering, privacy, affiliate transactions, conflicts of interest, and fair lending, where legal and regulatory requirements may apply to multiple business lines or legal entities within the banking organization. Certain other compliance risks may also warrant a firmwide risk management approach to address similar rules and standards that apply to the organization's operations across different jurisdictions. In all such instances, compliance risk management benefits from an aggregate view of the organization's compliance risk exposure and an integrated approach to managing those risks.

The processes established for managing compliance risk on a firmwide basis should be formalized in a compliance *program* that establishes the framework for identifying, assessing, controlling, measuring, monitoring, and reporting compliance risks across the organization, and for providing compliance training throughout the organization. A banking organization's compliance risk management program should be documented in the form of compliance policies and procedures and compliance risk management standards.[4]

Firmwide compliance oversight refers to the processes established to oversee compliance risk management across the entire organization, both within and across business lines, legal entities, and jurisdictions of operation. In addition to the oversight provided by the board of directors and various executive and management committees of an organization, a key component of firmwide compliance oversight in larger, more complex banking organizations is a corporate compliance function that has day-to-day responsibility for overseeing and supporting the implementation of the organization's firmwide compliance risk management program, and that plays a key role in controlling compliance risks that transcend business lines, legal entities, and jurisdictions of operation.

Federal Reserve Supervisory Policies

Large Banking Organizations with Complex Compliance Profiles. Although balance sheet size is not the defining indication of a banking organization's compliance risk management needs, experience has demonstrated that banking organizations with $50 billion or more in consolidated total assets typically have multiple legal entities that pose the type of compliance risks and challenges that call for a comprehensive firmwide approach to appropriately control compliance risk and provide effective oversight. Accordingly, such organizations should generally implement firmwide compliance risk management programs and have a corporate compliance function.

Compliance programs at such organizations should include more robust processes for identifying, assessing, controlling, measuring, monitoring, and reporting compliance risk, and for providing compliance training throughout the organization in order to appropriately control the heightened level and complexity of compliance risk. The corporate compliance function should play a key role in overseeing and supporting the implementation of the compliance risk management program, and in controlling compliance risks that transcend business lines, legal entities, and jurisdictions of operation.[5]

Large Banking Organizations with Less-Complex Compliance Profiles. In some instances, banking organizations that meet the $50 billion asset threshold may have few legal entities, be less complex in nature, and may engage in only a very limited range of business activities. Such organizations may be able to effectively manage and oversee compliance risk without implementing a comprehensive firmwide approach. Alternatively, these organizations may choose to implement a firmwide approach whose scope is highly risk-focused on particular compliance risks that exist throughout the organization. In lieu of relying on a corporate compliance function to play a key role in providing day-to-day oversight of the compliance program, these organizations may rely on executive and management committees that are actively involved in providing ongoing corporate oversight of the compliance risk management program. An organization that adopts this approach, however, should ensure that its compliance program incorporates controls that effectively address compliance risks that transcend business lines, legal entities, and jurisdictions of operation; that appropriate firmwide standards are established for the business lines to follow in managing compliance risk and reporting on key compliance matters; and that the organization is appropriately overseeing the implementation of its compliance risk management program.

Foreign Banking Organizations. Each foreign banking organization supervised by the Federal Reserve should implement a compliance program that is appropriately tailored to the scope, complexity, and risk profile of the organization's U.S. operations. The program should be reasonably designed to ensure that the organization's U.S. operations comply with applicable U.S. rules and standards, and should establish effective controls over compliance risks that transcend business lines or legal entities. Foreign banking organizations with large, complex U.S. operations should implement compliance programs for these operations that have more robust processes for identifying, assessing, controlling, measuring, monitoring, and reporting compliance risk, and for providing compliance training, than would be appropriate for foreign banking organizations with smaller, less-complex U.S. operations.[6]

With respect to oversight, foreign banking organizations should provide effective oversight of compliance risks within their U.S. operations, including risks that transcend business lines or legal entities. A foreign banking organization, however, has flexibility in organizing its oversight structure. Compliance oversight of U.S. activities may be conducted in a manner that is consistent with the foreign banking organization's broader compliance risk management framework. Alternatively, a separate function may be established specifically to provide compliance oversight of the organization's U.S. operations. Regardless of the oversight structure utilized by a foreign banking organization, its established oversight mechanisms, governing policies and procedures, and supporting infrastructure for its U.S. operations should be sufficiently transparent for the Federal Reserve to assess their adequacy.

II. Independence of Compliance Staff

Federal Reserve supervisory findings at large, complex banking organizations consistently reinforce the need for compliance staff to be appropriately independent of the business lines for which they have compliance responsibilities. Compliance independence facilitates objectivity and avoids inherent conflicts of interest that may hinder the effective implementation of a compliance program. The Federal Reserve has observed compliance independence to be an area in which there is considerable variation in practices, some of which do not consistently meet supervisory standards. A particular challenge for many organizations is attaining an appropriate level of independence with respect to compliance staff operating within the business lines.

The Federal Reserve does not prescribe a particular organizational structure for the compliance function. Large banking organizations with complex compliance profiles are encouraged, however, to avoid inherent conflicts of interest by ensuring that accountability exists between the corporate compliance function and compliance staff within the business lines. Such accountability would provide the corporate compliance function with ultimate authority regarding the handling of compliance matters and personnel decisions and actions relating to compliance staff, including retaining control over the budget for, and remuneration of, all compliance staff.[7] Compliance independence should not, however, preclude compliance staff from working closely with the management and staff of the various business lines. To the contrary, compliance functions are generally more effective when strong working relationships between compliance and business line staff exist.

The Federal Reserve recognizes, however, that many large, complex banking organizations have chosen to implement an organizational structure in which compliance staff within a business line have a reporting line into the management of the business. In these circumstances, compliance staff should also have a reporting line through to the corporate compliance function with respect to compliance responsibilities. In addition, a banking organization that chooses to implement such a dual reporting structure should ensure that the following minimum standards are observed in order to minimize potential conflicts of interest associated with this approach:

(1) In organizations with dual reporting line structures, the corporate compliance function should play a key role in determining how compliance matters are handled and in personnel decisions and actions (including remuneration) affecting business line compliance and local compliance staff, particularly senior compliance staff. Furthermore, the organization should have in place a process designed to ensure that disputes between the corporate compliance function and

business line management regarding compliance matters are resolved objectively. Under such a process, the final decision-making authority should rest either with the corporate compliance function, or with a member or committee of senior management that has no business line responsibilities.

(2) Compensation and incentive programs should be carefully structured to avoid undermining the independence of compliance staff. Compliance staff should not be compensated on the basis of the financial performance of the business line. Such an arrangement creates an improper conflict of interest.

(3) Banking organizations with dual reporting line structures should implement appropriate controls and enhanced corporate oversight to identify and address issues that may arise from conflicts of interest affecting compliance staff within the business lines. For example, in these circumstances, the process for providing corporate oversight of monitoring and testing activities performed by compliance staff within the business lines should be especially robust.

III. Compliance Monitoring and Testing

Robust compliance monitoring and testing play a key role in identifying weaknesses in existing compliance risk management controls and are, therefore, critical components of an effective firmwide compliance risk management program. Federal Reserve supervisory findings at large, complex banking organizations indicate that opportunities for improving compliance monitoring and testing programs at many of these organizations remain.

Risk Assessments and Monitoring and Testing Programs. Risk assessments are the foundation of an effective compliance monitoring and testing program. The scope and frequency of compliance monitoring and testing activities should be a function of a comprehensive assessment of the overall compliance risk associated with a particular business activity.[8] Many larger, more complex banking organizations, however, remain in the process of implementing comprehensive risk assessment methodologies. This presents a challenge to the effectiveness of compliance monitoring and testing programs as the effectiveness of these programs relies upon comprehensive risk assessments. Larger, more complex banking organizations are strongly encouraged to complete the implementation of comprehensive risk assessment methodologies and to ensure that compliance monitoring and testing activities are based upon the resulting risk assessments.

Testing. Although the Federal Reserve has generally observed considerable progress in the level of compliance monitoring, there continues to be room for improvement regarding the testing of compliance controls. Compliance testing is necessary to validate that key assumptions, data sources, and procedures utilized in measuring and monitoring compliance risk can be relied upon on an ongoing basis and, in the case of transaction testing, that controls are working as intended. The testing of controls and remediation of deficiencies identified as a result of testing activities are essential to maintaining an effective internal control framework.

The scope and frequency of compliance testing activities should be based upon the assessment of the specific compliance risks associated with a particular business activity. Periodic testing of compliance controls by compliance staff is strongly encouraged as this practice tends to result in an enhanced level of compliance testing. If, however, compliance testing is performed exclusively by the internal audit function, particular care should be taken to ensure that high-risk compliance elements are not otherwise obscured by a lower overall risk rating of a broadly defined audit entity. Otherwise, the scope and frequency of audit coverage of higher-risk compliance elements tends to be insufficient.

IV. Responsibilities of the Board of Directors and Senior Management

The primary responsibility for complying with applicable rules and standards rests with the individuals within the organization as they conduct their day-to-day business and support activities. The board, senior management, and the corporate compliance function are responsible for working together to establish and implement a comprehensive and effective compliance risk management program and oversight framework that is reasonably designed to prevent and detect compliance breaches and issues.

Boards of Directors.[9] Boards of directors are responsible for setting an appropriate culture of compliance within their organizations, for establishing clear policies regarding the management of key risks, and for ensuring that these policies are adhered to in practice. The following discussion is intended to clarify existing Federal Reserve supervisory views with regard to responsibilities of the board related to compliance risk management and oversight, and to differentiate these responsibilities from those of senior management.

To achieve its objectives, a sound and effective firmwide compliance risk management program should have the support of the board and senior management. As set forth in applicable law and supervisory guidance, the board and senior management of a banking organization have different, but complementary, roles in managing and overseeing compliance risk.[10]

The board has the responsibility for promoting a culture that encourages ethical conduct and compliance with applicable rules and standards. A strong compliance culture reinforces the principle that an organization must conduct its activities in accordance with applicable rules and standards, and encourages employees to conduct all activities in accordance with both the letter and the spirit of applicable rules and standards. The board should have an appropriate understanding of the types of compliance risks to which the organization is exposed. The level of technical knowledge required of directors to fulfill these responsibilities may vary depending on the particular circumstances at the organization.

The board should ensure that senior management is fully capable, qualified, and properly motivated to manage the compliance risks arising from the organization's business activities in a manner that is consistent with the board's expectations. The board should ensure that its views about the importance of compliance are understood and communicated by senior management across, and at all levels of, the organization through ongoing training and other means. The board should ensure that senior management has established appropriate incentives to integrate compliance objectives into the management goals and compensation structure across the organization, and that appropriate disciplinary actions and other measures are taken when serious compliance failures are identified. Finally, the board should ensure that the corporate compliance function has an appropriately prominent status within the organization. Senior management within the corporate compliance function and senior compliance personnel within individual business lines should have the appropriate authority, independence, and access to personnel and information within the organization, and appropriate resources to conduct their activities effectively.

The board should be knowledgeable about the general content of the compliance program and exercise appropriate oversight of the program. Accordingly, the board should review and approve key elements of the organization's compliance risk management program and oversight framework, including firmwide compliance policies, compliance risk management standards, and roles and responsibilities of committees and functions with compliance oversight responsibilities. The board should oversee management's implementation of the compliance program and the appropriate and timely resolution of compliance issues by senior management. The board should exercise reasonable due diligence to ensure that the compliance program remains effective by at least annually reviewing a report on the effectiveness of the program. The board may delegate these tasks to an appropriate board-level committee.

Senior Management. Senior management across the organization is responsible for communicating and reinforcing the compliance culture established by the board, and for implementing measures to promote the culture. Senior management also should implement and enforce the compliance policies and compliance risk management standards that have been approved by the board. Senior management of the corporate compliance function should establish, support, and oversee the organization's compliance risk management program. The corporate compliance function should report to the board, or a committee thereof, on significant compliance matters and the effectiveness of the compliance risk management program.

Senior management of a foreign banking organization's U.S. operations should provide sufficient information to governance or control functions in its home country, and should ensure that responsible senior management, including in the home country, maintain a thorough understanding of the risk and control environment governing U.S. operations. U.S. management should assess the effectiveness of established governance and control mechanisms on an ongoing basis, including processes for reporting and escalating areas of concern and implementation of corrective action as necessary.

V. Conclusion

This SR/CA letter should be disseminated to all large, complex banking organizations, and other institutions supervised by the Federal Reserve as Reserve Bank staff believes appropriate. Questions may be directed to Karen El Kochta, Senior Supervisory Financial Analyst, Compliance Risk, Division of Banking Supervision and Regulation, at (202) 452-5206; Chris Laursen, Manager, Risk Policy & Guidance, Division of Banking Supervision and Regulation, at (202) 452-2478; or Phyllis Harwell, Manager, Division of Consumer and Community Affairs, at (202) 452-3658. In addition, questions may be sent via the Board's public website.[11]

signed by
Deborah P. Bailey
Deputy Director
Division of Banking
Supervision and Regulation

signed by

Glenn E. Loney
Deputy Director
Division of Consumer
and Community Affairs

Cross Reference:

SR letter 04-18, "Bank Holding Company Rating System"

SR letter 95-51, "Rating the Adequacy of Risk Management Processes and Internal Controls at State Member Banks and Bank Holding Companies"

Notes:

1. Compliance risk is the risk of legal or regulatory sanctions, financial loss, or damage to reputation resulting from failure to comply with laws, regulations, rules, other regulatory requirements, or codes of conduct and other standards of self-regulatory organizations applicable to the banking organization (applicable rules and standards). (See, generally, *Compliance and the compliance function in banks*, Basel Committee on Banking Supervision, April 2005, www.bis.org.) Return to text

2. Effective compliance risk management programs incorporate controls designed to maintain compliance with applicable rules and standards, including safety and soundness and consumer protection guidance issued by supervisory authorities. Return to text

3. See SR letter 95-51, "Rating the Adequacy of Risk Management Processes and Internal Controls at State Member Banks and Bank Holding Companies." This letter provides general guidance on risk management processes and internal controls for consolidated organizations, and discusses the elements of a sound risk management system applicable to all banking organizations for which the Federal Reserve has supervisory responsibility. SR 95-51 states that all bank holding companies should be able to assess the major risks of the consolidated organization. See also 12 CFR Part 208, appendix D-1, "Interagency Guidelines Establishing Standards for Safety and Soundness." Return to text

4. *Compliance policies* refer to both: (1) firmwide compliance policies that apply to all employees throughout the organization as they conduct their business and support activities; and (2) the more detailed, business-specific

policies that are further tailored to, and more specifically address, compliance risks inherent in specific business lines and jurisdictions of operation, and apply to employees conducting business and support activities for the specific business line and/or jurisdiction of operation. *Compliance procedures* refer to the control procedures that are designed to implement compliance policies. *Compliance risk management standards* refer to policies and procedures applicable to compliance staff as they fulfill their day-to-day compliance responsibilities. Compliance standards should clearly articulate expectations regarding the processes to be followed in implementing the organization's firmwide compliance risk management program, including the processes and criteria to be utilized in identifying, assessing, controlling, measuring, monitoring, and reporting compliance risk, and in providing compliance training. Compliance standards should also clearly articulate the roles and responsibilities of the various committees, functions, and staff with compliance support and oversight responsibilities. Return to text

5. While the corporate compliance function is generally responsible for overseeing and supporting the compliance risk management program, it is recognized that the board of directors may assign primary responsibility for aspects of the compliance program to other units within the organization (e.g., finance, information technology, human resources, etc.). The corporate compliance function, therefore, may or may not have responsibility for monitoring and testing the controls over certain compliance activities embedded within these units, such as those over regulatory reporting and regulatory capital. Nevertheless, it is important that an organization's compliance program incorporates appropriate controls over these risks and that proper oversight of the management of these risks is conducted. Return to text

6. Foreign banking organizations with $50 billion or more in U.S. third-party assets will generally be considered as large banking organizations with complex compliance profiles for purposes of this SR/CA letter unless their U.S. activities are less complex in nature as described in Section I of this letter. The Federal Reserve's views on compliance risk management programs apply equally to the large, complex U.S. operations of foreign banking organizations. Return to text

7. The reference to all compliance staff includes corporate, business line, and local compliance staff. Return to text

8. Risk assessments should be based upon firmwide standards which establish the method for, and criteria to be utilized in, assessing risk throughout the

organization. Risk assessments should take into consideration both the risk inherent in the activity, and the strength and effectiveness of controls designed to mitigate the risk. Return to text

9. Foreign banking organizations should ensure that, with respect to their U.S. operations, the responsibilities of the board described in this section are fulfilled in an appropriate manner through their oversight structure and risk management framework. Return to text

10. See, for example, the Basel compliance paper; SR letter 04-18, "Bank Holding Company Rating System"; SR letter 95-51, "Rating the Adequacy of Risk Management Processes and Internal Controls at State Member Banks and Bank Holding Companies"; and the United States Sentencing Commission's *Federal Sentencing Guidelines Manual*, Chapter Eight, "Sentencing of Organizations." Return to text

11. See http://www.federalreserve.gov/feedback.cfm Return to text

Last update: October 16, 2008

EXHIBIT B

Supervision and Regulation Letters

Supervision and Regulation Letters, commonly known as SR Letters, address significant policy and procedural matters related to the Federal Reserve System's supervisory responsibilities. Active SR letters are listed here in reverse chronological order. Obsolete letters or letters that contain confidential supervisory information are not included.

About SR Letters

Supervision and Regulation Letters, commonly known as SR Letters, address significant policy and procedural matters related to the Federal Reserve System's supervisory responsibilities. These letters are issued by the Board of Governors' Division of Banking Supervision and Regulation and are a means of disseminating information to banking supervision staff at the Board and the Reserve Banks, as well as to supervised banking organizations.

SR Letters are numbered sequentially by year. For example, the first letter issued in 2005 is numbered SR 05-1.

Active SR letters are listed in reverse chronological order by year. Obsolete letters or letters that contain confidential supervisory information are not included.

Attachments to most of the SR letters are included. Hard copies of attachments not provided electronically are available from the Board's Freedom of Information Office.

Letters released prior to November of 2001 were assigned a designation identifying the primary supervisory function addressed in that letter, for example, SR 97-2 (SPE). The designations are explained below.

Letters issued from 1990 through 1994 were classified in one of four functional areas:

- FIS (domestic financial institution supervision),
- IB (international banking supervision),
- SA (specialized banking activities), and
- STR (banking structure and expansion).

In 1995, the functional areas were redefined, as follows:

- APP (Applications)
- ENF (Enforcement)
- GEN (General)
- NIC (National Information Center)
- SPE (Specialized Banking Activities)
- SRV (Surveillance)
- SUP (Financial Institution Supervision)
- TRN (Training)

Letters that concerned only foreign banking activities carried an additional designation, IB (International Banking), for example, SR 97-13 (SUP.IB).

Other Sources of Information on Supervisory Policies and Procedures

Supervision Manuals:

- *Bank Holding Company Supervision Manual*
- *Bank Secrecy Act/Anti-Money Laundering Examination Manual*
- *Commercial Bank Examination Manual*
- *Examination Manual for U.S. Branches and Agencies of Foreign Banking Organizations*
- *FFIEC Information Systems Handbook*
- *Trading and Capital-Markets Activities Manual*

Regulations

Application Filing Information

Federal Reserve Regulatory Service (FRRS), available through Publications Services

Last update: August 2, 2013

EXHIBIT C

Our Shared Responsibility to
Our Clients, Colleagues and Communities

Goldman Sachs

Code of Business Conduct and Ethics

To the People of Goldman Sachs:

Since our beginnings as a family business in 1869, Goldman Sachs has evolved into one of the leading companies in our industry. We have always aspired to create a workplace where talented individuals collaborate to deliver extraordinary results for our clients and, starting in 1999, our shareholders. In recent years, we have expanded that vision to reflect the value we place on diverse opinions, experiences and backgrounds, and to adapt to the changing needs of an increasingly interconnected world. Our Business Principles capture this vision, and our Code of Business Conduct and Ethics outlines the behaviors we expect of everyone at Goldman Sachs in order to achieve it.

As part of the Business Standards Committee's review, the firm has revisited our Code to ensure it reflects the highest legal and ethical standards in our industry. In tandem with our Business Principles, the Code articulates Goldman Sachs' commitment to integrity and honesty in everything we do. While no single document can address every situation, the updated Code provides clear guidance on critical issues. When facing a situation not covered by the Code, we expect our people to exercise good judgment and especially to seek guidance in resolving potential issues.

It has often been said that one person can cause more harm to Goldman Sachs from a single bad decision than good to the firm over the course of a career. As stewards of the firm's legacy and drivers of its future success, our actions each day have a profound impact. No financial incentive or opportunity—regardless of the bottom line—justifies a departure from our values. In fact, loosening our ethical standards in pursuit of business is a betrayal of our duty to clients, shareholders and colleagues and compromises everything we aspire to as a firm.

I ask each of you to review this Code of Business Conduct and Ethics as well as the Business Principles, and join me in making a personal commitment to using it to guide your work. In doing so, you protect the trust our clients place in us and uphold the moral and ethical principles that define Goldman Sachs.

Sincerely,

Lloyd C. Blankfein
Chairman and
Chief Executive Officer

Preamble to

Code of Business Conduct and Ethics

At Goldman Sachs, we believe the best way to build and to maintain trust is to conduct every element of our business according to the highest standards of integrity.

Our ability to do so rests on the behavior of those who work here, from consultants to employees to our chief executive to our directors. To that end, we select our people based not just on their skills, accomplishments and potential, but also on their principles and values. A commitment to integrity and ethical behavior is a critical factor in our decisions regarding professional advancement and compensation.

The firm maintains a Code of Business Conduct and Ethics, supplemented by both our Business Principles and compendium of internal policies, to inform and guide our people in their roles. We recognize, however, that a formal Code or policy cannot cover every situation. In a fast-paced and complex industry and an inherently innovative business, it is impossible to predict the various different unique circumstances our people will face during their careers. As such, the policies outlined in this Code should be viewed as the baseline of expected behavior at the firm.

While ethical behavior requires us to comply fully with all laws and regulations, "compliance" with the law is the minimum standard to which we hold ourselves. Those who work with us honor not just the letter of existing laws, but the spirit that underpins and informs them. We recognize that over time what is considered acceptable today may be viewed differently tomorrow. Thus, we do not look to prevailing "market practices" as an indication of appropriate behavior. We base our decisions on legal and regulatory rules, our Code, our Business Principles and our values. For the people of Goldman Sachs, ethical behavior is inseparable from integrity and good judgment.

Our franchise has evolved considerably since our founding in 1869, driven by the changing needs of a global world and an increasingly sophisticated and diverse client base. The scope of our business means that delivering outstanding client service may at times generate real or perceived conflicts for the firm. We are committed to addressing such conflicts with all appropriate disclosure and transparency. If a transaction generates a conflict that cannot be addressed, we would prefer to lose the business than to abandon our principles.

Every person at Goldman Sachs is a steward to our heritage of client service and our reputation as an ethical company. Our success has been and will continue to be dependent on the trust that our clients and shareholders place in us. Everything we do—every piece of advice we give, every transaction we execute, every dollar we manage, every interaction in which we take part—must serve to strengthen that trust.

Code of Business Conduct and Ethics

Application of the Code

The Goldman Sachs Code of Business Conduct and Ethics embodies the firm's commitment to conduct our business in accordance with the highest ethical standards and in compliance with all applicable laws, rules and regulations. The Code applies to all of our people, including members of our Board of Direcrors.

The Goldman Sachs Business Principles and Compendium of Firmwide Compliance Policies

In addition to the Code, you should read and be familiar wirh our Business Principles and the portions of the Compendium that apply to you depending on your business, position and geographic location. The Compendium, posted on the firm's internal website, includes detailed policies and procedures to guide you in adhering to the letter and the spirit of all applicable laws, rules and regulations.

Reporting Issues under the Code

It is critical that you strive to identify and escalate potential issues before they lead to problems. When in doubt, you should ask questions about the potential application of this Code.

There are a number of ethics contacts available to provide guidance in this regard. In many cases, an immediate supervisor (or his or her supervisor) and a member of the Global Compliance Division or Legal Department supporting your business or area will be your first contacts. Should you become aware of any existing or potential violation of this Code, promptly notify one of these individuals. The escalation policy in the Compendium provides further information on internal and alternate reporting channels.

Non-Retaliation Policy

Our people play a critical role in safeguarding the integrity of our business and escalating any exisring or potential breach of that integrity. To enable you to fulfill this responsibility, the firm strictly prohibits retaliation against anyone who reports in good faith a possible violation of the Code, no matter whom the report involves.

In addition, you may have certain rights in connection with reporting legal, compliance, ethical or other issues to regulatory, administrative or other governmental or self-regulatory bodies. Nothing in this Code is intended to limit those rights or any protections that may be applicable in connection with reporting potential violations.

Violations of the Code

We take this Code and your obligations under it very seriously, and will take any disciplinary or preventive action deemed appropriate to address existing or potential violations of the Code, up to and including termination of your employment. Violations of the Code may also constitute violations of law, which may result in criminal or civil penalties for you and the firm.

Compliance with Laws, Rules and Regulations

You must comply with all applicable laws, rules and regulations, including those related to insider trading, financial reporting, money laundering, fraud, bribery and corruprion. Detailed rules regarding applicable laws are included in the Compendium.

Generally, if you are aware of material nonpublic information relating to the firm, any of our clients or any other private or governmental issuer of securities, you cannot buy or sell any securities of those issuers or recommend that another person buy, sell or hold the securities of those issuers. Questions regarding the purchase or sale of any firm securities or any securities of issuers that you are familiar with by virtue of your role at Goldman Sachs should be directed to an appropriate ethics contact prior to any purchase or sale.

Personal Conflicts of Interest

A personal conflict of interest occurs when your private interest improperly interferes with the interests of the firm. Actions or relationships that create personal conflicts of interest are prohibited, unless approved by the firm.

It is important that you carefully consider whether any of your activities or relationships, including business or volunteer positions outside the firm, could cause a conflict (or the appearance of a conflict) with the interests of the firm. Even if an activity seems unrelated to your role at the firm, you may be required to obtain pre-approval before engaging in it. The Compendium provides detailed guidance on when and how pre-approval is obtained.

Additionally, personal gain and advantage must never take precedence over your obligations to the firm. You must never use or attempt to use your position at the firm to obtain any improper personal benefit (including loans or guarantees of obligations or gifts, from any person or entity) for yourself, family member(s) or any other individual or group.

If you are aware of a transaction or relationship that could reasonably be expected to give rise to a conflict of interest or perceived conflict of interest, you should discuss the matter promptly with an appropriate ethics contact. When in doubt, raise the question for appropriate consideration.

Corporate Opportunities

You are prohibited from taking for yourself (or directing to any other person) a business opportunity that is discovered through the use of corporate property, information or position at the firm, unless the firm has already been offered the opportunity and turned it down or otherwise renounced the opportunity. More generally, you are prohibited from using corporate property, information or position for personal gain or competing with the firm.

We recognize that it sometimes can be difficult to determine the line between personal and firm benefits; at times both personal and firm benefits stem from particular activities. The prudent course of action is to obtain pre-approval from an appropriate ethics contact for any use of firm property or services that is not solely for the benefit of the firm.

Fair and Ethical Competition

We rely on our people to uphold our culture of integrity in all that we do. Our values demand that we deal fairly with our clients, service providers, suppliers, competitors and each other. No one at the firm may seek competitive advantage through illegal or unethical business practices. Taking unfair advantage of anyone through manipulation, concealment, abuse of privileged information, misrepresentation of material facts, or any unfair dealing practice is a violation of this Code.

Protecting Confidential Information

In the course of business, our people often have access to confidential or proprietary information about the firm, our clients, prospective clients or other third parties. Our business and reputation depend on the commitment of each of you to protect this information. You must maintain the confidentiality of the information with which you are entrusted, including complying with information barrier procedures applicable to your business. The only exception is when disclosure is authorized or legally mandated. Confidential or proprietary information includes, among other things, any non-public information concerning the firm (including its businesses, financial performance,

results or prospects) and any non-public information provided by a third party with the expectation that the information will be kept confidential and used solely for the business purpose for which it was conveyed. We encourage a careful review of the Compendium for detailed guidance on this important topic.

Public Disclosure

It is our policy that all information in our public communications — including SEC filings — be full, fair, accurate, timely and understandable. All individuals who are involved in our disclosure process must act in a manner consistent with this policy. In particular, they are required to maintain familiarity with the relevant disclosure requirements, and are prohibited from knowingly misrepresenting, omitting, or causing others to misrepresent or omit, material facts about the firm to others, whether within or outside the firm, including our independent auditors.

Equal Employment Opportunities and Commitment to Diversity

Concern for the personal dignity of each individual is an indispensable element of the standards we set for ourselves at Goldman Sachs. We focus our personnel decisions on merit and contribution to the firm's success. The firm affords equal employment opportunity to all qualified persons without regard to any impermissible criterion or circumstance. We do not tolerate any type of discrimination prohibited by law, including harassment.

We value diversity as an important asset that enhances our culture, helps us serve clients well and maximizes return for shareholders. For us to excel, we must create for our people an inclusive environment that welcomes and supports differences and encourages input from all perspectives.

Political Contributions and Activities

Laws and regulations regarding political contributions and activities vary around the world and, in many cases, penalties for violations can be severe. While we encourage participation in the political process, we maintain policies and procedures regarding political contributions and activities to ensure compliance with all existing laws and regulations.

Importantly, we prohibit our employees from making or soliciting political contributions or engaging in political activities whose purpose is to assist the firm in obtaining or retaining business. In addition to the detailed policies included in the Compendium, we have posted our "Statement on Policy Engagement and Political Participation" on our external website.

Protecting and Properly Using Firm Assets

You should protect the firm's assets and ensure their efficient use. All firm assets should be used for legitimate business purposes only.

Additional Procedures

All of our employees are required to affirm that they have reviewed the Code and will comply with it.

Our Board members and our Chief Executive Officer, Chief Financial Officer and Principal Accounting Officer should report any existing or potential violation of this Code to the firm's General Counsel. No waivers of this Code for executive officers or Board members of the firm may be made unless approved by the Board of Directors or a committee of the Board, and if approved, will be disclosed on our website.

Business Principles

Our clients' interests always come first.

Our experience shows that if we serve our clients well, our own success will follow.

Our assets are our people, capital and reputation.

If any of these is ever diminished, the last is the most difficult to restore. We are dedicated to complying fully with the letter and spirit of the laws, rules and ethical principles that govern us. Our continued success depends upon unswerving adherence to this standard.

Our goal is to provide superior returns to our shareholders.

Profitability is critical to achieving superior returns, building our capital, and attracting and keeping our best people. Significant employee stock ownership aligns the interests of our employees and our shareholders.

We take great pride in the professional quality of our work.

We have an uncompromising determination to achieve excellence in everything we undertake. Though we may be involved in a wide variety and heavy volume of activity, we would, if it came to a choice, rather be best than biggest.

We stress creativity and imagination in everything we do.

While recognizing that the old way may still be the best way, we constantly strive to find a better solution to a client's problems. We pride ourselves on having pioneered many of the practices and techniques that have become standard in the industry.

We make an unusual effort to identify and recruit the very best person for every job.

Although our activities are measured in billions of dollars, we select our people one by one. In a service business, we know that without the best people, we cannot be the best firm.

We offer our people the opportunity to move ahead more rapidly than is possible at most other places.

Advancement depends on merit and we have yet to find the limits to the responsibility our best people are able to assume. For us to be successful, our men and women must reflect the diversity of the communities and cultures in which we operate. That means we must attract, retain and motivate people from many backgrounds and perspectives. Being diverse is not optional; it is what we must be.

We stress teamwork in everything we do.

While individual creativity is always encouraged, we have found that team effort often produces the best results. We have no room for those who put their personal interests ahead of the interests of the firm and its clients.

The dedication of our people

to the firm and the intense effort they give their jobs are greater than one finds in most other organizations. We think that this is an important part of our success.

We consider our size an asset that we try hard to preserve.

We want to be big enough to undertake the largest project that any of our clients could contemplate, yet small enough to maintain the loyalty, the intimacy and the esprit de corps that we all treasure and that contribute greatly to our success.

We constantly strive to anticipate the rapidly changing needs of our clients and to develop new services to meet those needs.

We know that the world of finance will not stand still and that complacency can lead to extinction.

We regularly receive confidential information as part of our normal client relationships.

To breach a confidence or to use confidenrial information improperly or carelessly would be unthinkable.

Our business is highly competitive, and we aggressively seek to expand our client relationships.

However, we must always be fair competitors and must never denigrate other firms.

Integrity and honesty are at the heart of our business.

We expect our people to maintain high ethical standards in everything they do, both in their work for the firm and in their personal lives.

Goldman Sachs

EXHIBIT D

Goldman Sachs

Report of the Business Standards Committee

January 2011

The Goldman Sachs Business Principles

Our clients' interests always come first.
Our experience shows that if we serve our clients well, our own success will follow.

Our assets are our people, capital and reputation.
If any of these is ever diminished, the last is the most difficult to restore. We are dedicated to complying fully with the letter and spirit of the laws, rules and ethical principles that govern us. Our continued success depends upon unswerving adherence to this standard.

Our goal is to provide superior returns to our shareholders.
Profitability is critical to achieving superior returns, building our capital, and attracting and keeping our best people. Significant employee stock ownership aligns the interests of our employees and our shareholders.

We take great pride in the professional quality of our work.
We have an uncompromising determination to achieve excellence in everything we undertake. Though we may be involved in a wide variety and heavy volume of activity, we would, if it came to a choice, rather be best than biggest.

We stress creativity and imagination in everything we do.
While recognizing that the old way may still be the best way, we constantly strive to find a better solution to a client's problems. We pride ourselves on having pioneered many of the practices and techniques that have become standard in the industry.

We make an unusual effort to identify and recruit the very best person for every job.
Although our activities are measured in billions of dollars, we select our people one by one. In a service business, we know that without the best people, we cannot be the best firm.

We offer our people the opportunity to move ahead more rapidly than is possible at most other places.
Advancement depends on merit and we have yet to find the limits to the responsibility our best people are able to assume. For us to be successful, our men and women must reflect the diversity of the communities and cultures in which we operate. That means we must attract, retain and motivate people from many backgrounds and perspectives. Being diverse is not optional; it is what we must be.

We stress teamwork in everything we do.
While individual creativity is always encouraged, we have found that team effort often produces the best results. We have no room for those who put their personal interests ahead of the interests of the firm and its clients.

The dedication of our people to the firm and the intense effort they give their jobs are greater than one finds in most other organizations. We think that this is an important part of our success.

We consider our size an asset that we try hard to preserve.
We want to be big enough to undertake the largest project that any of our clients could contemplate, yet small enough to maintain the loyalty, the intimacy and the esprit de corps that we all treasure and that contribute greatly to our success.

We constantly strive to anticipate the rapidly changing needs of our clients and to develop new services to meet those needs.
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ABBREVIATIONS

BPC	Firmwide Business Practices Committee
CBSC	Firmwide Client and Business Standards Committee
CRBSG	Conflicts Resolution and Business Selection Group
EMEA	Europe, Middle East and Africa
EMD	Extended Managing Director
FASB	Financial Accounting Standards Board
GAAP	Generally Accepted Accounting Principles
GIR	Global Investment Research
GSAM	Goldman Sachs Asset Management
IBD	Investment Banking Division
ICAAP	Internal Capital Adequacy Assessment Process
IPO	Initial Public Offering
IRBC	Internal Risk Based Capital
IMD	Investment Management Division
MBD	Merchant Banking Division
MD&A	Management Discussion and Analysis
MPE	Maximum Probable Exposure
PMD	Participating Managing Director (Partner)
PWM	Private Wealth Management
RTL	Restricted Trading List
SEC	U.S. Securities and Exchange Commission
SPC	Structured Products Committee
TCM	Transaction Class Matrix

EXECUTIVE SUMMARY

A. OVERVIEW

The financial crisis has had a profound impact on thousands of financial institutions and businesses, and on millions of households. Its aftermath has been a time of reflection and reform.

For Goldman Sachs, this has been a challenging period. Our industry, and our firm in particular, have been subjected to considerable scrutiny. Our senior management and Board of Directors recognized this as an opportunity to engage in a thorough self-assessment and to consider how we can and should improve.

At our Annual Meeting of Shareholders on May 7, 2010, our Chairman and Chief Executive Officer, Lloyd C. Blankfein, announced the firm's intention to create the Business Standards Committee to conduct an extensive review of our business standards and practices. The Committee's mandate was to ensure that the firm's business standards and practices are of the highest quality; that they meet or exceed the expectations of our clients, other stakeholders and regulators; and that they contribute to overall financial stability and economic opportunity. The Committee has operated with oversight by the Board of Directors, which established a four member Board Committee to provide additional focus and guidance. In addition, the firm engaged two consulting firms to provide independent advice to the Business Standards Committee.

The scope and intensity of the Committee's eight month review have been significant, encompassing every major business, region and activity of the firm. We made 39 recommendations for change spanning client service, conflicts and business selection, structured products, transparency and disclosure, committee governance, training and professional development and employee evaluation and incentives. These recommendations have been approved by the firm's senior management and Board of Directors and implementation has already begun.

The firm's culture has been the cornerstone of our performance for decades. We believe the recommendations of the Committee will strengthen the firm's culture in an increasingly complex environment. We must renew our commitment to our Business Principles – and above all, to client service and a constant focus on the reputational consequences of every action we take. In particular, our approach must be: not just "can we" undertake a given business activity, but "should we."

We believe the recommendations contained in this report represent a fundamental re-commitment by Goldman Sachs: a re-commitment to our clients and the primacy of their interests; a re-commitment to reputational excellence associated with everything the firm does; a re-commitment to transparency of our business performance and risk management practices; a re-commitment to strong, accountable processes that reemphasize the importance of appropriate behavior and doing the right thing; and a re-commitment to making the firm a better institution.

We expect that the work and recommendations of the Committee will strengthen our culture and increase our focus on serving our clients, while recognizing our responsibilities to the financial markets, our stakeholders, regulators and the public at large.

B. THE GOLDMAN SACHS BUSINESS PRINCIPLES AND OUR COMMITMENT TO CLIENTS

The Committee began its work by evaluating the relevance of the firm's 14 Business Principles to our business today. Our Business Principles were codified 30 years ago and define our fundamental expectations for the way we should interact with our clients, manage our business and attract, retain and motivate our employees. The Committee concluded that the firm's Business Principles are as relevant today as ever. However, our business has evolved and become more complex in recent years, presenting challenges that require us both to strengthen certain core client service values for all interactions with clients and to describe more clearly our role-specific client responsibilities.

The core client service values of integrity, fair dealing, transparency, professional excellence, confidentiality, clarity and respect are embedded in our Business Principles and express how we intend to conduct ourselves in each and every client interaction.

In terms of our role-specific client responsibilities, across our various businesses we act in many capacities, including as an advisor, fiduciary, market maker and underwriter. Each of these capacities requires that we fulfill specific responsibilities to our clients. We must be clear to ourselves and to our clients about the capacity in which we are acting and the responsibilities we have assumed.

We believe these core client service values and role-specific client responsibilities are fundamental to all of the Committee's recommendations.

C. THE BUSINESS STANDARDS COMMITTEE WORKING GROUPS

The Business Standards Committee identified six important areas for detailed examination based on the events and developments of recent years. We established a working group for each area:

- Client Relationships and Responsibilities. We examined the responsibilities we have to our clients, their expectations of the firm, the different roles we may play to accomplish our clients' objectives and how the firm communicates with clients. We identified actions that would further strengthen our focus on clients and long-term relationships.
- Conflicts of Interest. We examined our approach to conflicts that arise in our business and how we can strengthen our procedures for resolving them. We reviewed the various ways in which our role in serving one client may intersect with our role in serving other clients or with the firm's own interests. We considered the views of our clients, our people, other stakeholders, regulators and the broader public.
- Structured Products. We examined how to improve the process for identifying structured products that should be subject to heightened review. We focused on strengthening our processes for evaluating and approving these products and their suitability for particular clients, as well as pre- and post-transaction sales practices, product origination, underwriting and disclosure standards.
- Transparency and Disclosure. We examined how to improve the firm's financial reporting and enhance disclosure of business mix, risk management, balance sheet composition and liquidity. In particular, we explored how to explain our activities more clearly, especially as they relate to our performance and our commitment to serve clients.
- Committee Governance. We reviewed the governance, standards and practices of certain of our firmwide operating committees to ensure their focus on client service, business standards and practices and reputational risk management. In particular, we found ways to strengthen accountability, compliance and internal control standards.
- Training and Professional Development. We examined how to ensure our training and professional development, including our annual performance evaluation process and incentives, enhance our culture and strengthen the values of client service as well as behavior and personal accountability.

D. SUMMARY OF RECOMMENDATIONS

The Committee made 39 recommendations to improve the firm's business standards and practices. Several key recommendations are presented below, grouped into broad priorities for improvement.

Strengthening Client Relationships. Our clients must be at the heart of the firm's decision-making, thinking and committee governance, both formally and informally. Key recommendations include:

- Establishing a new Client and Business Standards Committee to place our client franchise at the center of our decision-making processes.
- Detailing the firm's specific professional responsibilities to our clients which depend on the nature of the relationship, role and the specific activity we are asked to undertake. We act as an advisor, fiduciary, market maker and underwriter across various businesses and it is important to articulate clearly both to our people and to clients the specific responsibilities we assume in each case.
- Designing and implementing a comprehensive firmwide program to strengthen client interactions and relationships and to enhance our client franchise.
- Strengthening evaluation criteria for all employees in client-facing roles to achieve an appropriate long-term, client-focused orientation.

Strengthening Reputational Excellence. Goldman Sachs has one reputation. It can be affected by any number of decisions and activities across the firm. Every employee has an equal obligation to raise issues or concerns, no matter how small, to protect the firm's reputation. We must ensure that our focus on our reputation is as grounded, consistent and pervasive as our focus on commercial success. Key recommendations include:

- Implementing a comprehensive training and professional development program on our Business Principles, core client service values and role-specific client responsibilities.
- Strengthening our standards for the identification, review, approval and documentation of structured products and the framework for evaluating their suitability for various client segments.
- Implementing enhanced disclosure and origination standards for each business unit that is responsible for originating structured product securities.

- Moving certain underwriting and origination activities from the Securities Division to the Financing Group in the Investment Banking Division, and implementing enhanced and consistent policies and procedures on disclosure, approval processes and other controls.
- Providing plain language explanations to our clients about the firm's conflicts resolution and business selection processes, including describing activities we may continue to conduct while we are advising or financing a particular client.
- Updating and strengthening the Code of Business Conduct and Ethics and requiring employees to certify their compliance.

Strengthening Committee Governance. The firm's committee governance structure must encourage ownership and accountability for client service, all business activities and reputational risk management and be oriented to action and decision-making. Key recommendations include:

- Restructuring the firm's existing committee governance:
  - Establishing a new Client and Business Standards Committee to place our client franchise at the center of our decision-making processes and to reflect the important interrelationships between clients, business practices and reputational risk management.
  - Establishing corresponding divisional and regional Client and Business Standards Committees to enhance accountability for all our business activities.
  - Establishing a Firmwide New Activity Committee to consolidate and strengthen existing processes for approving new products and activities and to assess the important question of not just "can we" undertake a given business opportunity, but "should we."
  - Establishing a Firmwide Suitability Committee to oversee standard setting for client, product and transaction suitability across the firm.
- Forming an Event Review Group to perform timely, focused reviews of incidents or other matters of concern arising from the firm's day-to-day business activities or in our industry more broadly.
- Establishing and maintaining a formal policy framework for committee best practices, processes and procedures governing all aspects of committee operations, including charters, regular meeting agendas, minutes and statements of action.

Enhancing Transparency of Communication and Disclosure. We recognize the need to better explain our business activities and how these activities relate to our performance and to our mission to serve clients. Key recommendations to improve and increase our financial disclosure include:

- Reorganizing our revenue reporting from three existing segments into four to provide greater clarity and visibility on the importance of our client franchise activities and client facilitation to our revenues.
- Providing a simplified balance sheet showing assets by business unit / activity as well as the firm's excess liquidity position.
- Describing in greater detail our overall risk management structure, culture and processes.
- Providing additional disclosure related to credit risk, operational risk and capital adequacy.

Strengthening Training and Professional Development. We must provide training and professional development to strengthen our culture, reinforce our core values and implement and embed the recommendations in this report into our daily practices. Key recommendations include:

- Creating a global program, led by our Chairman and CEO, to explain the Committee's recommendations, underline the importance of client service, our business standards and reputational risk management and reinforce the key attributes of our culture to the firm's 2,200 participating and extended managing directors. The "Chairman's Forum on Clients and Business Standards" will represent a large investment of time of our senior management team over the course of 2011.
- Implementing training and professional development programs tailored for each division to clarify the different roles their professionals have with clients and the client-specific responsibilities associated with each of those roles.
- Increasing emphasis on evaluation criteria relating to reputational risk management in the firm's annual performance review and compensation and other incentive and recognition processes.
- Increasing the focus on leadership, culture and values as part of the employee annual promotion, performance review and compensation processes.

E. IMPLEMENTATION OF THE RECOMMENDATIONS

Senior management and the Board of Directors are committed to the implementation of the recommendations and expect our employees to dedicate themselves to this initiative. Senior management and the Board of Directors will receive periodic progress reports on implementation of the Committee's recommendations.

Extensive training and professional development efforts that influence behavior over time are critical to the success of the overall implementation effort. In addition, the enhancements and changes arising from the Committee's recommendations will be documented and reflected in the policies, practices and procedures that govern how we conduct our business.

The Committee recognizes that the impact of its work will be measured by the success of the implementation effort and, ultimately, how well the employees of Goldman Sachs act on the recommendations and embrace their spirit.

SECTION I: STRUCTURE OF THE REPORT

Sections II through VII of this report present the recommendations of the six working groups established by the Committee.

The recommendations of each working group follow a common format:

Part A: Introduction and Overview, the context and setting in which the recommendations were developed.

Part B: Guiding Principles, the broad objectives that the recommendations of the working group are intended to achieve.

Part C: Discussion and Recommendations, the rationale and recommendations of each working group.

Each recommendation aims to strengthen our business standards and practices and is stated in terms of one or more broad priorities for improvement:

- Strengthening client relationships
- Strengthening reputational excellence
- Strengthening committee governance
- Enhancing transparency of communication and disclosure
- Strengthening training and professional development

The two objectives that underlie a majority of the recommendations are strengthening client relationships and reputational excellence.

Section VIII describes the comprehensive and rigorous implementation plan for the recommendations. The implementation plan establishes a time line, details a framework of internal control emphasizing ownership and accountability and puts in place procedures to ensure follow up and full documentation.

SECTION II: CLIENT RELATIONSHIPS AND RESPONSIBILITIES

A. INTRODUCTION AND OVERVIEW

The cornerstone of the Business Standards Committee's recommendations is the relationship between Goldman Sachs and its clients and a deeply rooted belief that if our clients are successful, our own success will follow. With this in mind, we have sought to understand and address client concerns, clarify our responsibilities to clients and recommend ways to strengthen our client relationships.

The Committee recognizes that we need to clearly articulate standards and expectations for client service and reputational excellence in order to strengthen client relationships. We have established three core components that describe how we interact with clients:

- Guiding principles for client relationships and responsibilities that complement our Business Principles and respond to current financial market realities.
- Client service values that apply to all client relationships. These values are embedded in the firm's Business Principles.
- Role-Specific Client Responsibilities that articulate the basic responsibilities we must fulfill when acting in different capacities for our clients.

Taken together, these components constitute the foundation of our commitment to client service and reputational excellence.

Client Survey: Background and Methodology

To better understand how our clients view Goldman Sachs, we retained an independent consultant to conduct non-attributable, in-depth, in-person discussions with senior management of more than 200 of our clients worldwide. Our consultant reported our clients' views in such a way that no Goldman Sachs employee knows what any individual client said during the interviews.

We selected the sample of clients from our three main businesses – Investment Banking, Investment Management and Securities – and all of our geographic regions. Our sample comprised, in roughly equal proportion, relationships we would characterize as strong, moderate, and weak.

The client interviews were conducted over a four month period without the presence or participation of Goldman Sachs employees so that clients would be more likely to offer critical feedback, concerns and perceptions.

The consultant used a structured but open-ended interview format that not only allowed clients to provide their views on the specific topics posed, but also invited them to share any other thoughts on Goldman Sachs. Specific topics covered included:

- How well Goldman Sachs serves the interests of its clients and how well we communicate our role when serving our clients;
- The client's view of its coverage team and its view of Goldman Sachs as an institution;
- Goldman Sachs' risk management capabilities;
- Goldman Sachs' business model;
- Goldman Sachs' approach to legal and regulatory compliance;
- Goldman Sachs' effectiveness at communicating its Business Principles;
- Goldman Sachs' research capabilities;
- Goldman Sachs' corporate citizenship activities;
- Other issues that Goldman Sachs senior management should be aware of or should consider; and
- Goldman Sachs' overall strengths and weaknesses, as compared to its competitors.

The consultant presented its findings and analysis to the Business Standards Committee, senior management, the Board Committee and the Board of Directors. We used these meetings to ask clarifying questions, identify and analyze the key themes and issues that emerged from the client interviews and to discuss and develop recommendations. In addition, the senior leadership of each division reviewed feedback relating specifically to their businesses.

Client Survey Summary

The client survey found that our clients view Goldman Sachs as a firm with highly talented people, strong execution and risk management capabilities and a well-respected brand. Clients recognized that Goldman Sachs' culture of teamwork enables the firm to work seamlessly across products and regions to execute difficult or multi-faceted transactions on their behalf. Clients also said they have a high level of confidence in the individuals at Goldman Sachs who serve them directly and whom they know well.

More importantly, the client survey included critical feedback. Clients raised concerns about whether the firm has remained true to its traditional values and Business Principles given changes to the firm's size, business mix and perceptions about the role of proprietary trading. Clients said that, in some circumstances, the firm weighs its interests and short-term incentives too heavily. These concerns pointed to the need to strengthen client relationships which, in turn, will strengthen trust. Clients recommended that we communicate our core values more clearly, both through individual interactions and through corporate communications. Clients also said they would like us to communicate more clearly about our roles and responsibilities in particular transactions.

B. GUIDING PRINCIPLES

These principles guided the Committee in making our recommendations:

- Client-Focused Approach. The firm will strengthen its focus on clients and client objectives. We must make decisions over time that result in our clients recognizing our commitment to serving their needs.

- Long-Term Orientation. The firm will recommit to the importance and value of building and sustaining a long-term client franchise. Goldman Sachs must place even greater emphasis in our incentive systems to support building long-term client relationships.

- Earn Clients' Respect and Trust. To earn the respect and trust of clients, we must attract, develop and retain employees who demonstrate character, act with the highest integrity and consistently provide clients with accurate, timely and clear communications.

C. DISCUSSION AND RECOMMENDATIONS

The Committee is making the following recommendations to strengthen client relationships and responsibilities:

1. The Business Standards Committee recommends that the firm reemphasize the client service values listed below. These values are embedded in our Business Principles and

express how we intend to conduct ourselves in each and every client interaction. This recommendation reflects our objective of strengthening client relationships.

- **Integrity**: Adhering to the highest ethical standards.
- **Fair Dealing**: Pursuing a long-term and balanced approach that builds clients' trust.
- **Confidentiality**: Protecting confidential information.
- **Clarity**: Providing clear, open and direct communication.
- **Transparency**: Informing our clients so that our role in any transaction is understood by them.
- **Respect**: Being respectful of our clients, other stakeholders and broader constituencies.
- **Professional Excellence**: Consistently providing high quality service, responsiveness, thoughtful advice and outstanding execution.

2. The Business Standards Committee recommends that the firm implement the framework for Role-Specific Client Responsibilities to communicate with clients about our different roles and responsibilities and as a benchmark for training and professional development for employees. Above all, we must be clear to ourselves and to our clients about the capacity in which we are acting and the responsibilities we have assumed. This recommendation reflects our objective to strengthen client relationships.

In broad terms, our clients ask the firm to act in the capacity of advisor, fiduciary, market maker and underwriter, and may require us to act in multiple capacities in our overall relationship. We have developed a "Role-Specific Client Responsibilities" matrix, provided on the following page, to briefly describe these roles and our responsibilities to clients. The matrix is illustrative and does not capture every possible client interaction, since our client service responsibilities will differ depending on the nature of the transaction, the role we are asked to play in any given situation and the applicable law of the relevant jurisdiction. We must be clear to ourselves and to our clients about the capacity in which we are acting and the responsibilities we have assumed.

Goldman Sachs Role-Specific Client Responsibilities

Relationship With Client: Advisor

Role	Activities	Basic Responsibilities
Banking Advisor	• Act as an advisor as agreed with client in engagement letter • Act as an advisor on an informal, client service basis with no engagement letter in place	• Provide our best advice • Disclose conflicts • Assist client in reviewing alternatives on their merits • In some jurisdictions, fiduciary duties apply

Relationship With Client: Fiduciary

Role	Activities	Basic Responsibilities
Asset and Private Wealth Manager	• Advise on asset allocation, portfolio construction and manager or securities selection • May invest on a discretionary basis	• Provide our best advice • Disclose conflicts • May assist in reviewing investment alternatives on their merits • Fiduciary duties apply, although not in all jurisdictions

Relationship With Client: Market Participant

Role	Activities	Basic Responsibilities
Market Maker / Counterparty (Principal)	• Make markets by committing capital • Provide investing ideas • Make our inventory available or add to our inventory	• Communicate clearly our role as principal • Stand ready to buy and sell regardless of whether the other side of the transaction is available • Set pricing to reflect market conditions • Fulfill applicable suitability and other pre-and post-transaction responsibilities
Broker	• Execute transactions for the account of clients • Provide investing ideas • Provide advice incidental to acting as broker	• Provide best execution • Arrange adequate protection of client assets for which we are responsible • Fulfill applicable suitability and other pre-and post-transaction responsibilities

Relationship With Client: Underwriter / Structurer

Role	Activities	Basic Responsibilities
Underwriter / Product Structuring	• Structure and execute underwritings, distributions or loan syndications • May make or buy loans, or buy securities or other instruments, and issue / sell securities that are based upon those assets • Prepare disclosure and conduct marketing • Set pricing to reflect relevant issuer- and market-related factors, including investor demand, when making a broad distribution	• Conduct appropriate and thorough due diligence on issuer and / or structure, as applicable • Disclose conflicts • Endeavor to ensure there is no material misstatement / omission in disclosure • Fulfill applicable suitability obligations • In underwritings in which the issuer or selling shareholder participates in selling efforts, make allocations explicitly taking into account their interests and expressed preferences • Generally make secondary trading market

While most of the roles, activities and responsibilities highlighted in this matrix are straight forward, the terms "market maker" and "underwriter" require some explanation.

Market making refers to our secondary sales and trading activities. We can act as an agent for buyers and sellers by executing their orders in the market or act as a principal by supplying liquidity directly to our clients. We do this regardless of market conditions and our view of the market. Our liquidity obligations in certain markets can also be explicit and obligatory – when, for example, we act as a Primary Dealer in government securities markets or as a New York Stock Exchange Designated Market Maker.

Our market making responsibilities can also be implicit. In the credit and mortgage markets, for example, our clients expect us to be willing to sell positions to them as a principal or to be willing to buy positions from them. Market making involves risk, and as a result, market makers engage in risk management activities such as hedging and managing inventory in both cash and derivative instruments.

Market makers provide liquidity and play a critical role in price discovery. They contribute to the overall efficiency of the capital markets, facilitating capital raising for corporations and governments and allowing money managers to better manage their portfolios and generate returns.

The role of an underwriter differs from that of a market maker. An underwriter of financial instruments works with the issuer in connection with offering financial instruments to investors. In this context, securities laws effectively impose a gatekeeper role on Goldman Sachs: as an underwriter, the firm is expected to assist the issuer in providing an offering document to investors that discloses all material information relevant to the offering. The purchaser of securities then evaluates whether they are worthy of investment based on his or her own view and analysis of the security in light of expectations about the future prospects of a company, financial instrument or market.

3. The Business Standards Committee recommends that the firm increase its emphasis on client service and client relationships in our annual performance review and other incentive processes. Among other things, the performance review system will seek to assess how well our people represent the Goldman Sachs client franchise and how well they build long-term client relationships. This recommendation reflects our objective of strengthening client relationships.

4. The Business Standards Committee recommends that the new Client and Business Standards Committee design and implement a comprehensive firmwide program to strengthen client interactions and relationships to enhance our client franchise. This recommendation reflects our objectives of strengthening client relationships and committee governance.

5. The Business Standards Committee recommends that the firm implement a comprehensive training and professional development program on the firm's Business Principles, client service values and the Role-Specific Client Responsibilities. Each division will tailor its program to emphasize its different roles and responsibilities to clients. This recommendation reflects our objectives of strengthening client relationships, reputational excellence and training and professional development.

6. The Business Standards Committee recommends that the leaders of each division play a critical role in the design and execution of a multi-faceted communication program to introduce the Committee's recommendations to clients. This recommendation reflects our objectives of strengthening client relationships and enhancing transparency of communication and disclosure.

SECTION III: CONFLICTS OF INTEREST

A. INTRODUCTION AND OVERVIEW

Conflicts of interest and the firm's approach to dealing with them are fundamental to our client relationships, our reputation and our long-term success. We must earn the trust of our clients by consistently fulfilling the responsibilities we undertake when we assume a role on their behalf. We also recognize the concerns of clients, other stakeholders, legislators, regulators, market participants and the general public over the potential for conflicts of interest in the financial services industry and at Goldman Sachs.

The Committee undertook a broad examination of the firm's infrastructure, policies and procedures in the area of conflicts resolution. Following this, we developed guiding principles and recommendations that will enhance our conflicts resolution and business selection practices. In the long term we believe that any constraints these enhancements may impose on the firm will be outweighed by the benefits derived from building client trust and strengthening the firm's reputation.

Goldman Sachs is a full-service, global investment bank. Many of our clients interact with the firm in several of our businesses. For example, working with entirely separate areas of the firm, a corporate client may issue securities through us in connection with an acquisition in which we acted as their financial advisor. That same client may engage in a commodity-related hedging program related or entirely unrelated to the acquisition, and, through its pension fund, may be an asset management client.

We are most effective in serving our clients when we are able to meet the full range of their financing, risk management, liquidity and advisory needs. Acting in these roles for multiple clients simultaneously, however, we necessarily encounter potential conflicts and business selection issues. It is critical for our business to have a comprehensive conflict management and business selection process that is overseen by senior, experienced people and embedded in core decision-making processes of the firm.

The term "conflict of interest" does not have a universally accepted meaning, and conflicts can arise in many forms within a business or between businesses. The responsibility for identifying potential conflicts, as well as complying with the firm's policies and procedures, is shared by the entire firm. The firm has invested considerable time and resources over many years in its conflicts resolution infrastructure, policies and procedures.

We have a multilayered approach to resolving conflicts and addressing reputational risk. The firm's senior management and divisional leadership oversee policies related to conflicts resolution. The firm's divisional leadership, a Conflicts Resolution and Business Selection Group (CRBSG), the Legal and Compliance Departments, the Firmwide Business Practices Committee (BPC) and other internal committees all play roles in the formulation of policies, standards and principles and assist in making judgments regarding the appropriate resolution of particular conflicts. Resolving potential conflicts necessarily depends on the facts and circumstances of a particular situation and the application of experienced and informed judgment.

The firm's Legal, Compliance and Internal Audit Departments help the firm's businesses operate in accordance with applicable laws and regulations and the firm's policies and procedures. The Compliance Department monitors the mechanisms – such as information barriers between business units – that are designed to ensure appropriate use and protection of confidential information, including having physical and other information barriers between business units.

At the transaction level, various people and groups have roles. As a general matter, prior to businesses accepting mandates, or making new loans or investments, the CRBSG reviews the potential transaction. It reviews all financing and advisory assignments in the Investment Banking Division (IBD) and lending, investing and other activities by the Merchant Banking Division (MBD), the Securities Division and segments of the Investment Management Division (IMD). Various transaction oversight committees, such as the Capital, Commitments, Investment, Suitability and Structured Products Committees, also review new underwritings, loans, investments and structured products. These committees work with internal and external lawyers and the Compliance Department to evaluate and address any actual or potential conflicts.

B. GUIDING PRINCIPLES

The Committee observed the following principles in making its recommendations relating to conflicts:

- Ability to Perform. Prior to accepting a role with a client, we will exercise care to ensure that we are able to fulfill our responsibilities to that client. Having assumed a role, we will not undertake activities or accept a new mandate that would prevent us from fulfilling those responsibilities.

- Long-Term Focus. In resolving potential conflicts and making business selection decisions, we will pursue a long-term and balanced approach that builds clients' trust.

- Clarity Regarding Our Responsibilities. Our clients ask the firm to provide various services. We will be clear with our clients about the specific responsibilities we are assuming. We will also be clear about what other activities we may continue to perform while we are advising or financing a particular client.

C. DISCUSSION AND RECOMMENDATIONS

We took the following steps to identify areas of focus:

- Reviewing the various ways in which a role we play with one client may intersect with the role we might play on behalf of another client or with the firm's own interests;
- Conducting an extensive survey of business and functional leaders within the firm;
- Reviewing the results of the client survey;
- Analyzing relevant judicial decisions and legislative material; and
- Considering forthcoming changes to the regulatory framework for our industry.

As a result of this process, we identified the following areas for in-depth review and enhancement:

- Information barriers;
- Origination and underwriting activities across the firm;
- Written communications about securities while the firm is contemporaneously underwriting or advising the issuer of the securities;
- Transactions where the firm may have multiple roles;
- Fund and firm balance sheet investment and lending activities;
- Documentation and conflicts policies, processes and principles; and
- Client communications.

C-1. Information Barriers

In accordance with industry practices, Goldman Sachs maintains information barriers (Information Barriers or Walls) to prevent the unauthorized disclosure of confidential information by "private side" personnel (predominantly in IBD) to "public side" personnel in the Securities Division and IMD.[1] The Compliance Department maintains the policies and procedures governing Information Barriers and monitors the communication of confidential information within the firm. It also conducts surveillance of trading activities during periods in which the firm possesses material non-public information and trains employees on Information Barrier policies and procedures. Consistent with applicable law, Information Barriers enable the firm to continue to conduct sales and trading activities on the public side of the firm while the private side has material, non-public information.

The Compliance Department may permit private side employees to communicate material, non-public information to public side employees, pursuant to established record-keeping and surveillance procedures to help facilitate investment banking transactions that require market judgment. In our equity capital markets business, for example, a client who owns a substantial block of stock may ask us to buy the stock, which we would then resell to other clients. In these circumstances, we would typically seek the judgment of a small number of professionals from the Securities Division regarding the potential market appetite for the stock in order to price it properly. Once wall crossed, these employees cannot influence, make recommendations or direct trading in the securities of the issuer on which they have received non-public information.

The Business Standards Committee and the BPC undertook a systematic review of the firm's wall crossing procedures with a view to reducing the number and duration of wall crosses. The following enhancements were implemented during the summer of 2010 and resulted in a reduction in the number and duration of wall crosses.

7. With respect to Information Barriers and wall crosses, requests by IBD to initiate a wall cross for a Securities Division employee must be approved by a participating managing director (PMD) or a senior extended managing director (EMD) in IBD who is supervising the relevant transaction or project, as well as one of a small number of PMDs or senior EMDs in the Securities Division, designated by divisional management. One of the heads of the Securities Division or his designee must approve requests when more than

[1] Goldman Sachs Asset Management is separated from other divisions of the firm both physically and pursuant to policies and procedures that have been developed in accordance with applicable regulations.

five Securities Division employees are needed to cross the Wall in connection with any particular transaction or project. This recommendation reflects our objectives of strengthening client relationships and reputational excellence.

The firm is also enhancing training and professional development programs and putting in place additional surveillance of Information Barriers.

C-2. Origination and Underwriting Activities

IBD personnel have primary responsibility for the execution of underwritings of corporate, sovereign and municipal debt and corporate equity securities. The Securities Division has historically executed some transactions that involve the issuance, creation or repackaging of financial instruments.

8. The Business Standards Committee recommends that certain underwriting and origination activities be moved from the Securities Division to the Financing Group within IBD, including certain activities related to mortgage-backed and asset-backed securitization, emerging markets debt and money market instruments such as commercial paper. Business units of the Securities Division that continue to conduct origination activities will have policies and standards, approval processes, disclosure requirements and oversight that are consistent with those that apply to all origination activities in IBD. This recommendation reflects our objectives of strengthening client relationships and reputational excellence.

C-3. Written Communications During Underwriting and Advisory Assignments

In connection with an underwriting or an advisory engagement involving a material strategic transaction, the firm operates a Restricted Trading List Policy (RTL Policy). This policy may impose restrictions on sales communications, trading and research to mitigate legal, regulatory, or conflict issues and to eliminate any appearance of the improper use of material non-public information. The RTL Policy permits the publication of research and the continuation of market making only to the extent permitted by applicable law.

Our clients expect our salespeople and traders to express their independent views on markets and companies and to develop trading ideas. These activities occur on the public side of the firm's Information Barriers. The RTL Policy restricts written client communications[2] regarding an underwritten security from the announcement of that offering until the offering is priced. Moreover, in connection with U.S. initial public offerings (IPOs), the policy further restricts written communications until 25 days after pricing. Subject to guidelines, the policy generally permits written communications by sales and trading personnel during a pending material strategic transaction on which the firm is advising a client, once that transaction is in the public domain.

We reviewed the RTL Policy to determine how we could reduce the appearance of conflicts of interest in the firm's sales and trading activities during and immediately after underwriting securities and advising clients, while preserving the firm's ability to appropriately serve its investing clients.

9. The Business Standards Committee recommends that the firm's existing policies regarding written communications during underwriting and advisory assignments be supplemented to restrict Securities Division and Private Wealth Management (PWM) personnel from disseminating broadly to clients written sales communications either (i) recommending an investment or transaction, or (ii) expressing a view[3] regarding the issuer or client, its securities or its other financial instruments, or regarding other transaction parties and their securities or their other instruments as follows:

- For offerings of equity or equity-linked securities or high yield debt offerings or loan syndications,[4] the restriction would apply from the pricing date until 30 days thereafter.

- For material strategic transactions in which Goldman Sachs is advising a party, the restriction would apply from public announcement through closing of the transaction.

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[2] This discussion does not address written communications by the firm's Global Investment Research Division ("GIR"). There are regulations and well-established firm policies that govern the publication of research by the firm's independent Global Investment Research Division in connection with an offering being underwritten by Goldman Sachs or a material strategic transaction in which the firm is advising a client. To the extent permitted by law and policy, GIR may continue to publish research.

[3] We will continue to permit written communications with views that are consistent with recently-published GIR research or that attaches, summarizes or references that research.

[4] Offerings and syndications of investment grade debt and offerings and trading of asset-backed and mortgage-backed securities are generally excluded because of their frequency and because they generally are not material to the issuer or originator of the underlying assets, in each case unless otherwise determined by the Capital Committee or a subcommittee thereof. Municipal and not-for-profit issuers will be treated as issuers of high yield corporate debt.

This recommendation reflects our objectives of strengthening client relationships and reputational excellence.

Securities Division or PWM personnel may request that the Legal or Compliance Departments grant an exception, subject to applicable regulations, if there is a fundamental change in the business or prospects of the issuer or other relevant party. In addition, if the time between the announcement and the closing date for a material strategic transaction becomes longer than is standard for transactions of this type, Securities Division and PWM personnel may also request an exception from the Legal or Compliance Departments, subject to applicable regulations.

C-4. Multiple Roles in a Particular Transaction

The firm often plays multiple roles in a specific transaction. Examples include the following:

- The firm provides financing for an acquisition by a firm-managed fund;
- The firm executes transactions, such as derivatives or purchases of loan portfolios, with an IBD advisory client;
- The firm underwrites securities of an issuer in which the firm or a firm-managed fund is an existing lender or investor; and
- The firm provides financing (staple financing) to potential buyers of an asset when IBD is advising the seller of that asset.

The CRBSG and, in most cases, one of the firm's transaction oversight committees review these transactions in advance because of the potential for actual or perceived conflict between the firm and a client or fund. The firm may be able to address potential conflicts by providing disclosure to its clients, obtaining appropriate consents, relying on Information Barriers, carefully defining its role and / or requesting that the client engage a co-advisor. The Committee has reviewed the firm's policies and practices governing these activities and makes the following recommendations.

10. To strengthen client relationships and reputational excellence, the Business Standards Committee recommends as follows:

    (i) Goldman Sachs will not be the sole financing source for acquisitions by MBD private funds, other firm-managed private funds or portfolio companies controlled by those funds,[5] except in special circumstances with the approval of senior management or an appropriate committee of the firm.

(ii) Goldman Sachs will carefully review requests to provide financing to competing bidders when a MBD fund or other firm-managed private fund is pursuing an acquisition as a bidder. Senior management or an appropriate committee of the firm will be part of the review process.

(iii) Goldman Sachs will carefully review requests to provide staple financing when IBD is selling a public company. This review will occur as part of the firm's customary staple financing approval process. Senior management or an appropriate committee of the firm will be part of the review process.

(iv) The applicable transaction oversight committees – with the assistance of the CRBSG and the Legal Department – will undertake a heightened review before approving an underwriting for an issuer in which the firm or its affiliates, including MBD and other firm-managed private funds, have a material interest as a shareholder or creditor.

C-5. Fund and Firm Balance Sheet Investing and Lending Activities

Several business units of the firm may pursue lending and investing activities. For example, the Securities Division as well as funds in IMD and MBD may make or invest in senior, subordinated and mezzanine loans. Equity investments may also be made by business units in different divisions. The Securities Division generally lends and invests for the firm's own account, while IMD and MBD generally invest and lend on behalf of funds for which the firm is acting as investment manager and fiduciary. Potential conflicts of interest may arise in connection with certain of these activities.

11. The Business Standards Committee recommends that IMD funds that make alternative investments should be integrated into the firmwide Conflicts Resolution and Business Selection process in a manner consistent with their fiduciary duties. This recommendation reflects our objective of strengthening client relationships and reputational excellence.

[5] Rules to be adopted as part of financial regulatory reform may limit or restrict certain of the activities described above between Goldman Sachs and MBD funds, other firm-managed funds and / or portfolio companies controlled by those funds.

C-6. Conflicts Policies / Processes / Principles

The CRBSG has developed policies and guidance on activities requiring advance clearance. To identify potential conflicts, the CRBSG relies on internal databases and consults with relevant firm employees. In addition, CRBSG professionals are members of many of the committees that oversee transaction execution. They also receive committee meeting agendas. The group obtains information about activities on the public side of the firm's Information Barriers – including positions in securities and confidential information possessed by employees – primarily by monitoring internal databases. This ensures that public side personnel are not inadvertently alerted to a potential transaction on the private side of the Wall. The group also obtains information about private side activities from relevant private side personnel. The CRBSG continually reviews and updates its policies and procedures in this regard.

12. To strengthen reputational excellence, the Business Standards Committee recommends that the firm review and update conflicts-related policies and procedures, as appropriate. The firm will make a consolidated and comprehensive compilation of these policies and procedures available to relevant personnel in connection with training and professional development initiatives. This compilation will also serve as an ongoing resource to the firm and its employees and facilitate monitoring by the Compliance and Internal Audit Departments. The Committee stresses that all employees share the responsibility to identify and elevate potential conflicts.

C-7. Client Communications

It is important that each client understand the roles and responsibilities that we assume in any particular transaction. We have reviewed what we disclose about actual or perceived conflicts in engagement letters, standard disclaimers and other documents. Our goal was to enhance the firm's overall conflicts resolution process, provide relevant information to clients and strengthen their confidence in Goldman Sachs.

13. The Business Standards Committee recommends that the firm employ materials written in plain language that articulate:

    (i) What it means that the firm has completed its conflicts resolution and business selection process in any particular situation; and

    (ii) What other activities the firm may continue to conduct while we are advising or financing a particular client.

We recognize that the language in engagement letters and standard disclaimers is often complex. We will provide education and training for firm employees and encourage them to communicate with clients through discussions and plain language written presentations about our conflicts resolution and business selection process. We will tailor this material to the business of a specific division and update it over time. Each employee who interacts with clients will be responsible for understanding and communicating the guiding principles for conflicts resolution and business selection to clients and will be accountable for following them. This recommendation reflects our objectives of strengthening client relationships and reputational excellence and enhancing transparency of communication and disclosure.

C-8. Training and Professional Development related to Conflicts Resolution

14. The Business Standards Committee recommends that the firm enhance its training and professional development programs regarding conflicts resolution. These programs will be updated to focus on familiarizing people with the compilation of conflicts policies and procedures discussed in the prior recommendation. Each employee who interacts with clients will participate in these programs. This recommendation reflects our objectives of strengthening client relationships and reputational excellence and enhancing transparency of communication and disclosure.

SECTION IV: STRUCTURED PRODUCTS

A. INTRODUCTION AND OVERVIEW

In the area of structured products,[6] we have recently seen efforts by market participants to simplify products and structures and avoid unnecessary complexity. Of course, the underlying forces which drive innovation in our financial markets and products cannot be eliminated; in fact, that innovation produces many benefits. However, for the most complex products, there may be a serious question about whether a complex product should be introduced into the market at all, even though it may address a client's needs.[7]

The Committee believes all financial institutions, including Goldman Sachs, bear responsibility for constantly improving practices and procedures relating to the marketing and distribution of structured products. In addition, regulators and lawmakers around the world are considering changes to rules and law governing these products. We also recognize that the financial services industry and capital markets will continue to evolve. Accordingly, the firm must maintain the flexibility to adapt over time the recommendations discussed below to address changes in markets, regulation and the competitive and macro-economic environment.

The Committee examined several issues related to structured products, including the firm's existing internal approval process, the suitability of products for different types of clients, pre- and post-transaction sales practices, disclosure and documentation. Our recommendations will strengthen the firm's standards by:

- Improving the process for identifying structured products that should be subject to heightened review and approval;
- Enhancing our framework for evaluating suitability by distinguishing between different client segments and focusing on individual clients;

[6] This section of the report deals with three categories of products and transactions: complex, structured and strategic. We use the term "structured products" to refer to these categories collectively and we use the category names complex, structured and strategic when discussing these categories individually.

[7] The Firmwide New Activity Committee (described in Section VI of this report) and the firm's transaction oversight committees will be expressly charged with addressing this question.

- Developing additional pre- and post-transaction sales practices that, by building on existing practices, strengthen the firm's responsibilities to our clients, provide stronger controls and enhance the post-transaction experience through additional client service; and
- Formalizing practices regarding securities origination and disclosure standards.

Several aspects of the Committee's principles and recommendations exceed current regulatory requirements. Certain recommendations will result in the documentation of practices that are already part of the firm's existing business standards. Documenting all practices will create greater accountability.

While the recommendations on structured products focus on the Securities Division, each division will implement these recommendations in a manner appropriate for their particular businesses.

B. GUIDING PRINCIPLES

The following principles guided the development of the recommendations on structured products:

- Standards of Sophistication. We are committed to knowing our clients and ensuring that they have the ability and background to understand the risks of all transactions they execute with us, including structured products.
- Market Participation. Before participating in a market for structured products, we will answer the critical question of whether we "should" engage in the relevant activity while we consider whether we "can" engage in the activity operationally.
- Disclosure. We are committed to making clear disclosures in offering documents.
- Documentation. We are committed to timely communication and transmission of relevant information and documents to our clients.
- Post-Transaction Engagement. Our responsibility to work with our clients does not end when we execute a transaction. We expect to engage with clients after the execution of a transaction, particularly when market developments occur that could materially impact the transaction and the client.

C. DISCUSSION AND RECOMMENDATIONS

The Committee's recommendations fall under the following four headings: (i) identifying complex transactions, designated structured transactions and strategic transactions; (ii) client suitability; (iii) pre- and post-transaction sales practices; and (iv) disclosure and origination standards.

C-1. Identifying Complex Transactions, Designated Structured Transactions and Strategic Transactions

The task of identifying structured products is complex. While certain factors such as leverage, lack of liquidity and lack of price transparency frequently characterize these products, there is often no simple mechanism for determining on which side of the line a particular structured product falls. Once a product has been identified as a structured product, the review and approval process for that product must consider the client segments investing in the product. Certain structured products that are suitable for one set of clients (e.g., professional investors) will not be suitable for others (e.g., retail).

Mindful of these challenges, we propose a framework for identifying those structured products that should be subject to heightened review and approval. We recognize that, as products and markets evolve, the framework will need to evolve and that a framework can never fully replace good judgment.

The Business Standards Committee recommends establishing a global, consistent process for determining which transactions will be subject to enhanced review, approval and documentation. Specifically, the Committee recommends a three step identification process for designated structured, strategic and complex transactions as follows:

15. Designated Structured Transactions. The Structured Products Committee (SPC) will continue to review and approve all transactions that meet the requirements of a "designated structured transaction" under the charter of the SPC. Designated structured transactions are transactions, series of transactions or products where: (i) one of the client's principal objectives appears to be to achieve a particular legal, regulatory, tax, or accounting treatment, including transferring assets off balance sheet; (ii) the proposed legal, regulatory, tax, or accounting treatment is materially uncertain; (iii) the product or transaction (or series of transactions) have substantially offsetting legs or lack economic

substance,[8] or (iv) the product or transaction (or series of transactions) could be characterized as a financing, but is structured in another manner. This recommendation reflects our objectives of strengthening client relationships and reputational excellence.

16. Strategic Transactions. All strategic transactions will be subject to heightened review and approval. For this purpose, "strategic transactions" are transactions that are sufficiently large and important to a client or sufficiently large in the context of the market that they warrant heightened scrutiny. These transactions are often characterized by several of the following factors: (i) losses or gains from the transaction could reasonably be expected to materially impact the client's financial position or have an adverse reputational impact on the firm; (ii) the transaction is likely to have a material impact on the market; (iii) the transaction requires the approval of the client's Chief Financial Officer, Chief Executive Officer or Board of Directors; (iv) the transaction hedges a material acquisition, disposition or other business combination transaction by the client, and the hedge is material; (v) the transaction requires separate disclosure in the client's financial statements or will otherwise be disclosed through a public filing; or (vi) the transaction represents a large financing commitment by the client. Strategic transactions may not involve complexity or unique structural features, but nevertheless merit heightened review because of these factors. This recommendation reflects our objectives of strengthening client relationships and reputational excellence.

17. Complex Transactions. Complex transactions will also be subject to heightened review and approval. While not an exhaustive list, the following factors indicate complexity: (i) leverage; (ii) illiquidity; (iii) the potential for losses in excess of initial investment; (iv) lack of price transparency; and (v) non-linear payouts. The Committee has identified these factors to guide salespeople[9] in deciding which transactions are complex and merit heightened review and approval. Not every transaction exhibiting these factors is complex – in fact these factors may be present in relatively simple transactions. Identifying complex transactions requires judgment. When in doubt, salespeople will seek guidance from their supervisor or the chairs of the Firmwide Suitability Committee (or their designees).

[8] "Offsetting legs" refers to cash flows under different parts of a transaction (or group of related transactions) which from an economic perspective cancel each other out. Transactions with offsetting legs may lack economic substance. Transactions without economic substance have not been and will not be approved by the SPC.

[9] References to salespeople include, where the context requires, marketers, structurers and other members of the Goldman Sachs business team that work on structured products.

The Committee recommends the creation of new due diligence procedures. As part of the heightened review of complex and strategic transactions, salespeople will be required to complete a due diligence questionnaire that discusses the factors detailed above. The Firmwide New Activity Committee will also analyze these factors when reviewing a proposed new product or activity. This recommendation reflects our objectives of strengthening client relationships and reputational excellence.

C-2. Client Suitability

The firm's policies and procedures must take into account the client segments to which products and transactions are being distributed. The level of scrutiny will depend partly on the client and partly on the specific role that Goldman Sachs is performing. Even where the firm does not have any legal responsibility to evaluate the suitability of a structured product, we believe the firm should nonetheless conduct suitability reviews as part of our pre-transaction approval process. We believe that this does not alter the fundamental nature of the client relationship or create additional legal duties or responsibilities.[10]

18. To strengthen client relationships and reputational excellence, the Business Standards Committee recommends redefining the firm's approach to segmenting clients for suitability purposes into one of the following three segments:

- professional investors (e.g., banks, broker-dealers, investment advisers and hedge funds);
- other institutional accounts (e.g., municipalities, sovereigns, sub-sovereigns, pension funds, corporations, charities, foundations and endowments); and
- high net worth accounts (e.g., natural persons, family offices).

Clients will be classified in one of these three segments; the classification will form part of their client profile, which is described below, and will be incorporated into the suitability analysis for transactions executed by that client.

As a general rule, the sale of structured products to other institutional or high net worth accounts will be subject to heightened suitability review. Professional investors will be presumed eligible to enter into most types of transactions without specific heightened review unless the

[10] For example, in jurisdictions where the firm has a suitability obligation only when it recommends transactions to a client, the firm nonetheless may choose to conduct a suitability-type review on other transactions.

transaction is flagged as a designated structured transaction (Recommendation 15) or strategic transaction (Recommendation 16).

We recognize that some clients do not fit easily into any particular segment.[11] Moreover, the designation of a client as belonging to any particular segment is not a prejudgment on that client's level of sophistication or ability to transact in particular types of instruments; on the contrary, we believe that there is no substitute for a specific review of each individual client in making determinations about suitability. We concluded that our segmentation of institutional investors into two segments is consistent with recent regulatory developments and will improve our assessments of suitability.

For retail and high net worth investors, Goldman Sachs has policies addressing the distribution of structured products through Goldman Sachs PWM and third-party distributors. These policies are part of a Global Framework for the Distribution of Structured Investment Products, which sets forth the approval standards and review processes for certain products (including structured products) that are sold or re-sold (or used to create a product that is re-sold) to these investors. The Structured Investment Products Committee oversees this framework. In the Business Standards Committee's view, the Global Framework is consistent with the firm's overall approach to the issue of suitability in relation to structured products.

C-3. Pre- and Post-Transaction Sales Practices

Pre-Transaction Sales Practices

The Committee analyzed the firm's pre-transaction sales practices, particularly in relation to structured products. This analysis builds on work previously conducted by the BPC on trading derivatives with municipal, sub-sovereign, sovereign and corporate clients. The following changes were made following the BPC's work:

- The firm introduced heightened suitability procedures and other enhanced controls for derivatives in 2008. These procedures and controls were expanded in 2009 and 2010 as part of a broad new suitability policy.
- The firm enhanced its review process for routine U.S. municipal bond underwritings.

[11] For example, some professional investors may themselves distribute products to retail and high net worth individuals. The firm has a separate process specifically designed to evaluate the suitability of the products distributed to retail or high net worth investors as discussed further below.

- The firm enhanced pre-transaction due diligence, disclosure and documentation procedures in 2009. The firm is now required to provide certain prospective clients with sensitivity analyses and mark-to-market scenarios for relevant transactions.
- The firm introduced new escalation and approval procedures, including a requirement that transactions with specified features (e.g., large in size or complex) receive approval by the supervisor for the applicable desk and, in certain cases, the appropriate Regional Suitability Committee.[12]

19. To strengthen client relationships and reputational excellence, the Business Standards Committee recommends the following additional enhancements to the firm's overall pre-transaction sales practices:

A client profile will be maintained for each client in the form of a matrix (a Transaction Class Matrix or TCM) which reflects the types of transactions (e.g., cash, options, contingent liabilities) and underliers (e.g., equities, commodities, rates, credit) in which the client is pre-approved to transact from a suitability perspective. The TCM must be reviewed and approved by the relevant sales manager and Compliance officer before becoming effective and before being amended.

A heightened suitability review and approval will be required for any transaction or transaction class that falls outside a client's TCM. The level of review and approval required will generally be based on: (i) the maximum probable exposure (MPE) for the transaction; (ii) the segment classification of the client determined as outlined in Recommendation 18 above; and (iii) the factors for determining complexity as outlined in Recommendation 17 above (collectively, Due Diligence Review Criteria). These Due Diligence Review Criteria will be included in the Due Diligence Questionnaire that sales professionals will complete when they seek approval for transactions with clients who have not been preapproved for those transactions.

All designated structured and strategic transactions will require heightened review even when a client is eligible to execute a transaction based on its TCM.

[12] As described in Section VI of this report, the Regional Suitability Committees are being replaced by a Firmwide Suitability Committee.

Post-Transaction Sales Practices

Our responsibilities to clients do not end on the execution date of a transaction. Post-transaction monitoring and follow-up will create greater sales force accountability, greater transparency to clients and a better client experience overall. As part of the BPC review noted above, the firm has already implemented several new post-transaction enhancements for derivative transactions with specific clients, including (i) tighter documentation standards (including reporting and escalation procedures for unexecuted confirmations); (ii) sending monthly valuation reports on specified transactions to certain clients; and (iii) improved ongoing monitoring (and internal review) of transactions through quarterly meetings with business supervisors and the Credit, Legal and Compliance Departments. The purpose of these meetings is to review high exposure levels and MPEs for certain clients.

20. To strengthen client relationships and reputational excellence, the Business Standards Committee recommends the following post-transaction sales practices for structured products:

    The firm will establish processes to monitor relevant metrics (e.g., mark-to-market) for clients. Sales managers will be responsible for reviewing the results of this monitoring and taking appropriate actions on relevant transactions. There will be a mechanism for escalating issues to sales leadership and the Credit, Legal and Compliance Departments. Sales professionals will also be required to monitor the actual mark-to-market for transactions selected for heightened review and compare that mark-to-market against any previously analyzed stress test results that were provided to the client. In addition, divisional management will consider practices for monitoring the fulfillment by sales professionals of these post-transaction responsibilities for clients.

C-4. Disclosure and Origination Standards

Financial intermediaries like Goldman Sachs play many different roles in structured products, including acting as issuer, underwriter / arranger, derivatives counterparty, index sponsor, collateral agent and calculation agent. Depending on the roles the firm undertakes and the form and structure of the instrument we ultimately transact, the firm can encounter different legal and reputational risks. The Committee examined a broad cross section of the structured product securities underwritten and sold by the firm to identify ways to enhance Goldman Sachs' origination and disclosure practices. The resulting recommendations, all designed to improve transparency, are outlined below.

21. The Business Standards Committee recommends that each business unit that originates securities products[13] be subject to consistent policies and standards, approval processes, disclosure requirements and oversight as contemplated by Recommendation 8. These controls will include the following: (i) each business unit will be required to have written policies and procedures incorporating minimum disclosure standards; (ii) the appropriate firmwide transaction oversight committee will review and approve the policies and procedures governing origination activities of each business unit; and (iii) each business unit will be required to designate a business supervisor who is responsible for its origination activities and compliance with applicable policies and procedures. This recommendation reflects our objectives of strengthening client relationships and reputational excellence.

22. To strengthen client relationships, reputational excellence and enhance transparency of communication and disclosure, the Business Standards Committee recommends as follows:

    (i) The offering documents for securities products should include appropriate disclosure of risk factors, including risks arising from the instrument structure, underlying assets, market risks and counterparty credit risks. Where appropriate, investors will be provided with scenario analyses and stress test results. The firm will formalize disclosure standards to cover instances when the firm is underwriting a securities product that is collateralized by securities issued by Goldman Sachs (including when the securities product is issued by a special purpose vehicle). In those cases, the firm will disclose any material risks, including liquidity and credit concentration risks, associated with the collateral securities.

    (ii) Business units must disclose to the relevant personnel responsible for approving a securities product any specific benefits to Goldman Sachs, in addition to underwriting fees.

    (iii) The firm will continue to undertake appropriate due diligence reviews of issuers of securities products (including third-party issuers) and third-party managers. The business unit's policies and procedures will address when, and under which circumstances, the firm should review existing due diligence of third-party issuers or managers. For any issuance involving a third-party issuer or manager, the business

[13] "Securities products" refers to new issue securities sold by means of an offering document; it does not include bilateral derivative transactions.

unit responsible for the transaction will confirm that it has followed the firm's due diligence procedures.

C-5. Training and Professional Development in the Area of Structured Products

The Committee's recommendations outlined above will require substantial training and professional development.

23. To strengthen training and professional development, the Business Standards Committee recommends the development of cross-divisional training and professional development programs to implement the structured products recommendations. These programs will apply to all sales and trading personnel worldwide.

SECTION V: TRANSPARENCY AND DISCLOSURE

A. INTRODUCTION AND OVERVIEW

The Committee evaluated the firm's public financial disclosures[14] with the objective of improving our standards of transparency and disclosure with clients, investors, market participants, regulators and the public. As part of our work, we analyzed the feedback provided through the client survey and by the investor and analyst communities. We focused on explaining more clearly our business activities and performance, and how they relate to serving clients. We also wanted to address certain concerns and perceptions.

Our recommendations should be set in context. First, the firm does not have complete flexibility in communicating its financial condition and results. A U.S. public company's financial disclosures are framed by the requirements of the Securities and Exchange Commission (SEC) and the Financial Accounting Standards Board (FASB). Indeed, our recommendations on disclosure will be subject to review by the SEC.

Second, any proposed new disclosure must be evaluated against the backdrop of disclosure provided by peers and competitors. It is important to our investors, regulators, and other constituencies that our disclosure be as comparable as practical to that provided by peers and competitors. In addition, the disclosure we provide should not competitively disadvantage the firm. Finally, improving disclosure is an ongoing process that will continue after the recommendations of the Committee have been implemented.

B. GUIDING PRINCIPLES

In making its recommendations, the Committee followed these principles:

- The firm's business activities should be described and presented in a way that clearly identifies the drivers of performance and revenues.
- The relationship between the firm's balance sheet and its business activities should be understandable and the firm's liquidity management practices clearly explained.

[14]The Committee concentrated its work on the firm's SEC disclosures, including the Form 10-K, Form 10-Q, and the firm's quarterly earnings release, which are filed on Form 8-K.

- The firm's risk management practices and philosophies should be transparent and quantitative, and qualitative disclosure on credit risk exposures should be strengthened.
- The entirety of the firm's financial disclosure and business descriptions should be presented simply and clearly.

C. DISCUSSION AND RECOMMENDATIONS

We have made recommendations addressing (i) Business Segment Reporting; (ii) Balance Sheet and Liquidity; (iii) Risk and Risk Management; and (iv) Clarity and Overall Disclosure. Each of these recommendations reflect our objective of enhancing transparency of communication and disclosure.

C-1. Business Segment Reporting

Because many of Goldman Sachs' businesses are complex and integrated, we must articulate clearly the drivers of our financial performance. The client survey and overall public scrutiny suggest that we must improve our description of the firm's businesses, distinguishing between our client franchise activities and our investing and lending activities.

24. The Business Standards Committee recommends reorganizing the firm's three existing business segments into four business segments. The reorganized segment disclosure will provide more clarity as to the nature of the firm's business activities, particularly the activities currently aggregated in the "Trading and Principal Investments" segment. This change will better demonstrate the importance of client franchise activities and client facilitation to our revenues. The four proposed business segments are:

    - **Investment Banking**: This segment will include the firm's revenues from its activities as an advisor together with its debt and equity underwriting activities and revenues associated with derivative transactions directly related to an advisory or underwriting assignment.
    - **Institutional Client Services**: This new segment will include the firm's revenues from client execution activities related to making markets in various products, which form an important part of the firm's client franchise businesses. These activities are currently included in the Trading and Principal Investments segment. Institutional Client Services will also include the firm's Securities Services business, which, under the existing segment construct, is aggregated into the "Asset Management and Securities Services" segment.

- **Investing & Lending**: This new segment will include the firm's revenues from investing and lending activities across various asset classes, primarily including debt and equity securities, loans, private equity and real estate.[15] These activities include both direct investing and investing through funds. Under the existing segment construct, these activities are currently included in the Trading and Principal Investments segment.

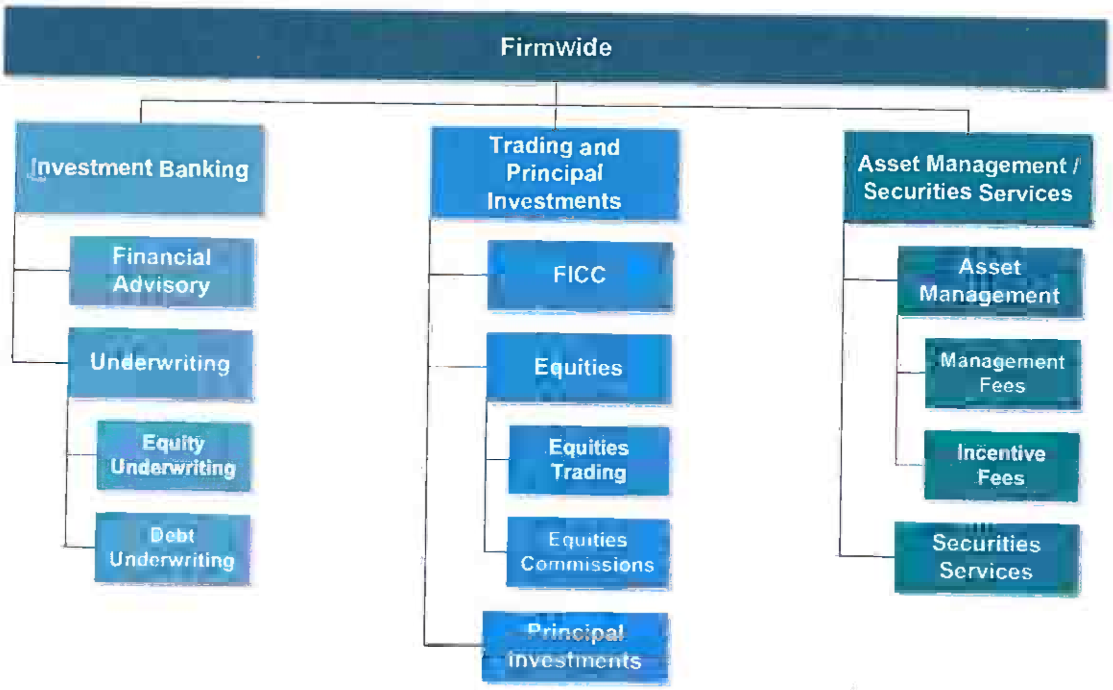
- **Investment Management**: This new segment will include the firm's fee revenues earned in connection with its asset and wealth management businesses, including Goldman Sachs Asset Management (GSAM), Private Wealth Management and the firm's merchant banking funds. In addition to management and incentive fee revenues, this segment will also include transaction revenues related to the firm's Private Wealth Management business, including commissions and spreads.

This change in the firm's business segments will require a three-year reorganization of the firm's segment disclosures.

[15] In the years through 2010, this segment also included the results of the firm's proprietary trading business, "Principal Strategies." The assets related to these activities were substantially liquidated during 2010.

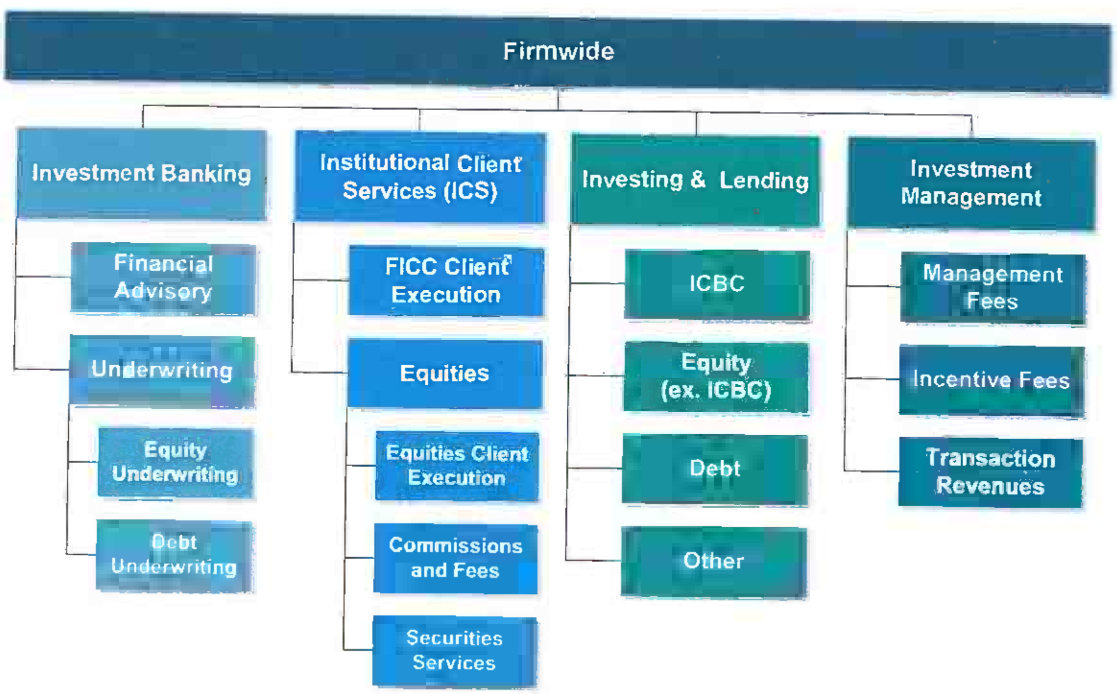
Existing Business Segments

The following diagram illustrates the firm's existing three business segments:



Proposed Business Segments

The following diagram illustrates the firm's proposed four business segments:



C-2. Balance Sheet and Liquidity

Balance Sheet

The firm's balance sheet disclosure provides another opportunity to describe more clearly the nature of the firm's business activities and the importance of the client franchise and client facilitation. In addition, balance sheet disclosure provides an opportunity to demonstrate the highly liquid nature of significant portions of the firm's balance sheet.

Our business model requires that we maintain a substantial balance sheet to facilitate client trades, provide financing to clients and make investments alongside clients. Current generally accepted accounting principles (GAAP) disclosure does not clearly identify the balance sheet impact of these client facilitation activities, nor does it explain the asset contribution of the firm's other activities and businesses.

25. The Business Standards Committee recommends that the firm disclose a simplified balance sheet showing assets by business unit / activity, including:

    - **Excess Liquidity**: the amount of available cash and highly liquid securities the firm maintains over and above its day-to-day liquidity needs;
    - **Secured Client Financing**: the assets related to secured funding provided to clients in the firm's prime brokerage, matched book and futures businesses, as well as client margin lending positions;
    - **Institutional Client Services**: the inventory related to the firm's client facilitation business, secured financing agreements and trading-related receivables;
    - **Investing & Lending**: the assets related to the firm's investing and lending activities, primarily including debt and equity securities, loans, private equity and real estate investments. These investments may be held directly or through funds; and
    - **Other Assets**: primarily includes the firm's goodwill, intangibles and physical property.

As required by U.S. accounting standards, the firm will continue to accord prominence in its disclosure to the GAAP balance sheet. It will also provide a detailed reconciliation of the GAAP balance sheet and the proposed simplified balance sheet.

Liquidity

The financial crisis underscored the need for financial institutions to maintain sufficient liquidity. Our liquidity policies are an important tool for ensuring that the firm maintains sufficient liquidity and we believe that additional disclosure on the mechanics and assumptions behind these liquidity policies will better describe our robust liquidity management framework.

26. The Business Standards Committee recommends that the firm (i) enhance disclosure with respect to liquidity stress tests by including details on both scenario assumptions and modeling parameters, as well as to provide substantial qualitative detail on the contractual and contingent cash and collateral outflows considered by the firm's Modeled Liquidity Outflow[16] and (ii) provide incremental qualitative detail on how the firm sizes its excess liquidity.

C-3. Risk and Risk Management

The financial crisis also demonstrated the critical importance of rigorous risk monitoring and management. We believe the firm should enhance the disclosure of risk management policies and practices, including details on our daily risk management process and overall credit risk.

27. The Business Standards Committee recommends that the firm implement the following:

- Describe, in greater detail and in plain language, the firm's risk management structure, culture and processes. This description will include detail on (i) the firm's risk management governance structure, including the interaction between business units and independent control functions; (ii) how the firm uses committees to assist in managing risk, including a description of the relevant committees' specific mandates and membership; and (iii) the firm's risk management processes, including its use of mark-to-market, risk limits, price verification and active position management, and robust systems to ensure the timely delivery of comprehensive and reliable data.
- Substantially enhance the discussion of Operational Risk, reflecting its increasing importance to the firm.

[16] Modeled Liquidity Outflow (MLO) is the firm's internal liquidity model that identifies and quantifies potential contractual and contingent cash and collateral outflows during both a market-wide and Goldman Sachs-specific stress situation.

- Provide additional qualitative disclosure regarding the Internal Capital Adequacy Assessment Process[17] (ICAAP) to explain more clearly this aspect of how the firm manages capital.
- Expand the description of credit risk to (i) include additional credit risks, such as loans and other non-derivative exposures, in our quantitative disclosure; (ii) provide increased granularity on credit exposures by industry and region; and (iii) qualitatively describe the firm's recent credit experiences.

C-4. Clarity and Overall Disclosure

Effective disclosure begins with describing the activities of a business in plain language. We identified areas where our disclosure could be clearer, where similar information could be synthesized in one place and where redundancy of information could be eliminated.

28. To improve the clarity of our overall disclosure, the Business Standards Committee recommends that the firm (i) rewrite its business description in the Form 10-K and its Annual Report to shareholders in plain language to better explain our business activities, our performance and how it relates to serving clients and (ii) reorganize its financial disclosure to consolidate related topics to remove, where possible, repetitive information described in both the Management Discussion and Analysis (MD&A) and financial statements, and to improve the overall clarity of the disclosure.

[17] The firm's Internal Capital Adequacy Assessment Process (ICAAP) ensures that the firm is appropriately capitalized relative to the risks of its businesses. ICAAP incorporates an internal risk based capital (IRBC) assessment designed to identify and measure risks associated with the firm's business activities, including market risk, credit risk and operational risk. Capital adequacy is evaluated based on the result of this IRBC assessment as well as using the results of stress tests which measure the firm's performance under various market conditions.

SECTION VI: COMMITTEE GOVERNANCE

A. INTRODUCTION AND OVERVIEW

Goldman Sachs relies heavily on committees to coordinate and apply consistent business standards, practices, policies and procedures across the firm. The firm's committee governance structure should serve to enhance our reputation, business practices and client service. In this way, committees serve as a vital control function.

In light of these objectives, the Business Standards Committee conducted a thorough review of certain of Goldman Sachs' firmwide operating committees with a particular focus on enhancements designed to achieve greater accountability for reputational risk management and client service.

B. GUIDING PRINCIPLES

In making its recommendations, the Committee followed these principles regarding the firm's committee governance structure:

- The structure must enhance accountability for business standards and practices, especially reputational risk management and client service.
- The structure must provide a clear roadmap for identifying, escalating and resolving reputational and client matters.

Summary of Process

We considered several factors and sources of information in reaching our conclusions and recommendations, including: (i) analysis of committee charters, agendas and meeting materials; (ii) interviews with committee chairs and observations of committee meetings and deliberations; (iii) analysis of committee membership and composition; (iv) analysis of processes and work flows, especially those involving new products approval and suitability review; (v) guidance from external consultants on governance, benchmarking and other areas; (vi) analysis of changing regulatory requirements and their impact, if any, on the firm's committee structure; (vii) detailed mapping of historical committee agenda items to the recommendations set forth below; and (viii) meetings with companies both within and outside the financial services industry to understand

and benchmark different practices and procedures, including those for managing reputational risk and responding to significant incidents.

C. DISCUSSION AND RECOMMENDATIONS

Our recommendations fall into three main categories: (i) establishing new committees or groups to enhance the firm's current committee governance structure; (ii) enhancing or restructuring existing firm committees to clarify roles, responsibilities and accountability; and (iii) enhancing the policies, procedures and infrastructure of committees to ensure greater consistency, efficiency and dissemination of best practices.

The recommendations of the Committee address the following objectives:

- Reinforce ownership and accountability for reputational risk management and client service;
- Reinforce ownership and accountability for decision-making and management of key risks by the leadership of divisions and business units;
- Clarify committee authority, roles and responsibilities;
- Reduce redundancy and potential gaps in committee responsibilities;
- Harmonize, where appropriate, cross-divisional practices to ensure consistency and comprehensive assessment of significant matters;
- Ensure that committees have membership from key risk disciplines, control functions and businesses;
- Formalize a process for reviewing events or incidents;
- Establish clear reporting lines of committees; and
- Ensure a transparent process for appeals of decisions and escalation of issues.

A diagram of the new committee structure and committee reporting lines is included at the end of this section.

C-1. Creation of Firmwide Client and Business Standards Committee

The Business Standards Committee recommends the creation of a Firmwide Client and Business Standards Committee (CBSC) that will assume the responsibilities of the existing Business Practices Committee and have additional focus on the primacy of client interests and reputational risk. This is an important change in the firm's committee structure, which is designed to show the interrelationship between client service, business practices and reputational risk management.[18]

29. The Business Standards Committee recommends that the following changes be made:

Establish a "Firmwide Client and Business Standards Committee." The Client and Business Standards Committee will function as a high-level committee that assesses and makes determinations regarding business practices, reputational risk management and client relationships. This committee will initially be chaired by the firm's President and Chief Operating Officer and will report to the Management Committee. Its responsibilities will include:

- designing and implementing a comprehensive firmwide program to enhance our client franchise;
- overseeing cross-divisional client coordination and annual client strategy reviews by division;
- regularly reviewing the operational and reputational risks of the producing divisions and certain control functions;
- resolving cross-divisional business practices and business selection matters;
- resolving appeals of business practices, suitability and reputational matters from other firm committees;
- periodically soliciting and assessing client views of the firm and addressing client concerns and incidents;
- overseeing divisional and regional Client and Business Standards Committees – formerly divisional and regional Business Practices Committees – and the newly formed Firmwide Suitability Committee and Firmwide New Activity Committee;
- commissioning cross-divisional committee reviews to identify best practices and / or to address emerging themes;
- overseeing the implementation of Business Standards Committee recommendations, where appropriate; and
- overseeing the Conflicts Resolution and Business Selection Group.

[18] The BPC recently conducted a self-assessment that resulted in several findings and recommendations that are consistent with the views and recommendations of the Business Standards Committee.

Establish a "Committee Operating Group" of the Client and Business Standards Committee. A Committee Operating Group will be established to assist the Client and Business Standards Committee in carrying out its functions. The Committee Operating Group will be headed by a senior leader reporting into the Chair of the Client and Business Standards Committee.

This recommendation reflects our objectives of strengthening client relationships, reputational excellence and committee governance.

C-2. Divisional and Regional Client and Business Standards Committees

The Client and Business Standards Committee will be supported by the divisional and regional CBSCs. These committees will be accountable for clients, business standards and reputational risk management at the divisional and regional levels.

The Business Standards Committee recommends:

30. Strengthen Procedures of Divisional and Regional Client and Business Standards Committees. The operating procedures of the divisional and regional CBSCs will strengthen accountability for reputational risk management and client relationships as follows:

    - appropriate senior leadership from divisions and regions will chair each divisional and regional CBSC. The Chairs of these regional and divisional committees will coordinate with the Chair of the CBSC in selecting members;
    - membership also will include senior control function leaders and, where appropriate, senior advisors such as retired PMDs. These members will help identify and elevate cross-divisional matters;
    - the divisional and regional CBSCs will be responsible for providing regular substantive reports to the Firmwide CBSC; and
    - unresolved matters and appeals will be escalated to the Firmwide CBSC.

    This recommendation reflects our objectives of strengthening reputational excellence and committee governance.

C-3. Suitability and New Activity

We analyzed how the firm makes product, client and transaction suitability determinations and how it reviews and approves new activities. Today, suitability determinations are made by different firm committees and at different levels. For instance, Regional Suitability Committees consider suitability for certain strategic transactions. The Structured Investment Products Committee considers suitability for certain products for high net worth or retail investors. The Capital and Commitments Committees consider suitability in connection with capital commitments and underwritings.

While various committees consider suitability, there is no single committee that acts as the central point of escalation for suitability matters arising from different committees. We believe one committee should set standards for client suitability across the firm's activities.

In addition, unless reviewed by a transaction oversight committee, the current approval process for new activities and products is primarily focused on operational and control matters. In other words, the approval process is focused primarily on answering the question of "can we" engage in the activity or product rather than also formally considering the question of "should we" engage in the activity or product, taking into account reputational, client, suitability or other concerns. Most of the work of regional and divisional New Products Committees focuses on the "can we" question. We believe that a firm committee should be required to formally ask and resolve the question of whether the firm "should" engage in any significant new product or activity, taking into account the factors above.

Any new product or activity must have the support of the leadership of the relevant division before it is brought before the appropriate firmwide committee. Each divisional CBSC will establish a formal process to consider and approve new products and activities from a reputational point of view before they are submitted to a transaction oversight committee for review.

The Business Standards Committee recommends that the following enhancements be made to the suitability and new activity review processes:

31. Establish a "Firmwide Suitability Committee." A Firmwide Suitability Committee will be established, reporting to the Client and Business Standards Committee. This new committee will replace the existing Regional Suitability Committees. In addition, to address time zone practicalities, an Asia Suitability Committee will be formed, which will

report to the Firmwide Suitability Committee. The Firmwide Suitability Committee will have the following responsibilities:

- review transactions originating in EMEA and the Americas that require review as set forth in Section IV of this report relating to Structured Products;
- set standards and policies for product, transaction and client suitability and provide a forum for more consistency across divisions, regions and products on suitability assessments;
- review suitability matters escalated from other firm committees; and
- oversee the activities of the Asia Suitability Committee, Structured Products Committee and Structured Investment Products Committee.

To facilitate consistent firmwide standards and practices for suitability assessments, the charters of the Firmwide Suitability Committee and the Asia Suitability Committee will require: (i) certain membership overlap; (ii) regular reports by the Asia Suitability Committee to the Firmwide Suitability Committee; and (iii) escalation of significant Asia-specific suitability matters by the Asia Suitability Committee to the Firmwide Suitability Committee.

Establish a "Firmwide New Activity Committee." A Firmwide New Activity Committee will be established, replacing the existing Firmwide New Products Committee. The Firmwide New Activity Committee will report to the Client and Business Standards Committee and will have the following responsibilities:

- for significant matters, answer the critical question of "should we" engage in the new activity (considering reputational, client, suitability and other concerns) as well as a detailed "can we" review, recognizing that divisional and regional business leadership must analyze both questions prior to sponsoring a matter;
- oversee the activities of the Regional New Products Committees, Acquisition Review Committee and Physical Commodity Review Committee; and
- establish a process to identify and review previously approved new activities that are significant and that have changed in complexity and / or structure or present different reputational and suitability concerns over time to consider whether these activities remain appropriate.

Considering the similarity of issues that may arise in the review of suitability matters related to transactions and new activities, the Business Standards Committee expects that the Firmwide Suitability Committee and Firmwide New Activity Committee will coordinate regularly to harmonize best practices and ensure a consistent approach. The two committees will have certain overlapping members.

This recommendation reflects our objectives of strengthening reputational excellence and committee governance.

C-4. Event Reviews

The Business Standards Committee recognizes the importance of learning from events or incidents that raise key risk concerns (e.g., reputational, business practices, client franchise or financial risks). These events can occur at the firm or in the market more broadly. The financial crisis further highlighted the importance and benefit of communicating this learning broadly throughout the firm along with targeted training and remediation following an event or incident. To facilitate "event reviews," it is important that senior management and select firmwide committees have a resource available to rapidly review incidents that raise key risks. The recommendation below is not intended to impact existing independent, internal functions, although event reviews should be coordinated with Internal Audit and other control functions where appropriate.

32. Establish the "Event Review Group." The Business Standards Committee recommends that an Event Review Group be on call to senior management and select firmwide committees to perform time-sensitive, high-profile targeted reviews of incidents or other business or industry matters of concern. The Event Review Group will comprise a rotating group of seasoned firm leaders. They will have the ability to assemble resources and work closely with the Legal and Compliance Departments and other relevant control groups. The Event Review Group will document and disseminate its findings to the appropriate constituents, and develop remediation, training and education initiatives. This recommendation reflects our objectives of strengthening reputational excellence, committee governance and training and professional development.

C-5. Enhancements to Committee Procedures

The charters of certain committees lack clarity and in some cases overlap with the jurisdiction of other committees. In addition, committees have different practices and procedures. To address these issues, the firm will improve the consistency of practices and procedures of firm committees, improve oversight and reporting lines and ensure that committees have the appropriate representation across key risk disciplines, control functions and businesses.

The Business Standards Committee recommends the following improvements to committee procedures:

33. Reputational Risk Ownership. Committee charters will reinforce the committees' ownership and accountability for, among other things, reputational risk management.

Firmwide Risk Committee Reporting. The Finance Committee and its subcommittees will report to the Firmwide Risk Committee, and the Firmwide Risk Committee will report to the Management Committee.

Capital and Commitments Committees. The Capital Committee will report to the Firmwide Risk Committee, and the Commitments Committees will report to the Client and Business Standards Committee. On reputational risk issues, both committees will engage with the Client and Business Standards Committee. On capital commitments issues, both committees will work with the Firmwide Risk Committee.

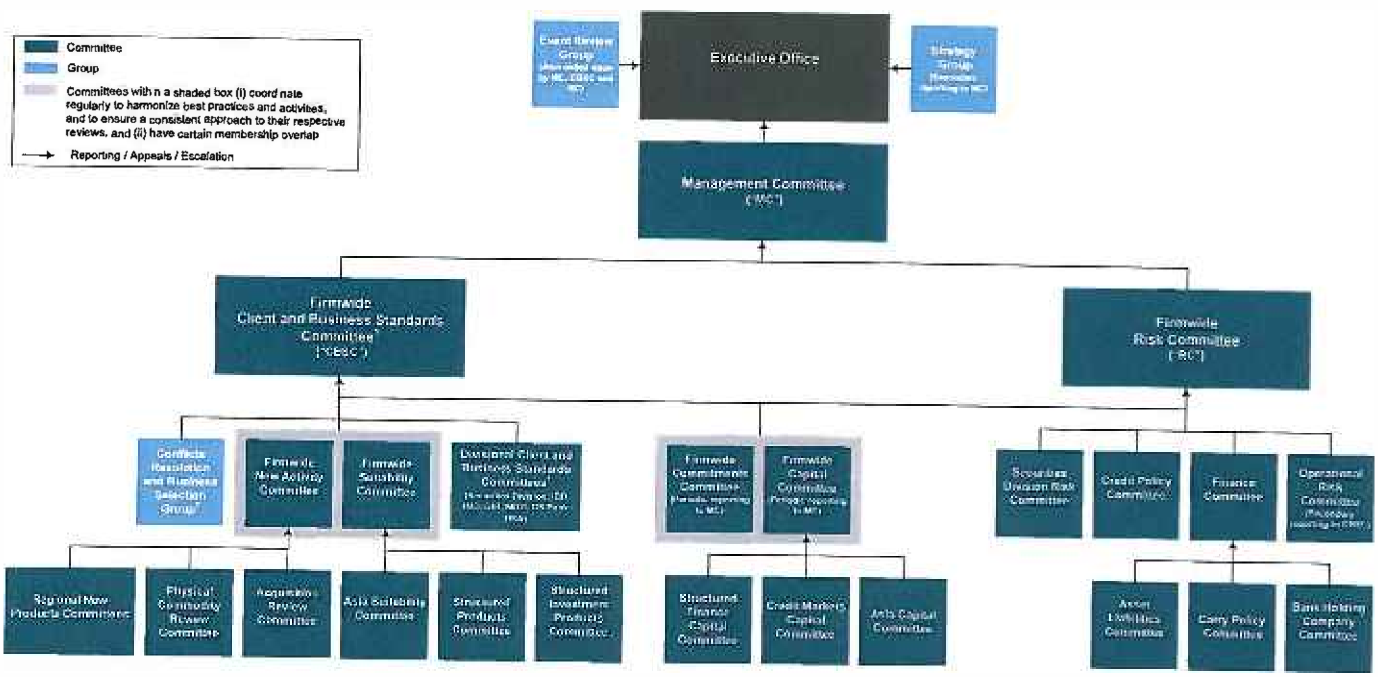
Both the Capital and Commitments Committees play significant roles in reviewing underwritings and firm capital commitments. Accordingly, each of these committee's charters will be amended to require certain membership overlap to ensure a consistent approach to reputational risk management and best practices.

Formal Committee Process Framework. The Committee Operating Group of the Client and Business Standards Committee will be responsible for establishing and maintaining a formal policy framework for committee best practices, processes and procedures governing all aspects of committee operations, including charters, regular meeting agendas, minutes and statements of action. The Committee Operating Group will require formal, periodic self assessments by committees of their activities and effectiveness, including member participation. These results will be presented to their supervising committee. The Client and Business Standards Committee and the Management Committee will be able to review these self assessments.

This recommendation reflects our objectives of strengthening reputational excellence and committee governance.

Recommended Committee Structure

The following chart reflects the new committee governance structure for the firm.



[1] Regional Client and Business Standards Committees report to executive leadership in the region and to the Firmwide Client and Business Standards Committee (coordinating with Divisional Client and Business Standards Committees as appropriate)
[2] Day-to-day responsibility to Division Heads; reporting / appeals / escalation to Firmwide Client and Business Standards Committee

SECTION VII: TRAINING AND PROFESSIONAL DEVELOPMENT

A. INTRODUCTION AND OVERVIEW

The success of the Business Standards Committee's efforts will be measured by how effectively our people act on its recommendations. Over time, effective training and development will enrich our corporate culture and strengthen the values of client service and our focus on reputational risk management.

Corporate culture is hard to define, but easy to recognize. We believe our culture is central to our ability to be successful. Yet even strong corporate cultures must evolve and adapt to changes in the business environment. In the aftermath of the financial crisis it is especially important for Goldman Sachs to adapt and evolve.

The Committee's implementation of recommendations will begin immediately in January 2011, starting with a meeting of all partners and followed by a meeting of all extended managing directors. In addition, the orientation in January 2011 for new PMDs and EMDs will include sessions related to the Committee's recommendations.

The goal of these efforts will be for top leadership to set the right tone and galvanize the firm into action. We will focus on the observations and recommendations of the Committee's report, and what the recommendations mean for our employees. This will serve as a guide for how we expect our employees to embrace and act upon the Committee's recommendations.

Over the next year, the firm's Chairman and CEO will lead a global program involving the firm's 2,200 PMDs and EMDs to reinforce the most important attributes of our culture. We will roll out a comprehensive program of communication and training to ensure that the critical themes and messages of the Committee are disseminated throughout each division and region of the firm. In addition, we will design and implement training and professional development to implement each of the recommendations in the report.

B. GUIDING PRINCIPLES

Our recommendations reflect the following guiding principles:

- Culture. The strength of Goldman Sachs' culture is critical to the firm's continued success. That culture must maintain its core values while continuing to evolve and adapt to changes in the market, regulation and the competitive and macro-economic environment.
- Leadership. Culture starts at the top of an organization. People must see their leaders and managers embodying the values and behaviors that exemplify the Goldman Sachs culture.
- Training and Professional Development. All training and professional development programs will emphasize the importance of our culture and reinforce the values embedded in our Business Principles.
- Communication. The firm's leaders should regularly communicate, both formally and informally, about our culture and values to ensure that they are part of every person's professional behavior.
- Recognition. Recognition includes compensation, promotion, assignments and mobility opportunities. The firm must make clear the link between the behavior expected of its people and the recognition used to encourage it. This is critically important because it signals broadly the way we expect people to behave and conduct business.

C. DISCUSSION AND RECOMMENDATIONS

C-1. Culture and Leadership

For more than 140 years, Goldman Sachs professionals have been building a culture based upon shared values that guide behavior and business dealings. These values – including client focus, excellence, integrity and teamwork – must inform how every person at Goldman Sachs behaves, interacts with clients and otherwise fulfills his or her daily responsibilities. These values are fundamental to earning the trust of clients, the confidence of stakeholders and the respect of the public at large.

Our culture – and employee confidence in and commitment to it – has remained strong following the financial crisis and the intense scrutiny of the industry and Goldman Sachs. That said, the events of the last several years and the results of both our external client survey and our internal culture survey[19] indicate that we need to reinforce certain aspects of our culture. We are committed to providing professional development programs that will strengthen key aspects of our culture, including:

- Client Orientation
- Reputational Excellence
- Personal Accountability
- Teamwork
- Long-Term Focus
- Professional Excellence

To ensure that our values are embedded in the activities and decision-making of our employees, we must repeatedly emphasize the importance of the firm's culture. We expect the firm's leaders to emphasize our values to our people at conferences, townhalls, other group meetings and in their day-to-day business activities. This is especially important given the firm's growth over the last decade. A majority of our people have been at the firm for less than five years. Instilling a sense of shared values across the firm requires that we constantly and rigorously emphasize, both formally and informally, our culture and each individual's responsibility for it.

The Business Standards Committee makes the following recommendations on our culture and leadership:

34. The firm will initiate professional development and training, beginning with its senior leaders, to immediately focus those leaders on reinforcing the firm's culture and on strengthening client relationships and reputational excellence. In addition, the firm will use milestones in people's careers as opportunities for targeted training on the Goldman Sachs culture. This recommendation reflects our objectives of strengthening client relationships, reputational excellence and training and professional development.

35. Our Chairman and CEO will lead the new Chairman's Forum on Clients and Business Standards, a global program engaging all of the firm's 2,200 PMDs and EMDs. This initiative will represent a large investment of time of our senior management team over the course of 2011 and will reinforce the most important attributes of our culture through in-depth discussions and case studies. The significant involvement of the CEO and other

[19] The firm regularly conducts an online culture survey of its employees. The Committee accelerated the timing and expanded the scope of the survey to have employee feedback for consideration in developing recommendations.

senior management communicates the importance of the program and its messages. This recommendation reflects our objectives of strengthening client relationships, reputational excellence and training and professional development.

These programs will (i) emphasize the firm's Business Principles and the client service values in order to reinforce the key cultural attributes identified above; (ii) provide early opportunities to review in detail the Committee's recommendations with the firm's senior leaders; (iii) reflect and incorporate key elements of our culture; and (iv) promote dialogue on the application of the Committee's recommendations to our businesses and the conduct of our people.

The major elements of the 2011 training and professional development programs are shown below:

C-2. Personal Accountability

Events during the financial crisis underscored the importance of managing reputational risk. Each employee of Goldman Sachs has responsibility for protecting the firm's reputation; an employee can do more to harm the firm's reputation through a single poor judgment than he or she can do to enhance it throughout an entire career. We believe that we must manage reputational risk with the same rigor as financial risk, and that each employee must focus on reputational risk.

36. To strengthen reputational excellence, the Business Standards Committee recommends that the firm emphasize the following criteria in the annual performance review process: (i) adherence to reputational risk management and (ii) reputational judgment and compliance. These enhancements were implemented for the 2010 performance review process.

C-3. Training and Professional Development

The implementation of the Committee's recommendations will require extensive training and a considerable investment of time and resources as discussed in greater detail in Section VIII, Implementation. The Committee believes that this training should emphasize the firm's culture and the firm's expectations for conduct and behavior. The better employees understand *why* we have certain expectations about behavior and conduct, the more likely they are to make good judgments.

37. To strengthen training and professional development, the Business Standards Committee recommends that the firm and each affected division design and implement training and professional development programs which address the Committee's specific recommendations.

C-4. Recognition

Recognition can powerfully communicate and reinforce expectations about appropriate behavior, when it is applied visibly and consistently. It can motivate people to behave in accordance with the highest standards of the firm. The converse is also true: when recognition is given to those who fail to meet the expected standard of behavior, or when deserved recognition is not given consistently, it can have a negative impact on employee behavior, and ultimately weaken the firm's culture.

In evaluating performance, the firm needs to give appropriate weight to leadership, culture and values along with commercial productivity. The firm will continue to focus on behaviors that exemplify client orientation, reputational excellence, personal accountability, teamwork, long-term focus and professional excellence and better link them to the firm's overall recognition programs, including promotion, compensation, assignments and mobility opportunities.

38. The Business Standards Committee recommends that the firm strengthen its focus on the importance of leadership, culture and values in the PMD and EMD promotion process by communicating to all involved their responsibility to thoroughly evaluate candidates on these attributes. This was accomplished in the 2010 PMD and EMD promotion process.

    Communications during performance reviews, promotion and compensation conversations must be clear and specific so that our employees understand the correlation between recognition and behavior, particularly behavior related to leadership, culture and values.

    This recommendation reflects our objective of strengthening reputational excellence.

C-5. Business Principles and Code of Business Conduct and Ethics

Acting with integrity and maintaining high ethical standards are critical values embedded in our Business Principles. Similarly, the firm's Code of Business Conduct and Ethics is intended to embody the commitment of the firm to conduct its business in accordance with all applicable laws, rules and regulations and with the highest ethical standards. While the Business Principles contain a set of core values, the firm's Code of Business Conduct and Ethics provides more specific guidance requiring amendment or updating from time to time. Both of these documents serve to maintain and encourage the compliance culture of the firm, a crucial element of our continued success.

39. To strengthen reputational excellence and training and professional development, the Business Standards Committee recommends that the firm update and strengthen the Code of Business Conduct and Ethics. Through that process, we will signal its importance and articulate the need for every employee to operate in accordance with the code. The firm should reinforce the importance of the Code of Business Conduct and Ethics by requiring employees to certify their compliance with the Code, highlighting it in orientation and training sessions and posting it more prominently on the firm's external and internal websites.

SECTION VIII: IMPLEMENTATION

A. INTRODUCTION

This final section of the Business Standards Committee report discusses the overall plan for implementing our recommendations. We view the recommendations as an integrated and complementary package of initiatives, each of which is concrete, realistic and achievable. Senior management and the Board of Directors are unequivocally committed to the implementation of all of the recommendations and expect our people to dedicate themselves to this effort. Finally, the Committee recognizes that the ultimate impact of its work will not be determined by what is written in this report but rather on how well the people of Goldman Sachs adapt their values and behavior to reflect the recommendations in the report.

An Oversight Group, consisting of senior leaders, will oversee the overall implementation effort. The Oversight Group will provide senior management and the Board of Directors with progress reports on the implementation effort and, more importantly, on how effective the changes are in achieving the Committee's larger goals. Below, we provide an overview of how the firm plans to execute these commitments.

The implementation plan has three basic principles. The first is ownership. One or more leaders of the firm have been assigned primary or secondary responsibility for the implementation of each of the Committee's recommendations. The second principle is accountability. Implementation leaders and their teams – through the Oversight Group – will report to senior management and the Board of Directors on their progress. The third, and more complex principle, is evaluation – is the implementation process yielding the desired results in promoting strengthened core values and culture across the firm?

The Committee's recommendations require major initiatives in training and professional development and substantial written documentation. Fulfilling these objectives requires a "plan within a plan" of implementation, which is discussed in parts C and D below.

B. IMPLEMENTATION FRAMEWORK

The key elements of implementation are: (i) Ownership and Oversight; (ii) Written Implementation Plans; (iii) Timing Commitments; (iv) Communication; and (v) Follow-Up and Evaluation.

- Ownership and Oversight. The Oversight Group will lead and oversee the implementation effort. As noted in Recommendation 29, one of the formal responsibilities of the newly formed Client and Business Standards Committee is overseeing implementation of the Business Standards Committee's recommendations. Accordingly, the Oversight Group will report to the Client and Business Standards Committee, to senior management and to the Board of Directors.

  Each recommendation has primary and secondary owners (Implementation Owners). The Implementation Owners include senior leaders from revenue producing divisions as well as the support and control side of the firm, reflecting the cross-divisional efforts required.

  For example, for structured products, the Implementation Owners have created separate workstreams including technology build outs, documentation, new policies and procedures and training materials. The Securities Division, the Technology Division, the Legal and Compliance Departments and other control functions are all committing substantial resources to this effort.

- Written Implementation Plans. A written implementation plan has been prepared for each of the Committee's recommendations and includes the following information:
  - the Implementation Owners;
  - a description of the implementation plan, including the concrete steps required and the defined outcome and goals;
  - a description of training and professional development required;
  - a list of critical items that are essential to determining overall timing;
  - a list of new documentation and documentation updates;
  - a description of any technology resources needed as well as any other special resources (such as external training experts) needed; and
  - a timetable for completion.

These written implementation plans are not intended to be static documents. They are tools to facilitate meeting deadlines and milestones, and Implementation Owners will review and update them regularly.

The complexity of the implementation plans varies by topic. The implementation of the recommendations related to structured products is especially complex. It will require a considerable amount of work including major technology build outs to implement the pre- and post-transaction sales practices and to standardize procedures with respect to origination and disclosure. Similarly, the implementation plan for Committee Governance in Section VI will require a large effort, since the charters for new firmwide committees must be created and those for existing committees must be updated.

- Timing Commitments. Given the amount and complexity of the work to be done, the Committee has avoided fixed deadlines and instead established targets by calendar quarters. Successful implementation is a beginning, not an end. For example, our success in reemphasizing the client service values can only be measured over time.

  A few recommendations have already been implemented. For example, the enhancements to our Information Barrier and wall crossing procedures outlined in Recommendation 7 are in effect. The firm has also completed the move of certain origination activities from the Securities Division to the Financing Group as contemplated by Recommendation 8.

  We recognize that timeframes cannot be rigid. The firm may need to adjust priorities in response to changing circumstances, including external events that impact our business and are beyond our control. The Committee is also acutely aware of the regulatory reform efforts underway in the United States and around the world that are certain to place enormous demands on our employees and resources. In certain cases, we have prioritized the implementation of the Committee's work to address the most critical changes first.

- Communication. One of the five broad priorities that run through the Committee's recommendations is enhancing transparency of communication and disclosure. For example, as noted in Recommendation 4, the new Client and Business Standards Committee will oversee a firmwide client franchise enhancement program. This program will include dialogue with our clients about the work of the Business Standards Committee. We also expect to have dialogue with our shareholders and the investor community about certain changes we are making, such as the changes in our financial disclosures. In addition, we will continue to post our regulators on the progress of our implementation of the recommendations.

- Follow-Up and Evaluation. The real test of success of the Business Standards Committee process will be whether the recommendations bring about the desired improvements in business standards and behavior. Accordingly, as implementation occurs over the next year and beyond, we will need to develop mechanisms to realistically evaluate how well we are meeting our underlying objectives.

C. TRAINING AND PROFESSIONAL DEVELOPMENT

For our business standards to adapt and change, our people need to adapt and change. Training and professional development is the essential tool in that process of adaptation and change because it reaches our people directly and in a strong and meaningful way.

The recommendations in this report have substantial training requirements. These requirements are in some cases firmwide initiatives and, in others, divisional and business-specific initiatives. For many firmwide initiatives, the training will have to reach all our people. For division or business-specific initiatives, the training will also have to reach large audiences. For example, we anticipate that the training on structured products, which will be highly specialized and intensive, will be rolled out globally to over 2,100 professionals in the Securities and Investment Management Divisions.

In light of the scale of this effort, we have created a Training Oversight Group consisting of senior business leaders. Each training initiative has a "Training Owner" responsible for roll out and for overseeing the development of the training curriculum for their programs. In areas such as Structured Products and Conflicts of Interest where significant changes are being introduced, the training materials will be very detailed and time consuming to develop. As necessary, Training Owners will work with outside vendors to develop the curriculum and content.

In developing a roll out plan for the training initiatives, we have analyzed a number of different factors. For example, we considered whether the training program needs to address a change in our organizational structure (e.g., the movement of a business unit), a change in our policies and procedures (e.g., updated written communication guidelines), or a change to our technology. The firm has also considered whether the training initiative should apply firmwide (e.g., training regarding the client service values) or should be targeted to a specific division or business unit (e.g., training regarding new disclosure and origination standards for newly issued securities products). We also identified a target audience for each training program. These audiences can include employees with specific titles and levels of seniority as well as employees with specific experience levels (e.g., experienced new employees versus recent graduate employees).

D. DOCUMENTATION

Written policies and procedures are an essential component of the compliance culture at Goldman Sachs. A critically important part of implementing the work of the Business Standards Committee involves updating and / or writing new policies, procedures and other key documents. The Committee places great importance on documentation because it is a key element in ensuring accountability. While long-standing business practices may develop without formal codification, there is a significant risk that good practices may not endure without documentation, particularly given employee turnover, and that accountability will be lost.

The Committee's recommendations will require a number of new documents as well as updating and revision of existing policies, procedures and documentation. An inventory of documentation updates and new documentation requirements (Documentation Inventory) has been created and a senior leader from either the Legal Department or the Compliance Department (or individual business units as necessary) has been assigned ownership as the document owner of each item included in the Documentation Inventory.

As part of the written implementation plans, a proposed timeframe has been identified for each item on the Documentation Inventory, recognizing that document owners will need the flexibility to adjust schedules and prioritize items which mitigate the greatest risks and are responsive to regulatory developments.

E. THE BUSINESS STANDARDS COMMITTEE EFFORTS IN PERSPECTIVE

In every case, we expect to verify when the implementation, training initiatives and documentation updates relating to the Business Standards Committee effort are complete. However, the critical, long term question is whether implementation of the recommendations as a whole has had a meaningful and sustained impact on our business standards and culture, particularly with respect to client service and reputational excellence. Looked at in that light, the ultimate success of the Business Standards Committee effort will need to be judged over an extended period of time through a combination of self-evaluation and feedback from our clients and our other stakeholders.

Membership

Board Committee Overseeing the BSC

William W. George, Chair
Professor of Management Practice at Harvard Business School and Former Chairman & Chief Executive Officer at Medtronic

James J. Schiro
Former Chief Executive Officer of Zurich Financial Services

Lois D. Juliber
Former Vice Chairman and Chief Operating Officer, the Colgate-Palmolive Company

H. Lee Scott, Jr.
Chairman of the Executive Committee of the Board of Directors, Wal-Mart Stores, Inc.

Business Standards Committee

E. Gerald Corrigan, Co-chair
Managing Director, Executive Office

J. Michael Evans, Co-chair
Vice Chairman of Goldman Sachs, Chairman of Goldman Sachs Asia

Alan M. Cohen
Global Head of Compliance

Gwen R. Libstag
Head of the Firmwide Business Selection and Conflicts Clearance Group

Edith W. Cooper
Global Head of Human Capital Management

Timothy J. O'Neill
Co-Head of the Investment Management Division

Michael D. Daffey
Global Head of Equities Sales and Securities Distribution Europe

John F. W. Rogers (ex officio)
Chief of Staff and secretary to the Board of Directors

Edward C. Forst
Co-Head of the Investment Management Division

Harvey M. Schwartz
Global Co-Head of the Securities Division

Richard J. Gnodde
Co-CEO of Goldman Sachs International

Sarah E. Smith
Controller and Chief Accounting Officer

David B. Heller
Global Co-Head of the Securities Division

David M. Solomon
Co-Head of the Investment Banking Division

Kevin W. Kennedy
Head of Latin America

John S. Weinberg
Vice Chairman of Goldman Sachs, Co-Head of the Investment Banking Division

Honorable Arthur Levitt, Jr.
Senior Advisor to Goldman Sachs and Former Chairman of SEC

Matthew Westerman
Global Head of Equity Capital Markets

Of Counsel: David J. Greenwald, Esq.
Deputy General Counsel and International General Counsel

COO: Jeffrey W. Schroeder
Chief Administrative Officer

H. Rodgin Cohen, Esq.
Senior Chairman, Sullivan & Cromwell
Outside Counsel

EXHIBIT E

FEDERAL RESERVE BANK *of* NEW YORK

33 LIBERTY STREET, NEW YORK, NY 10045-0001

DAVID L. GROSS
COUNSEL AND VICE PRESIDENT

October 10, 2013

VIA ELECTRONIC MAIL (Abrams_NYSDChambers@nysd.uscourts.gov)

Hon. Ronnie Abrams, U.S.D.J.
United States District Court
for the Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square, Room 2203
New York, NY 10007

Re: Carmen Segarra v. Federal Reserve Bank of New York
Civil Action No.: 13-CV-7173

Dear Judge Abrams:

I represent Defendant Federal Reserve Bank of New York (the "New York Fed") in the above-referenced matter, and respectfully submit this application for an expedited protective order under Rule 26(c) of the Federal Rules of Civil Procedure. Earlier today, plaintiff filed a Complaint in the above-referenced matter, which contains Confidential Supervisory Information ("CSI") that is protected from public disclosure by federal law. See 12 C.F.R. Part 261. The New York Fed seeks (1) an order removing the Complaint from the Court's public, electronic docket pending further proceedings to determine the extent of redactions or sealing required; and (2) a hearing at the Court's earliest convenience to discuss the nature of the CSI included in the Complaint.

By way of background, Plaintiff Carmen Segarra was an employee of the New York Fed from October 2011 until May 2012, when she was terminated for cause. Ms. Segarra has brought a lawsuit against the New York Fed alleging unlawful termination and seeking reinstatement and damages. At various paragraphs in her Complaint, Plaintiff has summarized the work she conducted as part of the New York Fed's supervision of financial institutions. For example, meetings with a supervised financial institution are pleaded at paragraphs 22 to 28, 75 to 76, and 79; deliberations within the New York Fed are pleaded at paragraphs 63 to 68; and discussions with a different banking regulator are pleaded at paragraph 77. Plaintiff also attached a number of exhibits that she obtained during her work at the New York Fed, including meeting notes, document requests, correspondence with a supervised financial institution, and examination summaries. Several of the attachments are stamped "Restricted FR" and "Confidential Supervisory Information."

Plaintiff's allegations regarding the New York Fed's supervisory work and all of the attachments to her Complaint are CSI. Under federal law, CSI is confidential and privileged property of the Board of Governors of the Federal Reserve System (the "Board"), and its use is subject to authorization by the General Counsel of the Board. See 12 C.F.R. §§ 261.2(c)(1)(i) and (iii) (defining "[c]onfidential supervisory information" to include "any information derived from [or] related to" "reports of examination, inspection and visitation, confidential operating and condition reports" or "[a]ny documents prepared by, on behalf of. or for the use of . . . a Federal Reserve Bank"); 261.22(a) ("It is the Board's policy regarding confidential supervisory information that such information is confidential and privileged. Accordingly, the Board will not normally disclose this information to the public."); 261.22(e) ("All confidential supervisory information made available under this section shall remain the property of the Board. Any person in possession of such information shall not use or disclose such information for any purpose other than that authorized by the General Counsel of the Board without his or her prior written approval.") (emphasis added).

The New York Fed is not aware that Plaintiff has obtained, much less sought, permission from the Board's General Counsel to publish the CSI contained in her Complaint. (Nor did Plaintiff seek or obtain permission to possess any CSI after she was terminated in May 2012.) Plaintiff's counsel did not discuss the incorporation of CSI into the Complaint with any attorney from the New York Fed prior to filing. Indeed, the New York Fed only became aware of Plaintiff's unauthorized disclosure late this afternoon, when it was served with the Complaint and when various news outlets began reporting its contents. On behalf of the New York Fed, I called Plaintiff's counsel to seek her consent to remove the Complaint from the Court's docket pending further proceedings. As of the writing of this letter, I have not received a response.

Rule 26(c) provides that a "court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." Fed. R. Civ. P. 26(c). In this instance, there is good cause for removing the Complaint from the Court's public docket pending a hearing: to prevent the unlawful public dissemination of CSI. The confidentiality of supervisory information is critical to free communication between the New York Fed and supervised financial institutions; the unauthorized disclosure of CSI harms the mandate of this institution to conduct examinations for the safety and soundness of the nation's financial system. Supervised financial institutions will be less inclined to share sensitive information if they cannot rely on the guarantee that the New York Fed will keep that information confidential. By contrast, the burden on Plaintiff for removing the Complaint from the public docket pending further proceedings is minimal. Plaintiff will have an opportunity to argue in favor of publication, which the Court can then decide to grant in whole or with appropriate redactions. But in the meantime, the harm to the New York Fed, the other banking

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regulator mentioned in the Complaint, and the supervised financial institution at issue will be great and cannot be undone.

Under all these circumstances, the New York Fed respectfully requests: (1) an order removing the Complaint from the Court's public, electronic docket pending further proceedings to determine the extent of redactions or sealing required; and (2) a hearing at the Court's earliest convenience to discuss the nature of the CSI included in the Complaint.

Thank you for your consideration.

Respectfully submitted,

David Gross

Dat id Gross
Counsel and Vice President

cc: Linda J. Stengle, Esq., Counsel for Plaintiff (via e-mail to linda@lindastengle.com)
Thomas C. Baxter, Jr., Esq., General Counsel, Federal Reserve Bank of New York
Thomas M. Noone, Esq., Attorney, Federal Reserve Bank of New York

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33 LIBERTY STREET, NEW YORK, NY 10045-0001

DAVID L. GROSS
COUNSEL AND VICE PRESIDENT

October 11, 2013

FILED ON ECF AND SENT VIA ELECTRONIC MAIL
(Abrams_NYSDChambers@nysd.uscourts.gov)

Hon. Ronnie Abrams, U.S.D.J.
United States District Court
for the Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square, Room 2203
New York, NY 10007

Re: **Carmen Segarra v. Federal Reserve Bank of New York**
Civil Action No.: 13-CV-7173 (RA)

Dear Judge Abrams:

The Federal Reserve Bank of New York (the "New York Fed") respectfully submits this letter in the above-referenced matter in support of our emergency application for a protective order. The New York Fed's position is that portions of the complaint and attachments should not be publicly filed because they contain Confidential Supervisory Information ("CSI") under 12 C.F.R. Part 261 and must therefore be removed from public access. The New York Fed also requests that the Court order Plaintiff and her counsel not to publish any other CSI without further order of the Court.

The Second Circuit enumerated the steps a district court must take when deciding whether documents may be removed from public access in *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110 (2d Cir. 2006). Under the Second Circuit's framework, the first step is to determine whether the documents at issue are "judicial documents." *Id.* at 119. "Judicial documents" are those documents filed with the court that are "relevant to the performance of the judicial function and useful in the judicial process." *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("Amodeo I"). If the court determines that the documents are "judicial documents," the court must assess the weight to be given to the presumption in favor of public access to the documents. *Lugosch*, 435 F.3d at 119. The weight assigned must be "governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts. Generally, the information will fall somewhere on a continuum from matters that directly affect an adjudication to matters that come within a court's purview solely to insure their irrelevance." *United States v. Amodeo*, 71 F.3d 1044, 1049 (2d Cir. 1995) ("Amodeo II"). Finally, "after determining the weight of the

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presumption of access, the court must balance competing considerations against it. . . . Such countervailing factors include but are not limited to the danger of impairing law enforcement or judicial efficiency and the privacy interests of those resisting disclosure." *Lugosch*, 435 F.3d at 120 (quoting *Amodeo II*, 71 F.3d at 1050) (internal quotation marks omitted).

The Second Circuit has held that "the mere filing of a paper or document with the court is insufficient to render that paper a judicial document subject to the right of public access." *Amodeo I*, 44 F.3d at 145. The documents filed in the appendices to the complaint in this matter are not judicial documents; they are bank supervisory materials that fall into two categories: (i) internal New York Fed e-mails and memoranda evaluating an institution that the New York Fed supervises; and (ii) documents provided to the New York Fed by Goldman Sachs, a supervised institution. These documents are all CSI. *See* 12 C.F.R. §§ 261.2(c)(1)(i) and (iii) (defining "[c]onfidential supervisory information" to include "any information derived from [or] related to" "reports of examination, inspection and visitation, confidential operating and condition reports" or "[a]ny documents prepared by, on behalf of, or for the use of . . . a Federal Reserve Bank"). These documents show that at the time she left the employ of the New York Fed, she purloined property of the Board of Governors of the Federal Reserve System. *See* 12 C.F.R. 261.22(e) ("All confidential supervisory information made available under this section shall remain the property of the Board. <u>Any person in possession of such information shall not use or disclose such information for any purpose other than that authorized by the General Counsel of the Board without his or her prior written approval.</u>") (emphasis added).

But assuming that the Court finds that these documents are "judicial documents," and the common law presumption of access attaches, the competing considerations against public disclosure in this matter outweigh the presumption. There is no question that the documents in the appendices are CSI: several of them are stamped as "Confidential Supervisory Information." Memos that were written by Plaintiff are designated by her as "Restricted FR," meaning that she understood how sensitive they were and that they were both: (i) never to be disclosed to the public; and (ii) property of the Federal Reserve System. ("Restricted FR" is the Federal Reserve System's second-highest classification level. Documents containing that designation may not be publicly disclosed without authorization.) By publishing these documents with the Complaint, Plaintiff has engaged in a flagrant and clear violation of Federal law.

Even under the *Lugosch* First Amendment analysis, "the presumption of access . . . can be overcome . . . by specific, on-the-record findings that higher values necessitate a narrowly tailored sealing." *Lugosch*, 435 F.3d at 126. In fact, the Second Circuit acknowledged that something like the attorney-client privilege might well be a sufficiently compelling reason to warrant a narrow sealing order like the one we seek here. *Id.* at 125. The bank examination privilege has been widely acknowledged. *See In re Bankers Trust Co.*, 61 F.3d 465, 471 (6th Cir.

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1995); *In re Subpoena Served Upon Comptroller of Currency*, 967 F.2d 630, 633-34 (D.C. Cir. 1992); *Linde v. Arab Bank, PLC*, No. 04 Civ. 2799, 2009 WL 3055282, at *1 (E.D.N.Y. Sept. 21, 2009); *Bank of China v. St. Paul Mercury Ins. Co.*, No. 03 Civ. 9797, 2004 WL 2624673, at *4 (S.D.N.Y. Nov. 18, 2004). The bank examination privilege, like the attorney-client privilege, exists so that supervised institutions (the equivalent of clients) share their most sensitive, confidential information with their supervisor (the equivalent of an attorney). In fact, the Congress amended Federal law by passing the Regulatory Relief Act of 2006, Section 607 of which enables supervised institutions to share information protected by the attorney-client privilege with their supervisors without the sharing constituting a waiver. 12 U.S.C. § 1828. The obvious policy reason is to encourage such a communication between the supervised and the supervisor. The current law shows the convergence between the attorney-client privilege and the bank examination privilege.

Federal law is very clear on the subject. CSI may not be communicated by any Federal Reserve employee without the permission that is required by the regulation. Ms. Segarra had no permission. She purloined CSI when she was discharged by the New York Fed, and now seeks to use the Court as an enabler of further wrongful communication of that information. In effect, her complaint is a vehicle for that further wrong. The incantation of a "public right to know" cannot ever be a license to discharged employees that they may violate Federal law simply by filing a complaint in Federal court.

Moreover, the Federal Reserve has shown zero tolerance for employee disrespect of the rules of Federal law that protect bank examination material. We attach an allocution before Judge Pauley of a former New York Fed employee who pleaded guilty to a criminal information for stealing confidential supervisory information. *United States v. Garzon*, 98-CR-1500, at 14-17 (S.D.N.Y June 4, 1999). Judge Pauley's acceptance of the plea in *Garzon* shows that this court recognizes such conduct as criminal. *See* Exhibit 1. We cannot turn a blind eye to Ms. Segarra's substantially similar conduct here.

Before concluding, the New York Fed must address one piece of material information that was omitted from Ms. Stengle's letter of October 11, 2013. In that letter, Ms. Stengle "opened the door" on settlement discussions that began with a letter sent to the New York Fed's General Counsel on behalf of Ms. Segarra. While Ms. Segarra has now publicly communicated some of those discussions, she has not communicated her demand that the New York Fed pay her over $7 million. Obviously, she believes that the "right to know" has a multi-million-dollar price tag. She is incorrect that the New York Fed never met with her prior counsel: I met with him on several occasions. But she is correct that we had no interest in that kind of "settlement" proposal.

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Ms. Segarra has a right to have her case adjudicated in this Court, and we are ready and willing to litigate and prove she was discharged for good reason. We are not saying that she cannot put on proof of her claim. But the case must be litigated within the bounds of Federal law, and Ms. Segarra does not get to decide what law she will and will not follow. We ask the Court to instruct the parties as to what Federal law says, and to issue a narrow sealing order protecting the bank examination privilege by sealing the parts of the complaint that contain it, paragraphs 16, 17, 20-34, 36-39, 41-43, 46-52, 59-90, 95, 97, 105, and 107, and all of the appendices. Finally, we request that the Court order Plaintiff and her counsel not to publish any other CSI without further order of the Court.

Thank you for allowing us to be heard earlier today, and thank you for your consideration of our application.

Respectfully submitted,

David Gross

David Gross
Counsel and Vice President

cc: Linda J. Stengle, Esq., Counsel for Plaintiff (via e-mail to linda@lindastengle.com)
Thomas C. Baxter, Jr., Esq., General Counsel, Federal Reserve Bank of New York
Thomas M. Noone, Esq., Attorney, Federal Reserve Bank of New York

Exhibit 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
------------------------------x

UNITED STATES OF AMERICA,

v. 98 Cr. 1500

MAURICIO GARZON,

Defendant.

------------------------------x

June 4, 1999
9 a.m.

Before:

HON. WILLIAM H. PAULEY, III,

District Judge

APPEARANCES

MARY JO WHITE
United States Attorney for the
Southern District of New York
DAVID GREENWALD,
Assistant United States Attorney

MARK R. HELLERER, ESQ.
Attorney for Defendant

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(Case called)

THE COURT: Would counsel give their appearances for the record.

MR. GREENWALD: David Greenwald for the government.

MR. HELLERER: Mark Hellerer from Winthrop Stimson for the defendant, Mr. Garzon.

THE COURT: Good morning, Mr. Hellerer.

I am informed, Mr. Hellerer, that the defendant has an application in this matter. What is that application?

MR. HELLERER: It's not actually an application, your Honor. We are here on a misdemeanor information that was filed with the court on our last appearance and Mr. Garzon is prepared today to plead guilty to that misdemeanor information.

THE COURT: All right.

Very well. Is this plea pursuant to a plea agreement?

MR. GREENWALD: Yes, your Honor.

THE COURT: Would you hand up an executed copy, Mr. Greenwald, and I will ask my deputy to mark it as Court Exhibit 1, and then pass it up to me for my inspection.

All right, at this time I am going to ask my courtroom deputy to administer the oath to the defendant,

Mr. Garzon.

(Defendant sworn)

BY THE COURT:

Q. Mr. Garzon, do you understand that you are now under oath and that if you answer any of my questions falsely your false or untrue answers may later be used against you in another prosecution for perjury or making a false statement?

A. I do, your Honor.

Q. Mr. Garzon, what is your full name?

A. Mauricio Garzon.

Q. How old are you?

A. 35.

Q. How far did you go in school?

A. Graduate program in business.

Q. From what college or university?

A. New York University.

Q. Did you obtain a degree?

A. Masters in business administration.

Q. Are you able to read, write, speak and understand English?

A. Yes.

Q. Are you now or have you recently been under the care of a doctor or a psychiatrist?

A. No, sir.

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Q. Have you ever been treated or hospitalized for any mental illness or any type of addiction, including drug or alcohol addiction?

A. No, sir.

Q. In the past 24 hours have you taken any drugs, medicine or pills or have you drunk any alcohol?

A. No, sir.

Q. Is your mind clear today, Mr. Garzon?

A. Yes, it is, your Honor.

Q. Are you feeling all right today?

A. Yes.

Q. Are you represented by counsel?

A. Yes, sir.

Q. And who is that?

A. Mr. Mark Hellerer.

THE COURT: Mr. Hellerer, do you have any doubt as to Mr. Garzon's competence to plead at this time?

MR. HELLERER: No, your Honor.

Q. Now, Mr. Garzon, your attorney has informed me that you wish to enter a plea of guilty. Do you wish to enter a plea of guilty?

A. Yes, sir.

Q. Have you had a full opportunity to discuss your case with your attorney and to discuss the consequences of entering a plea of guilty?

A. Yes, sir.

Q. Are you satisfied with your attorney, Mr. Hellerer, and his representation of you in this matter?

A. Yes, sir.

THE COURT: On the basis of Mr. Garzon's responses to my questions and my observations of his demeanor here in my courtroom this morning, I find that he is fully competent to enter an informed plea at this time.

Q. Mr. Garzon, before I accept any plea from you I am going to ask you certain questions. My questions are intended to satisfy me that you wish to plead guilty because you are guilty and that you fully understand the consequences of your plea. I am now going to describe to you certain rights that you have under the Constitution and laws of the United States which rights you will be giving up if you enter a plea of guilty. Please listen carefully.

If you do not understand something I am saying or describing, stop me and either I or your attorney, Mr. Hellerer, will explain it to you more fully.

Under the Constitution and the laws of the United States you have the right to a speedy and public trial by a jury on the charges against you which are contained in the misdemeanor information. Do you understand that?

A. Yes, sir, I do.

Q. If there were a trial, Mr. Garzon, you would be

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presumed innocent and the government would be required to prove you guilty by competent evidence and beyond a reasonable doubt. You would not have to prove that you were innocent at a trial. Do you understand that?

A. Yes, sir.

Q. If there were a trial a jury composed of 12 people selected from this district would have to agree unanimously that you were guilty. Do you understand that, Mr. Garzon?

A. Yes, sir.

Q. If there were a trial you would have the right to be represented by an attorney and if you could not afford one an attorney would be provided to you free of cost, do you understand that?

A. Yes, I do.

Q. If there were a trial, Mr. Garzon, you would have a right to see and hear all of the witnesses against you and your attorney could cross examine them. You would have a right to have your attorney object to the government's evidence and offer evidence on your behalf if you so desired and you would have the right to have subpoenas issued or other compulsory process used to compel witnesses to testify in your defense. Do you understand that?

A. Yes, sir.

Q. If there were a trial, Mr. Garzon, you would have

the right to testify, if you wanted to, but no one could force you to testify if you did not want to. Further, no inference or suggestion of guilt could be drawn if you chose not to testify at a trial. Do you understand that?

A. Yes, sir.

Q. Do you understand that by entering a plea of guilty today you are giving up each and every one of the rights that I have described, that you are waiving these rights and that you will have no trial?

A. I do, sir.

Q. Do you understand that you can change your mind right now and refuse to enter a plea of guilty?

A. Yes, sir.

Q. You do not have to enter this plea if you do not want to for any reason. Do you understand this fully, Mr. Garzon?

A. Yes, I do.

Q. Now, Mr. Garzon. have you received a copy of the misdemeanor information?

A. Yes. I have.

Q. And have you read it?

A. Yes.

Q. And did your attorney, Mr. Hellerer, discuss the information with you?

A. Yes, he did, sir.

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Q. Do you waive my reading of the information word for word here in open court?

A. Yes, sir.

Q. Now, do you understand that the information charges you with, while being an assistant bank examiner, unlawfully taking property of value in possession of banks that were members of the Federal Reserve system in violation of Title 18 of the United States Code, Section 655?

A. I do, sir.

Q. And do you understand that you have a constitutional right to be charged by an indictment rather than by an information?

A. Yes, sir.

Q. An indictment, Mr. Garzon, would be from a grand jury and not like the information, simply a charge by the prosecutor. Do you understand that you have waived the right to be charged by an indictment and that you have consented to being charged by an information of the government?

A. Yes, sir.

Q. And do you waive this right voluntarily and knowingly?

A. Yes, I do.

Q. Mr. Garzon, do you understand that if you did not plead guilty the government would have to prove each and

every part or element of the charge in the information beyond a reasonable doubt at a trial?

A. Yes, I do.

Q. And do you understand that the government would be required to prove that you were a bank examiner or an assistant bank examiner, that you had stolen or unlawfully taken or unlawfully concealed money, notes, drafts, bonds or securities, or any other property of value from a bank or banking institution which is a member of the Federal Reserve system or insured by the Federal Deposit Insurance Corporation or a branch or agency of a foreign bank or an organization operating under Sections 25 or 25(a) of the Federal Reserve Act, do you understand that?

A. Yes, sir.

Q. Do you understand that the maximum possible penalty of the crime to which you are entering a plea of guilty is one year of imprisonment, plus a maximum fine of the greatest of $100,000, twice the gross pecuniary gain derived from the offense or twice the gross pecuniary loss to persons other than yourself resulting from the offense, do you understand that?

A. Yes, sir, I do.

Q. And do you also understand that you would be subject to a special assessment of $25?

A. Yes, sir.

Q. And supervised release of a maximum term of one year?

A. Yes, sir.

Q. And supervised release, Mr. Garzon, means that you will be subject to monitoring when you are released from prison, the monitoring to be under terms and conditions which could lead to reimprisonment without a jury trial for all or part of the term of supervised release without credit for time previously served on post-release supervision if you violated the terms and conditions of supervised release, do you understand that?

A. I do.

Q. Do you understand that if I accept your guilty plea and adjudge you guilty that adjudication may deprive you of valuable civil rights, such as the right to vote, the right to hold public office, the right to serve on a jury and the right to possess any kind of firearm?

MR. HELLERER: Your Honor, I think for a misdemeanor information that is not accurate.

THE COURT: I think you are correct on that, Mr. Hellerer, and I withdraw that statement, Mr. Garzon, recognizing that this information supersedes the prior information and only charges you with a misdemeanor.

Q. Under current law, Mr. Garzon, there are sentencing guidelines that judges must follow in determining

Case 1:13-cv-07173-RA Document 4 Filed 10/11/13 Page 16 of 25

your sentence.

Have you talked with your attorney, Mr. Hellerer, about the sentencing guidelines?

A. Yes, sir.

Q. Do you understand that the court will not be able to determine your guideline sentence until after a presentence report has been completed by the U.S. Probation office and you and the government have had a chance to challenge any of the facts reported by the probation office?

A. Yes, sir.

Q. Do you further understand that even after it is determined what guideline range applies to your case I have the authority in some circumstances to impose a sentence that is higher or lower than the sentence called for by the guidelines?

A. Yes, sir.

Q. Do you understand that if you are sentenced to prison parole had been abolished and you will not be released any earlier on parole?

A. Yes, sir.

Q. Do you understand that if your attorney or anyone else has attempted to estimate or predict what your sentence will be, that their estimate or prediction could be wrong?

A. Yes, sir.

Q. No one, Mr. Garzon, not even your attorney or the

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government, can nor should give you any assurance of what your sentence will be. Your sentence cannot be determined until after the probation office report is completed and I have ruled on any challenges to the report and determined whether I believe there are grounds to depart up or down from the guideline range, do you understand this?

A. I do.

Q. Do you also fully understand that even if your sentence is different from what your attorney or anyone else told you it might be or if it is different from what you expect, you will still be bound to your guilty plea and you will not be allowed to withdraw your plea of guilty?

A. I do, your Honor.

Q. Now, I have been given a plea agreement dated May 20, 1999 which has been marked as Court Exhibit 1.

Have you signed this plea agreement, Mr. Garzon?

A. Yes, sir.

Q. Did you read this agreement prior to signing it?

A. I did.

Q. Did you discuss it with your attorney, Mr. Hellerer, prior to the time you signed it?

A. I did.

Q. And did you read it at the time you signed it?

A. Yes, I did.

Q. Did you fully understand this agreement before

you signed it?

A. Yes, sir.

Q. Does this letter agreement, Court Exhibit 1, constitute your complete and total understanding of the entire agreement between the government, your attorney and you?

A. Yes, sir.

Q. Is everything about your plea and sentence contained in this agreement?

A. Yes, sir.

Q. And has anything been left out?

A. No, sir.

Q. Has anyone offered you any inducements or threatened you or forced you to plead guilty or to enter into this plea agreement which is Court Exhibit 1?

A. No, sir.

Q. Do you understand that as part of this plea agreement you are giving up or waiving your right to appeal if I sentence you within the guidelines range?

A. I do, sir.

Q. Do you understand that I am completely free to disregard any position or recommendation by your attorney or by the government as to what your sentence should be and that I have the ability to impose whatever sentence I believe is appropriate under the circumstances and

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guidelines and you will have no right to withdraw your plea?
A. I do.
THE COURT: Mr. Hellerer, do you know of any valid defense that would prevail at trial or do you know of any reason why your client should not be permitted to plead guilty?
MR. HELLERER: No, your Honor.
THE COURT: Is there an adequate factual basis to support this plea of guilty, Mr. Hellerer?
MR. HELLERER: We believe so, your Honor. I think the government believes so as well.
THE COURT: Mr. Greenwald, in the government's view, is there an adequate factual basis to support this plea of guilty?
MR. GREENWALD: Absolutely, your Honor.
Q. Mr. Garzon, please tell me what you did in connection with the crime to which you are entering a plea of guilty?
A. Yes, sir. While I worked at the Federal Reserve Bank as part of my job responsibilities I took certain documents home to work on them and kept --
Q. You have to speak up. I am having trouble hearing you.
A. While working for the Federal Reserve Bank as part of my job responsibilities I took certain documents

home to work on them and kept those documents after I left the Federal Reserve and some of those documents were of a confidential nature.

Q. And when did you do this?

A. I worked at the Federal Reserve between 1995 and 1997.

Q. And where did you work at the Federal Reserve Bank, what branch of the Federal Reserve Bank did you work at?

A. The Federal Reserve Bank of New York.

Q. Here in the Southern District of New York in lower Manhattan?

A. Yes, sir.

Q. And at that time what was your position at the Federal Reserve Bank?

A. It was assistant bank examiner.

Q. And did you know at the time that you were taking these documents home that that was unlawful?

MR. HELLERER: One moment, your Honor.

(Pause)

A. The taking of the documents it was my understanding it was illegal to take the documents and to keep them after I left. I understand it was illegal.

Q. So is it your testimony that you took documents home while employed and after you left the Federal Reserve

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Bank you never returned those documents to the Federal Reserve Bank?

A. Yes, sir.

Q. Is that correct?

A. That is correct.

Q. And when you failed to return those documents to the Federal Reserve Bank, did you know that that was wrong?

A. I knew it was wrong.

MR. GREENWALD: If your Honor can just confirm that among the documents the defendant failed to return were documents that belonged to banks that were members of the Federal Reserve system.

Q. What kind of documents did you fail to return to the Federal Reserve Bank upon your departure from the employ of the Federal Reserve Bank?

A. Internal policies and procedures, some documentations for pricing model testing, just internal manuals for procedures written by the banks.

Q. What banks were these?

A. They were Chase Manhattan Bank, Bankers Trust, Chemical Bank and J.P. Morgan, sir.

Q. And you knew those institutions to be members of the Federal Reserve system?

A. I did.

THE COURT: Would the government please summarize

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its evidence against the defendant?

MR. GREENWALD: Yes.

The government's evidence against the defendant would consist primarily of the introduction of documents seized pursuant to a search warrant from the defendant's home and from his workplace that the government would prove by competent evidence came from examinations that the defendant had worked on.

Q. Mr. Garzon, how do you now plead to the charge in the information, guilty or not guilty?

A. Guilty, sir.

Q. Are you pleading guilty because you are guilty?

A. Yes, sir.

Q. Are you pleading guilty voluntarily and of your own free will?

A. I am.

THE COURT: Mr. Hellerer, do you wish me to make any further inquiries of Mr. Garzon?

MR. HELLERER: No, your Honor, I don't think any further inquiry is required.

THE COURT: Does the government wish me to make any further inquiries of the defendant?

MR. GREENWALD: No, your Honor.

THE COURT: Mr. Garzon, because you acknowledge that you are guilty as charged in the information and

because I find you know your rights and are waiving them knowingly and voluntarily, and because I find your plea is entered knowingly and voluntarily and is supported by an independent basis in fact containing each of the essential elements of the offense, I accept your guilty plea and adjudge you guilty of the offense to which you have pleaded.

Now, the U.S. Probation office will next prepare a presentence report to assist me in sentencing you. You will be interviewed by the probation office. It is important that the information you give the probation officer be truthful and accurate. The report is important in my decision as to what your sentence will be. You and your attorney have a right and will have an opportunity to examine the report, challenge or comment upon it, and to speak on your behalf before sentencing.

I am going to fix September 10, 1999 at 2:30 as the date and time for sentencing in this matter.

Do either counsel have any applications with respect to or requests to alter any bail conditions?

MR. HELLERER: If I may just have a moment, your Honor.

THE COURT: Certainly.

(Pause)

MR. HELLERER: Your Honor, since the intervening period between now and the sentencing is over the summer

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months, Mr. Garzon would like to have his bail geographical limitations extended so that he can visit family in California and in Massachusetts over the course of the summer and I don't believe that the government has any objection to that request.

THE COURT: Mr. Greenwald.

MR. GREENWALD: No objection.

THE COURT: Very well. I am going to modify the geographic limitations on Mr. Garzon's bail conditions to extend them to include California and Massachusetts for the purpose of Mr. Garzon visiting with members of his family who reside in those states and I will note that Mr. Garzon has appeared here on each occasion when the court has required his appearance and I have previously allowed Mr. Garzon to travel outside of the United States for a business purpose with the consent of both counsel in this matter.

So I am modifying his bail conditions to that extent.

Now, Mr. Garzon, do you understand that if you fail to return to my courtroom for sentencing on the day and time set that you will be guilty of a criminal act for which you could be sentenced to imprisonment separate and apart from and in addition to any other sentences you might receive for the crime to which you have just pleaded guilty?

THE DEFENDANT: I do, sir.

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THE COURT: And do you further understand that all of the conditions on which you were released up to now continue to apply except that I have extended the geographic limitations and a violation of any of those conditions can be severe?

THE DEFENDANT: Yes, sir.

THE COURT: Then I will fully expect to see you in my courtroom on the date of sentencing and I will at this time advise counsel and you, Mr. Garzon, that when the date of sentencing comes around we will not be in this courtroom but we will be in courtroom 618 in this building, just four floors above where we are presently sitting. So I will expect to see you in courtroom 618 on September 10, 1999.

Is there anything further that we need to address at this time?

MR. HELLERER: I don't believe so, your Honor.

MR. GREENWALD: No, your Honor.

THE COURT: Very well.

Thank you, gentlemen.

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EXHIBIT F

OPERATIONS REVIEW REPORT

Federal Reserve Bank of New York

Bank Supervision Group

December 2009

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INTRODUCTION AND SCOPE

A review of the operations of the Bank Supervision Group (the Group) of the Federal Reserve Bank of New York (the Reserve Bank) was completed during the weeks of November 30 and December 7, 2009. The review team consisted of officers and senior staff from the Board of Governors and eight Federal Reserve Banks; a list of the individual team members appears at the end of this report. The previous operations review occurred in May 2005.

The primary objective of the operations review was to evaluate whether the Reserve Bank's policies, processes, and products for its supervision and regulation programs adequately support performance of its delegated responsibilities and meet requisite standards and objectives of the System supervision function.

The scope of the review addressed the core safety-and-soundness and consumer compliance business lines, including large, regional, community and foreign bank supervision programs, market and liquidity risk, consumer compliance and consumer complaints. In addition, we reviewed the Applications function, which resides in the Legal Group, having been moved from the Bank Supervision Group in 2007. To assess the Reserve Bank's supervision function, we relied on existing supervisory guidance, such as SR and CA letters, the Reserve Bank's internal policies and procedures, and accepted sound practices.

On Thursday, December 10, 2009, we presented our findings to the officers responsible for each program area reviewed, and summarized those findings for Executive Vice President William Rutledge, and Senior Vice Presidents Zahra El-Mekkawy, Brian Peters, and Marc Saidenberg. On Wednesday December 23, 2009, Bill Spaniel and Paul Robin summarized the material findings for President William Dudley, General Auditor Edward Smith, and Executive Vice President Rutledge.

EXECUTIVE SUMMARY

Since the emergence of the financial crisis in the first half of 2007, the Reserve Bank and the Bank Supervision Group have operated in an extraordinarily challenging and stressful environment. Despite the strains on personnel, the Reserve Bank's officers and staff have responded to the financial market turmoil, banking crisis, and consequences of severe economic recession with outstanding commitment and teamwork. The Group's contributions to System initiatives, crisis management, and the supervisory response to the deterioration in banking conditions, have been exceptional. When market issues unfold, the Group is highly effective at gathering pertinent information quickly and comprehensively from across firms on specific topics, such as liquidity and funding, counterparty exposure, and other risk areas. Throughout the crisis, management and staff both led and supported numerous System initiatives that were critical to the success of the Federal Reserve's broader mission and objectives, while also taking steps to adapt the Reserve Bank's supervision program to address the urgent, large-scale problems faced by the banking sector. By playing a major role in System initiatives, focusing on external vulnerabilities, and reallocating supervisory resources to where they were most needed, the Bank Supervision Group made large contributions to stabilizing the individual major institutions in the Second District. These actions were accomplished despite the reality of having to work in an unprecedentedly difficult financial and economic environment throughout the crisis period.

The financial market turmoil and reassignment of personnel to crisis management activities have made it difficult during 2008 and 2009 for some large bank teams to fulfill some supervisory program objectives. These factors have also contributed to staffing shortages in regional, community, and foreign banking supervision programs, and in the risk specialty areas. The Group accelerated hiring in 2008 and 2009, and will finish 2010 with a personnel increase of nearly 24 percent over staffing levels at year-end 2007, when the dimensions of the future financial crisis were still unknown. A large portion of the increase in personnel helped to offset the transfer of experienced staff to new bank holding company dedicated teams, and filled the need for technical skills and industry experience in the risk units. Notwithstanding the personnel increases, resource allocation remained a challenge for the Group at the time of the review due to the critical priority of resolving the financial crisis.

The operations review team's major finding is that the superb crisis management efforts of the past two years were of necessity accomplished by deferring important aspects of the institution-specific supervision program. Although the Reserve Bank generally met its supervisory responsibilities, the team identified a number of improvement opportunities that are described in this report. The demands of System initiatives such as the Supervisory Capital Assessment, Troubled Asset Restructuring, and

Financial Sector Assessment Programs in 2009, required senior management to reprioritize staff assignments and objectives, with the result that components of the supervisory process were not performed. Specifically, our team found that due to necessary priority adjustments, some institution-specific supervision was unable to consistently meet System standards with regard to the following:

- quality, and consistency of supervisory documents and processes;
- rigor of analysis and support for some supervisory conclusions;
- timeliness of some supervisory communications and products; and
- clarity of communications with supervised institutions.

As the economy and the banking system recover, and the demands of crisis management work subside, senior management of the Bank Supervision Group will continue to address how they should modify the Reserve Bank's supervisory program and resource allocation in the context of "lessons learned." Central to this question is how the Group will allocate staff resources between different but complementary supervisory objectives as outlined recently by Chairman Bernanke – improve our ability to identify and correct problems in individual financial institutions, and move to a supervisory approach that considers the stability of the financial system as a whole.[1] The Bank Supervision Group has long been the System leader in developing horizontal perspectives on financial industry risk management practices, and much of the Group's work during the crisis has moved the Reserve Bank's supervision program in the direction outlined by the Chairman.

The review identified improvement opportunities primarily in the performance of safety-and-soundness supervision, including the Applications function which is part of the Reserve Bank's Legal Group but reliant on the Bank Supervision Group for analysis and input. The review also identified improvement opportunities in the consumer compliance supervision program and in the administration of consumer complaints.

[1] "Monetary Policy and the Housing Bubble," speech by Chairman Bernanke at the Annual Meeting of the American Economic Association, Atlanta, Georgia, January 3, 2010.

FINDINGS

Safety-and-soundness Supervision

For safety-and-soundness supervision, the report groups findings into five **recommendations**, each of which is composed of related elements that we discuss in more detail below. The five recommendations are:

1. Fully implement the System's Consolidated Supervision and Compliance Risk Management guidance across all applicable portfolios;
2. Improve the timeliness of supervisory ratings, communications, products, and processes;
3. Improve the quality, content, and consistency of supervisory documents and processes;
4. For the Applications function, reinforce accountability, enhance processes, and strengthen analytical skills for both safety-and-soundness and Applications staff; and
5. Evaluate resource prioritization and allocation, with the goal of staffing to meet System standards for institution-specific supervision and our evolving macro-prudential efforts.

Fully implement Consolidated Supervision Guidance across all applicable portfolios

The Bank Supervision Group has not yet fully implemented the Consolidated Supervision or the Compliance Risk Management guidance.[2] We **recommend** that management fully implement the System's Consolidated Supervision and Compliance Risk Management guidance across all applicable portfolios. This recommendation has four related components:

- ensure that continuous monitoring efforts are sufficient to support the ongoing validation of supervisory and risk assessment ratings, and timely ratings changes;
- update risk assessments and supervisory plans on an ongoing basis to reflect changes in the institutions' risk profile and financial performance;
- make the coordination with primary and functional regulators more transparent and effective; and

[2] *SR 08-09/CA 08-12 Consolidated Supervision of Bank Holding Companies and the Combined U.S. Operations of Foreign Banking Organizations* and *SR 08-8/CA 08-11 Compliance Risk Management Programs and Oversight at Large Banking Organizations with Complex Compliance Profiles.*

- where needed, strengthen work regarding compliance with *SR 08-8 Compliance Risk Management Programs*.[3]

Ensure that continuous monitoring efforts are sufficient to support the ongoing validation of supervisory and risk assessment ratings, and timely ratings changes

There should be more explicit linkage between continuous monitoring efforts and staff perspectives on supervisory ratings and their subcomponents. Specifically, analysis and conclusions drawn from documents such as management meeting notes, target examination reports, monthly reports or quarterly analyses, and analytical products developed by the Risk staff, should significantly contribute to the updating of risk assessments and supervisory plans, as warranted. Supervisory issues raised by primary or functional regulators should inform this process as well. We observed that monthly reports and/or quarterly analyses were largely factual discussions of supervisory events, financial performance or institutional events, and that these documents lacked critical evaluations with respect to the relevant events' impact on supervisory ratings and risk assessments/supervisory plans. Management should ensure that continuous monitoring efforts are sufficient to support the ongoing validation of supervisory and risk assessment ratings, and the timeliness of ratings changes.

Update risk assessments and supervisory plans on an ongoing basis to reflect changes in the institutions' risk profile and financial performance

The team found that some risk assessment and supervisory plan documents were not being updated in response to changes in institutional risk profiles and/or in financial performance. At present, changes to these documents are generally annual events as opposed to ongoing evaluations based on current information about the risk profile or control framework as emerging risks are identified. An important goal of continuous monitoring is to apply information regarding emerging risks faced by the supervised institution to necessary changes in supervisory direction and strategy to address the

[3] A fifth objective relates to Consumer Compliance supervision and is described below in the Consumer Compliance section of this report.

evolving concerns. Management should direct staff to update risk assessments and supervisory plans on an ongoing basis, to reflect changes in institutional risk profiles or in financial performance.

Make the coordination with primary and functional regulators more transparent and effective

Effective implementation of consolidated supervision recognizes the interdependencies of primary and functional regulators and their respective oversight responsibilities and actions. Particularly in the Large Complex Institutions and FBO portfolios, our team observed that Bank Supervision Group staff meet with domestic and foreign supervisors, participate in supervisory colleges, and share supervisory products under existing protocols and mechanisms. However, our team did not observe that these efforts were clearly connected or integrated into the risk assessments, supervisory plans, and other documents that support consolidated supervision.

- Specifically, these documents did not provide sufficient transparency that Bank Supervision Group staff were relying on the supervisory work of primary and functional regulators to inform Federal Reserve supervisory assessments or shape supervisory plans. Even in those cases where staff had gathered the supervisory plans of the primary or functional regulators, staff did not document the impact of those regulators' plans on the Federal Reserve's own risk assessments and supervisory plans. Management should direct staff to improve the transparency with which the staff document how they are leveraging the work and opinions of the other regulators to improve the effectiveness and efficiency of the Group's supervisory program.

- Also with respect to transparency, in a number of cases our team could not determine whether Reserve Bank staff evaluated the work of other supervisors in reaching judgments about whether that work met our standards as the consolidated supervisor. If the work of the functional regulators (or our access to that work) does not meet our standards as the consolidated supervisor, then Reserve Bank staff should document the gaps in supporting documents, explain the work that Reserve Bank staff will perform to fill the gap.

Where needed, strengthen work regarding compliance with *SR 08-8 Compliance Risk Management Programs*

We found examples where the examination teams need to perform more work to determine compliance with *SR 08-8 Compliance Risk Management Programs.*

- In one example, the supervisory plan did not always address activities to determine compliance with *SR 08-08.* The dedicated team is comfortable, based on information obtained through discovery reviews, that the firm's compliance risk management function complies with the guidance; however the team agreed going forward to document their evaluation in the risk assessment.

- In another example, the team was not able to complete its assessment of compliance with *SR 08-8*, and completion of the assessments did not appear to be planned until 2011. The team has completed considerable testing of compliance risk management at the firm; however, they have not always compared the firm's practices to the guidance.

Improve the timeliness of supervisory ratings, communications, products, and processes

Our team found opportunities to improve timeliness throughout the Group's supervisory program. Timeliness of supervisory products and processes, and of delivery of supervisory messages to the banking institutions, becomes even more important given current banking conditions. This is a repeat finding from the 2005 operations review, which recommended that the Bank Supervision Group improve timeliness of supervisory products and processes. The Bank Supervision Group took steps to improve timeliness following that review, but because our team found issues related to timeliness during this review, we conclude that additional efforts are necessary. Thus, we **recommend** that management continue progress to improve the timeliness of supervisory ratings, communications, products, and processes. The recommendation includes four components, which are described below:

- Make prompt adjustments to supervisory ratings when warranted;
- Deliver timely supervisory communications;

- Improve timeliness of examination products and processes; and
- Ensure timely and effective follow-up on supervisory issues.

Make prompt adjustments and interim changes to supervisory ratings when warranted

In the Large Complex Institutions supervision program, we found that supervisory ratings were not always updated on an ongoing basis to reflect the evolving risk profile and financial condition of the organization. Specifically the team found ratings updates tended to be calendar-driven events; ratings were usually assigned annually, and did not always reflect ongoing changes in the supervisory team's identification of evolving supervisory conditions or emerging risks. In some cases, there was evidence of a changing risk profile and deterioration at the supervised organization, but no intermediate change in supervisory ratings. System guidance[4] requires that supervisory ratings reflect a current assessment of an institution's financial condition and risk profile; up-to-date ratings are important because ratings affect a range of statutory and regulatory requirements, including supervisory reporting and examination requirements.

Improve timeliness of examination products and processes in Community supervision

In Community supervision, our review found some instances where the distribution of examination reports and the documentation of workpapers was not timely. The timeline for the examination process was often quite extended, with six months or more elapsing from the on-site start date until the date the report was mailed. A protracted examination cycle delays the communication of the supervisory findings, which adversely affects the timeliness of correction on supervisory issues. We also found delays in documenting the resolution of supervisory issues in the Community supervision program. Posting of workpapers to the Electronic Workpapers (EWP) database was not timely in several instances.

Management and staff explained that extended timeframes for the examination process are chiefly the result of limited availability of staff. We acknowledge that shortage of staff in the Community

[4] *SR 99-17, Supervisory Ratings for State Member Banks, Bank Holding Companies and Foreign Banking Organizations, and Related Requirements for the National Examination Data System.*

supervision program could be a reason for the extended timeframes, but our review team has also communicated to Reserve Bank staff where process improvements could contribute to a more timely examination cycle.

Perform timely and effective follow-up on supervisory issues

Our team found some opportunities for more timely and effective follow-up on supervisory issues, and examples where the staff were delayed in recording supervisory issues and follow-up actions in the Issues Tracking Database; our findings are consistent with the Bank Supervision Group's Quality Assurance report on LFI Issues Tracking performed in July 2009.

- Examples include a situation where staff did not take timely and appropriate action to validate that the organization had addressed supervisory findings. We concluded that the dedicated team should have developed a more disciplined (meaning periodic and structured) and proactive approach to assessing and validating actions taken by the firm to address supervisory issues, and thus improve how it monitored the firm's compliance with the Memorandum of Understanding (MOU).

- At another large institution, we believe that the dedicated team will need to perform analytically rigorous and timely tracking to evaluate the firm's progress to successfully implement the large number of projects underway to improve credit, market, and operational risk management systems.

- In Regional supervision, our team did not find consistent written evidence that formal and informal supervisory actions are being analyzed and assessed on a regular basis. Our review also found that staff were at times relying on verbal rather than written communications with bank or holding company management to provide supervisory feedback on the status of the institution's progress to address those supervisory actions; such communications are sufficiently important that they should be in writing. In addition, supervisory databases did not show how the status of identified supervisory concerns is being regularly monitored and updated.

Improve the quality, content and consistency of supervisory documents and processes

Our review found some examples where supervisory products are not fully completed, and supervisory processes were not fully performed, relative to System standards. We **recommend** that management take steps to improve the quality and content of supervisory documents, and the consistency of the performance of supervisory processes. This recommendation includes five components, which are described below:

- improve the quality and content of supervisory documents;
- improve the consistency of supervisory processes;
- enhance review of risk areas and communicate broader risk management themes in Regional supervision;
- strengthen oversight of Market and Liquidity Risk supervision across the LFI institutions; and
- improve supervisory processes in Community bank supervision.

Large Complex Institutions supervision: Improve the quality and content of supervisory documents

In the Large Complex Institutions supervision program, we found that weaknesses were greatest in the large FBO institutions, but we also found opportunities to improve transparency with respect to the quality, content, and consistency of supervisory documents and processes in the domestic LFIs. In this discussion, supervisory documents include the risk assessment, supervisory plan, and all documents supporting continuous monitoring.

We found that risk assessment documents did not always provide full support for risk ratings assigned. A comprehensive risk assessment is important if weaknesses within the firm are to be fully identified so that they can be addressed in the supervisory program via planned and appropriately scoped supervisory activities. We also found that risk assessments/institutional overviews were sometimes incomplete and did not always present a consolidated view of the risk of U.S. operations of the organizations.

In addition, we found that supervisory documents were not always posted to BOND in a consistent and timely manner. Scope memos for discovery reviews were not always prepared consistent with System guidance. In addition, examination reports issued by other regulators have not consistently been posted to BOND.

Improve the consistency of supervisory processes

We found that supervisory issues and supervisory actions were not consistently tracked, followed-up on, or closed out. We also found instances where supervisory issues were closed based on responses from the supervised institution's management; however, follow-up documentation did not always evidence validation or testing by the supervisory team. In some cases, there was not documentation that control functions had been sufficiently evaluated.

- Examples include a situation where the supervisory program lacked the appropriate level of focus on risk management and internal audit functions. The team had not conducted a review of the firm's corporate risk management function in a number of years. As a result, significant work remains to be done to fully evaluate the adequacy of the corporate risk management function and associated risk assessment and control processes. Additionally, the team recently assigned a satisfactory rating to internal audit without addressing how the audit function should have performed relative to identifying outsized risk taking and poor risk management in certain business lines.

- In another situation, we concluded the 2009 and 2010 supervision plans for the firm did not include enough transaction testing across the credit, market, and liquidity risk areas.

- Our team found several examples where the process for documenting the results of continuous monitoring work in the teamroom, BOND, Issues Tracking Database, or monthly reports needs improvement. In one situation, it is difficult to track the status of some of the supervisory issues, and thus it is difficult to understand how any identified risk management and control issues roll up into the overall assessment of risk management and controls at the firm. Asset quality deterioration, and the scale and complexity of the over-the-counter (OTC) trading, sales and hedging business, were emerging issues at the institution during 2009. Although these issues have been mentioned in the monthly reports, the possible significance of the issues to the firm's financial rating and risk management assessments is not clearly documented.

Certain formal communications to management do not consistently meet System guidance for addressing Matters Requiring Attention (MRAs) in communication of examination findings.[5] We found that examination reports and annual roll-up letters did not consistently identify the MRAs identified during discovery and target reviews conducted throughout the supervisory cycle, and did not always include specific timeframes for corrective action on MRA issues.

Regional supervision: Enhance review of risk areas and communicate broader risk management themes

In Regional supervision, we found that risk factors at the some of the regional holding companies were not always evaluated at a critical level of depth or detail. For example, some risk assessments and supervisory plans were prepared using dated financial information, and lacked critical analysis of the key control functions and processes at the institution.

With respect to the state member banks, the analysis in supervisory documents was more consistently thorough and better documented. We found, however, that state member bank examination reports did not always effectively communicate the broader supervisory concerns that the board of directors needs to hear. In some cases, the reports would deliver a more effective message if they presented the supervisory concerns framed in risk management themes as opposed to individual findings. Specifically, the reports and work products should focus more on forward-looking observations and broader risk management themes.

Strengthen oversight of Market and Liquidity Risk supervision across the LFI institutions

In Market and Liquidity Risk, we found that the allocation of resources and rigor of analysis and documentation that supports this supervision program are not consistent across the portfolio of LFI institutions. Management should strengthen its oversight of this program across the LFI portfolio. Current management and staff are experienced, knowledgeable, and committed to delivering a strong oversight program; the program has been considerably deepened and strengthened in the past two

[5] *SR 08-1, Communication of Examination/Inspection Findings.*

years. Acknowledging this significant progress, management also agrees with our assessment that additional work is needed to deliver an appropriate level of supervisory activities (continuous monitoring, control validation reviews and discovery reviews) to support timely risk management and control assessments across the portfolio of LFI institutions.

Our review of the liquidity risk-related supervisory activities and assessments at one foreign LCBO indicated that the supervisory approach for the company is not at a comparable rigor and depth when compared to supervisory guidance and to similar companies of a like size, risk profile and complexity. The firm has a very complex structure and risk profile with significant market positions in several key areas (e.g., domestic and international clearing and settlement, derivatives, etc.). The complex structure and activity, let alone the volatile nature of recent and current market conditions, supports the need for more intensive supervisory coverage.

With regard to the market and liquidity risk program overall, management should review staffing needs to determine the adequacy of coverage in terms of staffing numbers and skill sets. The assessment should include the market, liquidity, and models/methodologies teams, and span examination activities, continuous monitoring, related supervisory activities (such as follow-up and issue resolution), special projects, and evolving macro-prudential commitments. Management should adjust staff levels based on the review results.

All three teams -- market, liquidity, and models/ methodologies -- have played key roles throughout the market disruption, and going forward demand for the teams' skills clearly exceeds supply. In 2010, we see the Reserve Bank has planned supervisory activities across multiple areas such as commodities and derivatives reviews, price/valuation methodologies, Basel II models support, enhanced market risk monitoring, the pending incentive compensation horizontal review, and evolving macro-prudential commitments. With the range of future supervisory assignments for the staff seemingly open-ended, there is a risk that conflicts regarding resource prioritization could remain and, in an attempt to fill all requested assignments, service levels for core supervisory activities could fall below minimum effectiveness.

We conclude that management can more fully articulate expectations for the Market, and Funding and Liquidity Risk supervisory activities at the LFI institutions. These expectations should be consistent with System standards and should provide a foundation or floor of coverage to ensure sufficient resources across the portfolio. Expectations should similarly be set to guide the target objectives expected for offline monitoring, special projects, and evolving macro-prudential activities. After the minimum expectations are defined, the resource assessment described above can be conducted to evaluate the adequacy of staffing and skills against the target commitments.

<u>Improve supervisory processes in Community bank supervision</u>

The team found opportunities to bring greater consistency and transparency to examination and supervision processes and thus improve administration of the Community bank supervision program. Management should reinforce expectations regarding continuous monitoring activities, issues tracking processes, and vetting processes to achieve greater consistency. Staff should more clearly document decisions to either not carry issues from workpapers to examination reports, or to change the issues' significance.

The staff's process to review state examination reports, to assess the state's findings and the appropriateness of state-assigned ratings, is informal. Although staff reported that they review the state reports, there was no documentation of their review or the results of their assessment of the examination findings and ratings. Management told our team that staff were recently informed of the need to document these reviews, and to document whether there is Federal Reserve concurrence with the assigned ratings. Management also stated that more formal procedures would be incorporated into the unit's processes regarding continuous monitoring. We encourage management to develop and implement procedures as soon as possible to ensure that the Community bank supervision program complies with System guidance.[6]

[6] *SR 99-17*, cited earlier, and *AD 09-12, Rating Differences between the Federal Reserve and the State Supervisory Agencies*, issued August 13, 2009. AD 09-12 states that if there is a disagreement with the CAMELS composite or component ratings assigned by the state supervisory agency, the Reserve Bank should assign a separate rating and communicate both the rating and the reason for assigning that rating in writing to the board of directors of the banking organization, the appropriate state supervisory agency, and the Board of Governors.

Applications: Reinforce accountability, clarify responsibilities, and strengthen skills

With respect to applications, especially domestic applications, the review found that the current structure and process to review safety-and-soundness issues in the Applications function are not satisfactory; the resulting supervisory products and decisions do not meet System expectations and standards. We **recommend** that management reinforce accountability for the Applications function, clarify roles and responsibilities between the Bank Supervision Group and the Applications department, strengthen applications analysis skills for both groups, and ensure that key processes are performed. Specifically, we found that:

- The safety-and-soundness review of Applications proposals should be performed by staff who are accountable for this aspect of the review, and who feel a sense of ownership for the results. Staff should have the skills to perform financial and managerial analysis, identify issues requiring further review, and ensure resolution of issues prior to taking approval action, as well as sufficient training in the Applications function to understand how to apply the skills in context.

- Analysis of novel, expansionary proposals, and membership applications, should be expanded to ensure that staff perform a comprehensive assessment of the overall risk profile of the organization that will result from the proposed transaction, and a determination of whether that risk profile is acceptable from a safety-and-soundness perspective.

- Management should ensure that staff perform, or participate in, a pre-membership examination before approving any membership application regarding a bank that has key red flags or a dated safety-and-soundness report.

- Applications and safety-and-soundness staff should work collaboratively to monitor bank compliance with commitments related to approval of specific applications. The Applications function should produce and distribute to the safety-and-soundness, consumer, and legal sections a quarterly report on outstanding commitments.

- Management should direct staff to evaluate whether the proposed bank's investment in premises will conform to the requirements of Regulation H and generally accepted occupancy requirements.

Reinforce accountability for analysis that supports the Applications function, and clarify roles and responsibilities

Despite efforts by the Applications staff to gain input from the Group's safety-and-soundness staff, safety-and-soundness staff members reported in our interviews that they do not have sufficient time to review the proposals closely; as a result, safety-and-soundness staff rely on the Applications staff to identify issues that need further consideration. Roles and responsibilities between the safety-and-soundness staff and the Applications staff are either not fully understood by staff or not enforced by management. Applications staff believe that issue identification is being performed by safety-and-soundness staff, while safety-and-soundness staff believe that issue identification is being performed by Applications staff; as a result, our team found that there is a significant deficiency with respect to the overall accountability and ownership for the safety-and-soundness review of proposals.

Improve training and strengthen skills for both groups of staff

The situation regarding issue identification described above is made worse because Applications staff members have limited backgrounds and training with respect to finance, accounting, or other supervision matters. For this reason, and by the Reserve Bank's internal guidance[7], Applications staff are expected to rely heavily on safety-and-soundness relationship managers to review the proposals and perform issue identification. However, this protocol is not followed; Applications staff develop the requests for additional information, and write the financial and managerial analysis of the proposal, despite their limited background and experience to perform these tasks; as a result, the analyses are narrowly focused. Meanwhile, staffing constraints in safety-and-soundness make it difficult for those staff to devote the requisite time needed to comprehensively evaluate proposals, much less develop the requests for additional information, and perform the financial and managerial write-ups. Our review also found that safety-and-soundness relationship managers have received limited training in the

[7] Bank Supervision Group *Instruction Bulletin 832, Responsibilities and Procedures for Reviewing Bank Applications*, issued March 13, 2008.

applications area, and this lack of training further hampers their ability to identify applications-specific concerns.

Expand analysis of novel, expansionary proposals, and membership applications

Our review also found a significant deficiency with respect to the analysis of novel, expansionary and membership proposals. The record for these types of proposals generally reflects insufficient documented analysis of the overall risk exposure and the acceptability of the risk exposure. Further, branch proposals do not take into consideration certain statutory and safety-and-soundness aspects. Examples of factors that do not appear to be consistently considered or were not mentioned in the record include: why the novel activity was considered to be a safe and sound practice; what would be the resulting asset quality of the pro forma organization; why the future prospects of the resulting organization are consistent with approval; and why membership applications for prospective membership banks with declining asset quality and other negative indicators should be approved.

Perform or participate in a pre-membership examination before approving applications for banks with red flags or dated safety-and-soundness information

We conclude that the Reserve Bank should have performed pre-membership examinations of two applicant institutions that showed signs of financial weakness when their applications were evaluated. Board guidance[8] requires that pre-membership examinations of state nonmember banks, national banks, and savings associations seeking to convert to state membership status will not be required if the bank or savings association seeking membership meets the criteria for "eligible bank." However, in the case of two recently processed membership conversions, the applications were approved without benefit of pre-membership examinations despite the fact that both institutions showed grounds for supervisory concern. The Reserve Bank should have conducted and/or participated in pre-membership examinations. As of this operations review, both banks were considered to be in less-than-satisfactory condition and one may possibly fail.

[8] *SR 98-28, Examinations of Insured Depository Institutions Prior to Membership or Mergers into State Member Banks.*

Management should ensure that safety-and-soundness staff conduct or have significant participation in a pre-membership examination prior to approving any membership application regarding a bank that is in deteriorating financial condition or has not received a recent safety-and-soundness examination.

Monitor bank compliance with commitments related to approval of specific applications

Our review found that the Reserve Bank had not fully implemented a system for monitoring the status of outstanding commitments related to approval of specific applications. This finding is consistent with the Bank Supervision Group's Quality Assurance review of commitment monitoring, which concluded that there is no formal process to track and review compliance with commitments. Although the Reserve Bank now has internal guidance[9] that outlines procedures that both Applications and Bank Supervision Group staff must follow to monitor compliance with applications-related commitments from financial institutions, neither the Applications function nor the Bank Supervision Group complies with that guidance.

We found that some safety-and-soundness relationship staff are relying on the financial institution to attest that it complies with all outstanding commitments, rather than reviewing and evaluating the institution's actions to address the commitments. This situation depends on the effectiveness of the supervised institution's internal controls rather than on the Reserve Bank's independent review.

Applications management has committed to take corrective steps to implement *Bulletin 833* and perform its obligations, including production and distribution of a quarterly *Outstanding Commitment Report* to the appropriate safety-and-soundness, consumer, and legal staff. BSG Quality Assurance will validate performance in 2010.

[9] Bank Supervision Group *Instruction Bulletin 833, Commitments Monitoring,* and *Commitments Monitoring FAQs*, issued July 9, 2008. Specifically, the Bulletin states that the Applications unit will distribute an "Outstanding Commitments Report" to selected safety-and-soundness staff on a quarterly basis, and those staff will be responsible for tracking and assessing, at least annually, whether the institution is complying with the commitments. Safety-and-soundness staff must document their review in a "Commitments Compliance Review Memo" that is forwarded to the Applications unit. This process has not yet been fully implemented.

Evaluate whether proposed investment in premises conforms to the requirements of Regulation H and occupancy requirements

Our review of branch proposals indicated that the Reserve Bank does not evaluate limitations on investment in premises as defined in Regulation H section 208.21, as well as the generally accepted requirement that a bank must initially occupy 25 percent of newly acquired premises and 50 percent of the premises within a reasonable time period. This issue was self-identified by the Applications function, and management plans to incorporate review of this regulation, and generally accepted occupancy requirements, into the review process.

Improve quality and accuracy in Consumer Affairs analysis

The team concluded that, in a few cases, analysis of consumer affairs issues in the applications process did not cover the issues in sufficient depth, were poorly organized, or placed too much reliance on the applicant's representations rather than the analysis and opinion of consumer affairs staff. More recent consumer affairs memoranda are more concise and better organized. Further training of consumer affairs analysts, and closer review of their memoranda, should result in more consistently achieving products with high quality content.

In a number of files reviewed, the team found inaccuracies or discrepancies in the CRA or consumer compliance rating dates presented in the safety-and-soundness applications memoranda or the consumer affairs memoranda. Staff reviewing applications memoranda should more thoroughly check the CRA and consumer compliance rating dates to ensure they are accurate.

Evaluate resource prioritization and allocation

Because our review found examples where supervisory products and processes were not consistently meeting System standards, and interviews revealed that many staff members have felt and continue to feel stress from the operating environment, it would be easy to conclude that the Bank Supervision Group is understaffed. This explanation, however, is likely too simplistic, because it does not recognize the Group's recent challenges to allocate scarce resources in the face of the recent financial crisis. Nor would such an explanation recognize the significant staffing initiatives the Group has accomplished for the 2009 and 2010 budget years.[10] The Reserve Bank's supervision function faces a dynamic situation caused by the interplay of different factors: the demands of crisis management work may be subsiding in some respects while those of macro-prudential supervision are expanding, and the large number of recently hired staff are being progressively integrated into the supervision programs. This places the Bank Supervision Group at a strategic juncture, where it is timely to assess how its significant resources should be best allocated to meet all of the Group's important responsibilities.

During the financial crisis, senior management had to make numerous decisions to shift staff to address the highest priorities, and focus its primary attention on major problem situations within the Large Complex Institutions portfolio. Management also selected experienced and very senior individuals when it organized the new teams to supervise the investment banks and other major firms that converted to bank holding companies. To immediately address the challenges of having lesser experienced staff on some LFI teams, management assigned "senior relationship managers" with significant supervisory experience over such CPC teams. The goal of this structure was to enable these senior relationship managers to better understand and assess risks and breakdowns in controls across like institutions, as well as to provide additional senior oversight to these teams.

Recognizing the value of these changes, it remains the case that resource allocation questions arose in each of the safety-and-soundness areas that our team reviewed. In Consolidated supervision, the team

[10] The Bank Supervision Group (Service Line 4000) added 79 ANP in 2009 and 42 ANP for 2010. Most of the 2010 increase represents the full-year effect of personnel already hired in 2009. The increases bring the total ANP to nearly 696 for budget year 2010, an increase of 21 percent relative to 2008 ANP of 575. Subsequent to the review, the Group announced plans to propose additional supervision resources in the 2011 budget.

According to BSG management, of the new staff members hired in 2009, approximately 70 percent were experienced industry professionals. These hires were largely devoted to the new supervisory responsibilities, and to addressing the Group's highest priorities. In addition to a proactive hiring program, the Group also implemented an accelerated on-boarding process, as well as a new System training course to orient experienced industry professionals to the perspective and role of bank supervision. As of April 2010, the Group's management plans to continue recruiting staff with critically needed skills through the next eighteen months to bring the Group to a level of resources needed to address all portfolios.

concluded that a 2005 Operations Review recommendation[11] should be noted as a repeat finding because staffing seems "insufficient across the Large Complex Institutions portfolio to properly sustain continuous supervision objectives." In addition, the team reviewing other aspects of Large Complex Institutions supervision concluded that management should "critically evaluate resource allocation and experience to ensure that an effective supervisory program is carried out." In FBO supervision, the team concluded that management should "review the staffing model and overall staffing allocation currently in place for the business line." In Market and Liquidity Risk supervision, the team concluded that management should "conduct a staff resource review to determine the adequacy of coverage" relative to expected obligations, and "adjust staff levels or management priorities based on the review results." In Regional bank supervision, the team concluded management should "evaluate the resource needs and staffing model." In Community bank supervision, the team concluded that management should "thoroughly assess resource allocation" in the context of achieving "consistent performance that meets System expectations." Accordingly, we **recommend** that management evaluate the Group's resource prioritization and allocation with the goal of staffing to meet System standards for institution-specific supervision and our evolving macro-prudential efforts.[12]

Quality Assurance

The Quality Assurance (QA) section was not explicitly scoped for this review. The team, however, evaluated and leveraged the selected QA reports as part of its work. The Quality Assurance reports are generally thorough, identify relevant issues and present their findings clearly, and promote the objective of quality management for the business lines reviewed. The reports often identified many of the same issues described in this report. For many of the issues identified, management and staff had initiated steps to address the issues prior to the opening date of this operations review; management and Quality Assurance staff also acknowledged that additional work remains to fully resolve the issues identified.

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[11] Specifically, there were two closely-related recommendations related to resource allocation and prioritization: (i) that management review the sufficiency of staff across the LCBO portfolio to address the teams' capacity to properly sustain continuous supervision objectives; and (ii) that management dedicate adequate priority to provide regular and timely documentation of ongoing supervision and monitoring.

[12] The Consumer Compliance review team also concluded with a resource-related recommendation that is described later in this report.

Consumer Compliance and Consumer Complaints Supervision

Overall, the Reserve Bank's consumer compliance supervision and consumer complaint programs are effective. Consumer compliance examination reports and CRA performance evaluations are generally well written and conclusions are adequately supported. Matters raised in consumer complaints are appropriately investigated and response letters accurately address concerns raised by consumers. Our review, however, did identify some concerns regarding consumer complaint processing and consumer compliance risk assessments.

The overall concern with consumer complaint processing involves the number of experienced analysts (one) dedicated to investigating complaints, particularly given the increase in the volume and complexity of complaints received in 2009 and the anticipated continued growth in both volume and complexity. In the area of consolidated supervision of bank holding companies, consumer compliance risk assessments (separate from the general risk assessments prepared by the CPC for each institution) have not been completed for nine of the twelve bank holding companies in the Reserve Bank's LFI/LBO portfolio.

Consumer Complaints Processing and Documentation

The operations review included an evaluation of the Reserve Bank's adherence to applicable Board policies and the quality of analyses and written responses for consumer complaints. Overall, adherence to policy and the quality of analyses and responses were found to be satisfactory. However, in 2009, the Reserve Bank saw significant increases in the volume and complexity of consumer complaints, leading to the concern that one analyst dedicated to the consumer complaints function may not be sufficient.

The Reserve Bank's volume of consumer complaints increased significantly from 354 in 2008 to 624 (a 76 percent increase) in 2009. Over the same time period, an increase occurred in the volume of consumer complaints received from Congressional offices. Specifically, Congressional complaints increased from 14 to 61 (a 336 percent increase). Many of the 2009 complaints involved complex issues, including foreclosure and loan modifications. The number of complaints closed outside the

Board standard of 60 days increased from 12 complaints in 2008 to 30 complaints (an 150 percent increase) in 2009. In 2009, in approximately 40 percent of the cases, the Federal Reserve supervised entity responded to the complaint more than 7 days after the due date of the response.

Until the fourth quarter of 2009, the Reserve Bank had only one full-time complaint analyst who analyzed and responded to all consumer complaints, including Congressional complaints.
In the fourth quarter, given the increased volume of complaints, the Reserve Bank temporarily assigned an additional analyst, who has consumer complaint processing experience, to work on complaints. Complaint volume has increased throughout the System and the increase is expected to continue, in part due to the current economic conditions that have resulted in increased complaints related to foreclosures and loan modifications. In addition, on September 14, 2009, the Board announced a new policy that includes the investigation of complaints against nonbank subsidiaries of bank holding companies and FBOs engaged in activities covered by the consumer protection laws and regulations that the Federal Reserve enforces.[13] The Reserve Bank, in conjunction with Board staff, has tentatively identified a number of nonbank subsidiaries in the New York District that are likely to draw complaints due to their engagement in consumer credit-related activity. Prior to the new Board policy, in mid-2008 the Reserve Bank began reviewing complaints against a particular nonbank subsidiary. The number of complaints against this entity increased from 47 for 2008 to 121 for 2009 (29 of the 2009 complaints were Congressional complaints).

Given the continued increase in the number and complexity of complaints, including Congressional complaints, we **recommend** that management assess the number of experienced staff dedicated to consumer complaint processing to ensure that the Board's required processing times are met and that responses are maintained at the highest quality.

Large Bank and Consolidated Supervision

Consumer compliance risk assessments, separate from the general risk assessment, were not prepared for nine of the twelve the bank holding companies in the Reserve Bank's large bank portfolio. We

[13] *CA 09-8, Consumer Compliance Supervision Policy for Nonbank Subsidiaries of Bank Holding Companies and Foreign Banking Organizations.*

recommend that by June 2010 separate consumer compliance risk assessments be prepared pursuant to the Board policy for the applicable bank holding companies in the large bank portfolio.[14]

[14] *CA 03-51/SR 03-22, Framework for Assessing Consumer Compliance Risk at Bank Holding Companies*, and *CA 06-8, Pilot of Additional Revisions to the Draft Risk-Focused Consumer Compliance Supervision Program.*

REFERENCE LIST OF RECOMMENDATIONS

Safety-and-Soundness Supervision

We **recommend** that the Bank Supervision Group fully implement the System's Consolidated Supervision and Compliance Risk Management guidance across all applicable portfolios. This recommendation has four related components:

- ensure that continuous monitoring efforts are sufficient to support the ongoing validation of supervisory and risk assessment ratings, and timely ratings changes;
- update risk assessments and supervisory plans on an ongoing basis to reflect changes in the institutions' risk profile and financial performance;
- make the coordination with primary and functional regulators more transparent and effective; and
- where needed, strengthen work regarding compliance with *SR 08-8 Compliance Risk Management Programs*.

We **recommend** that management continue progress to improve the timeliness of supervisory ratings, communications, products, and processes. The recommendation includes four components:

- Make prompt adjustments to supervisory ratings when warranted; use interim ratings changes.
- Deliver timely supervisory communications and messages in Regional supervision.
- Improve timeliness of examination products and processes in Community supervision.
- Perform timely and effective follow-up on supervisory issues.

We **recommend** that management take steps to improve the quality and content of supervisory documents, and the consistency of the performance of supervisory processes. This recommendation includes five components:

- Improve the quality of supervisory documents in Large Complex Institutions supervision.
- Improve the consistency of supervisory processes.
- Enhance review of risk areas and communicate broader risk management themes in Regional supervision.
- Strengthen oversight of Market and Liquidity Risk supervision across the LFI institutions.
- Improve supervisory processes in Community bank supervision.

We **recommend** that management reinforce accountability for the Applications function, clarify roles and responsibilities between the Bank Supervision Group and the Applications department, strengthen applications analysis skills for both groups, and ensure that key processes are performed. This recommendation includes seven components:

- Reinforce accountability for analysis that supports the Applications function, and clarify roles and responsibilities.
- Improve training and strengthen skills for both groups of staff.
- Expand analysis of novel, expansionary proposals, and membership applications.
- Perform or participate in a pre-membership examination before approval for a bank with red flags or dated safety-and-soundness information.
- Monitor bank compliance with commitments related to approval of specific applications.
- Evaluate whether proposed investment in premises conforms to the requirements of Regulation H and occupancy requirements.
- Improve quality and accuracy in Consumer Affairs analysis.

We **recommend** that management evaluate the Group's resource prioritization and allocation with the goal of more consistently meeting System standards for institution-specific supervision as well as our evolving macro-prudential efforts.

Consumer Compliance and Consumer Complaints Supervision

We **recommend** that management assess the number of experienced staff dedicated to consumer complaint processing to ensure that the Board's required processing times are met and that responses are maintained at the highest quality.

We **recommend** that by June 2010 separate consumer compliance risk assessments be prepared pursuant to the Board policy for the applicable bank holding companies in the large bank portfolio.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARMEN M. SEGARRA,	
Plaintiff,	ECF CASE
v.	13-CV-07173 (RA)
FEDERAL RESERVE BANK OF NEW YORK, MICHAEL SILVA, MICHAEL KOH, and JOHNATHON KIM,	ORAL ARGUMENT REQUESTED
Defendants.	

<u>REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT</u>

Thomas C. Baxter, Jr.
General Counsel and Executive Vice President
Federal Reserve Bank of New York
33 Liberty Street
New York, NY 10045

Of Counsel
David Gross
Thomas M. Noone

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PRELIMINARY STATEMENT

The New York Fed and the Individual Defendants established in their Moving Brief ("Mov. Br.") that Plaintiff's federal "whistleblower" claim must be dismissed because (1) the plain language of Section 1831j does not create liability for the Individual Defendants, (2) Plaintiff failed to allege a violation of "law or regulation" by a "depository institution"—two express requirements of the statute, (3) Congress granted the right to determine the contents of examination reports to the Board of Governors and the New York Fed, not to individual employees of either institution, and (4) the Amended Complaint contains patent contradictions that defy common sense. The Defendants also moved to dismiss each of Plaintiff's pendant state law claims because, among other reasons, New York State lacks jurisdiction over the New York Fed's employment decisions, especially in light of Congress's decision to create an "at will" employment arrangement for employees of Federal Reserve Banks.

Plaintiff, in her Opposition Brief ("Opp. Br."), brushes aside the plain language of Section 1831j and proposes strained readings of "law or regulation." She trivializes Congress's definition of "depository institution" as a "phantom distinction," and ignores the statutory right of the Board of Governors and the New York Fed to make examination conclusions. And she conveniently suggests that the contradictions within her own pleadings demonstrate that the case presents material issues of fact. As for her state law claims, Plaintiff concedes some points and ignores others. Most notably, though, she misapplies state employment and consumer protection laws to the New York Fed, whose status as a federal instrumentality was reaffirmed by the Second Circuit just last week. *See Starr International Co., Inc. v. Fed. Reserve Bank of New York*, No. 12-5022-cv, 2014 U.S. App. LEXIS 1770, at *8-12 (2d Cir. Jan. 29, 2014). For the reasons explained herein and in the Moving Brief, each of Plaintiff's claims must be dismissed.

ARGUMENT

I. Section 1831j Does Not Create Liability For The Individual Defendants.

Plaintiff argues that the Moving Brief "cite[s] no mandatory authority" for dismissing her Section 1831j[1] claim against the Individual Defendants. (Opp. Br. 11.) She ignores, however, the plain language of the statute itself, which is "mandatory" authority. *See* 12 U.S.C. §§ 1831j(a)(2) (establishing violation by a "Federal banking agency," not employees of that agency) and (c) (creating a cause of action against an employer, not colleagues). She also urges this Court to disregard decisions from courts in this District and within the Third, Fifth, and Seventh Circuits, which have concluded uniformly that Section 1831j does not create individual liability (*see* Mov. Br. 7-8). According to Plaintiff, those cases are factually distinguishable because, in this case, Plaintiff has alleged "multiple counts" of misconduct. (Opp. Br. 12.) This distinction is not only erroneous,[2] but also irrelevant. Liability under Section 1831j is determined in the first instance by the words of that statute. Because Section 1831j supplies no textual basis to sue the Individual Defendants, Plaintiff's claim against them must be dismissed.[3]

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[1] Defined terms in the Moving Brief have the same meaning in this brief.

[2] *See, e.g.*, *Cosgrove v. Fed. Home Loan Bank*, No. 90 Civ. 6455, 1999 U.S. Dist. LEXIS 7420, at *2 (S.D.N.Y. Mar. 22, 1999) (noting that plaintiff brought claims for multiple "violations of her constitutional and statutory rights, discrimination based on sex, tortious interference with her employment and business relationships, and slander").

[3] Rather than address the plain language of Section 1831j, Plaintiff cites two other federal banking laws that, in her view, create "personal[] and individual[] liability" for employees of the New York Fed. (Opp. Br. 11.) Neither of these provisions applies to her claim. The first provision, 12 U.S.C. § 503, creates liability for directors and officers of a "member bank"—that is, a regulated financial institution, *see* 12 U.S.C. § 221—not for employees of a Federal Reserve Bank. The second, 12 U.S.C. § 505, expressly applies to violations of Section 19 of the Federal Reserve Act, which concerns bank reserve requirements. *See* 12 U.S.C. §§ 461-67. Plaintiff further argues that the reference in Section 505 to "institution affiliated parties" creates liability for individuals. (Opp. Br. 12.) "Institution affiliated parties," however, is a defined term that covers persons affiliated with regulated financial institutions, not employees of Federal banking agencies. *See* 12 U.S.C. § 1813(u)(1)-(4).

II. SR 08-8 is Neither a Law Nor a Regulation.

In the Moving Brief, Defendants argued that Plaintiff had not alleged a protected activity because she allegedly reported a violation of an advisory letter, not a "law or regulation." (Mov. Br. 9-11.) Plaintiff responds that SR 08-8 is a "binding regulation," and therefore supplies an actionable predicate, because it is (1) published somewhere, (2) adopted pursuant to federal law, and (3) enforced by the government's "coercive power." (Opp. Br. 4.) Plaintiff's first two reasons are inapposite because federal agency policies, interpretations, and guidance are routinely published and are adopted pursuant to some enabling statute. In other words, those two reasons are necessary but not sufficient to create "binding regulation." Plaintiff's third reason—that SR 08-8 is enforced through the government's "coercive power"—is plainly mistaken. *None* of the eight enforcement actions cited in the Opposition Brief were issued on the basis of a violation of SR 08-8. Instead, *each* of those actions refers to SR 08-8 as "guidance" for structuring remedial risk management programs prospectively.[4] Several of them expressly

[4] *See In re Citigroup*, No. 13-004-B-HC, ¶ 3(i) (Mar. 21, 2013) (requiring financial institution to "address, consider, and include" in a remedial plan "consistency with the Board of Governors' *guidance* [in SR 08-8]"); *In re JPMorgan Chase & Co.*, No. 13-002-B-HC, ¶ 3(g) (Jan. 14, 2013) (same); *In re Morgan Stanley*, No. 12-015-B-HC, ¶ 11(d) (April 2, 2012) (requiring financial institution to "address, consider, and include" in a remedial plan "compliance with supervisory *guidance* of the Board of Governors, including, but not limited to the *guidance* entitled [SR 08-8]"); *In re the Goldman Sachs Group, Inc.*, No. 11-112-B-HC, ¶ 12(d) (Sept. 1, 2011) (same); *In re Wells Fargo & Co.*, No. 11-025-B-HC, ¶ 3(b) (Apr. 13, 2011) (requiring financial institution to create a remedial plan that will "ensure that the risk management program complies with supervisory *guidance* of the Board of Governors, including, but not limited to, the *guidance* entitled [SR 08-8]"); *In re JPMorgan Chase & Co.*, No. 11-023-B-HC, ¶ 7(b) (Apr. 13, 2011) (same); *In re Bank of America Corp.*, No. 11-29-B-HC, ¶ 3(b) (Apr. 13, 2011) (same); *In re HSBC North American Holdings, Inc.*, No. 10-202-B-HC, ¶ 5(n) (Oct. 4, 2010) (requiring financial institution to "address, consider, and include" in a remedial plan "consistency with the Board of Governors *guidance* [in SR 08-8]"). (Emphases added throughout.) For ease of reference, copies of these enforcement actions are available on the Board of Governors' website at http://www.federalreserve.gov/newsevents/press/enforcement/2014enforcement.htm.

distinguish such "guidance" from "Legal Requirements."[5] The consistent description of SR 08-8 as "guidance"—including the use of that term in SR 08-8 itself (Gross Decl. Ex. A at 2) and in the Operations Review Report quoted in the Amended Complaint (Gross Decl. Ex. F at 3, 6, and 9)—overcomes Plaintiff's attempt to repurpose that advisory letter to serve her claim.[6]

Moreover, Plaintiff fails to address the tenor of SR 08-8, which is written in distinctly non-binding terms that "encourage" large financial institutions to devote adequate resources to compliance, state "expectations" for compliance with banking "principles," provide "clarification" of related matters, and recommend steps that those institutions "should generally implement." (Mov. Br. 10-11.) The use of precatory language—"should" or "encourage" as opposed to "shall" or "must"—is a cardinal distinction between a binding regulation and mere guidance. *See Brock v. Cathedral Bluffs Shale Oil, Co.*, 796 F.2d 533, 538 (D.C. Cir. 1986) (highlighting the distinction between "may" and "will"). Yet Plaintiff ignores this and other hallmarks of regulation—in particular, publication in the Code of Federal Regulations, *see id.* at 539, and enactment pursuant to public notice and comment, *see* 5 U.S.C. § 553(c)-(e)—which weigh strongly against treating SR 08-8 as "binding regulation." (Mov. Br. 9-10.)

Plaintiff suggests, in the alternative, that a violation of SR 08-8 could be actionable because that document contains "an authoritative agency's interpretation of statutes [*sic*]" and therefore "has the same effect as a regulation or statute." (Opp. Br. 7.) This argument fails for three reasons.

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[5] *See, e.g., In re Morgan Stanley*, No. 12-015-B-HC, at 4 and ¶ 3(a) (distinguishing "Legal Requirements," defined to include "state and federal laws . . . , rules, regulations, . . . court orders, . . . [and] contractual obligations," from "supervisory guidance"); *In re Wells Fargo & Co.*, No. 11-025-B-HC, at 2 and ¶ 4(b) (same).

[6] Plaintiff's "equitable estoppel" argument—that the Board of Governors "instruct[ed]" the New York Fed "to enforce SR 08-8 as a binding regulation" (Opp. Br. 7)—fails for the same reason: The source of that conclusion (the Operations Review Report) indicates unequivocally that SR 08-8 is "guidance," not a regulation. (Mov. Br. 10 n.9.)

First, Plaintiff's argument that the phrase "law or regulation" means something more than a law or a regulation strains the ordinary meaning of those three words, especially the word "or." A better reading would construe "law" and "regulation" as alternatives. "Law" means a constitution, statute, treaty, or judicial opinion. "Regulation" means a duly enacted agency rule.[7] "Or," a disjunctive conjunction, ordinarily signals a choice between alternatives. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) ("[T]erms connected by a disjunctive [should] be given separate meanings, unless the context dictates otherwise."). Nothing in the collective use of those words justifies a departure from their ordinary meanings.

Second, where Congress has intended that a federal banking statute should address agency interpretations, policies, or guidance, it has done so expressly—indicating strongly that the phrase "law or regulation" does not include interpretations, guidance, or policies.[8] In the context of Section 1831j, the decision to limit that statute to violations of "law or regulation" (as opposed to guidance) makes sense: Congress sought to protect the reporting of *illegal* activity, not unadvised or imprudent conduct. (Mov. Br. 14.)

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[7] *Compare* Black's Law Dictionary 884 (6th Ed. 1990) (stating that the sources of "law" are "statutory and constitutional enactments, as interpreted by . . . courts, and, in the absence of statute law, in rulings of its courts," and observing that the "[w]ord 'law' generally contemplates both statutory and case law"), *with id.* at 1286 (defining "regulation" as a "rule or order having force of law issued by executive authority of government").

[8] *See, e.g.*, 12 U.S.C. § 24a (referencing capital rules "under any Federal or State *law, regulation, or interpretation*"); 12 U.S.C. § 1463(c) (discussing, as separate items, "[t]he *regulations* of the Comptroller [of the Currency] and the *policies* of the Comptroller and the [FDIC] governing the safe and sound operation of savings associations"); 12 U.S.C. § 1831x(g)(2)(iii) (requiring a preemption notice where a state "*law, rule, regulation, order, or interpretation*" offers less protection than a federal regulation); 12 U.S.C. § 1843(k)(4)(G) (referring to "*regulations* prescribed or *interpretations* issued" by the Board of Governors); 12 US.C. § 1851(d)(1)(F) (permitting purchases of securities by a subsidiary insurance company that are in compliance with state "*laws, regulations, and written guidance*"); 12 U.S.C. § 1852(d) ("The Board [of Governors] shall issue *regulations* implementing this section . . . as necessary. The Board may issue *interpretations* or *guidance* . . . to an individual financial company or to financial companies in general."). (Emphases added throughout.)

Third, Plaintiff's assertion that SR 08-8 "has the same effect as a regulation or statute" because it "interprets" federal statutes (Opp. Br. 7-8) misapplies *Chevron* deference, which concerns a federal agency's interpretation of ambiguity in a governing statute. *See generally City of Arlington v. FCC, __ U.S. __*, 133 S. Ct. 1863, 1868 (2013) (summarizing the "canonical" role of *Chevron* as a method of resolving statutory ambiguity). Plaintiff has not identified any statutory ambiguity, and so there is no occasion to defer to an agency's interpretation of that statute.[9] Moreover, on its face, SR 08-8 does not cite, interpret, or apply any statute at all. (Gross Decl. Ex. A.) It merely provides forward-looking "guidance" based on the Board of Governors' responsibility as a prudential supervisor. (*Id.* at 2.)

Finally, Plaintiff's argument that the "underlying statutes collected under SR 08-8" provide a "concurrent basis" for a Section 1831j claim (Opp. at 9) also fails. The two statutes she cites authorize regulatory and examination activity in general, but do not address the contents of risk management and compliance programs for large, complex financial institutions, much less the substance or format of a "firmwide" conflict of interest policy. *See* 12 U.S.C. §§ 248 (authorizing the Board of Governors to conduct examinations, enforce banking laws, and delegate functions to Reserve Banks, among other things); 1844(b) (authorizing the Board of Governors to issue "regulations and orders" concerning bank holding companies).[10] Plaintiff's Section 1831j claim does not concern the Board of Governors' *authority* to issue regulation,

[9] Plaintiff's discussion of *Barnhard v. Walton*, 535 U.S. 212 (2002), is irrelevant for the same reason (Opp. Br. 9): That case concerned the meaning of an ambiguous word within the Social Security Act, and the Court noted that an agency's interpretation of that word need not be contained within formal regulation to justify judicial deference (even though the Social Security Administration had, in that case, promulgated formal regulation). *Barnhard*, 535 U.S. at 221-22.

[10] Plaintiff also describes to the litany of federal securities laws and regulations contained in paragraph 139 of the Amended Complaint as statutes that SR 08-8 "interprets and applies." (Opp. Br. 7.) She fails to explain, though, how insider trading and market manipulation laws are in any way relevant to SR 08-8, much less how her disagreement with management about Goldman Sachs's conflict of interest policies involved a breach of federal securities laws.

conduct examinations, or perform other functions, and therefore cannot be based on a violation of those statutes. Instead, she alleges a disagreement with more senior examiners over the substance of SR 08-8. Plaintiff does not and cannot point to any federal law or regulation on point. If Plaintiff has pleaded a violation of anything, it must be a violation of SR 08-8, as she has repeatedly alleged. (Compl. ¶ 97; AC ¶¶ 133, 151.)

III. Goldman Sachs is Not a Depository Institution.

Defendants also moved to dismiss the Section 1831j claim because that statute protects the provision of information about a "depository institution," not a holding company like Goldman Sachs. (Mov. Br. 11.) Plaintiff characterizes this as a "Phantom Distinction" and a "red herring" (Opp. Br. 5), but offers no analysis to dispute the plain meaning of the defined terms used in the statute. Instead, she observes that SR 08-8 applied to Goldman Sachs, and so it does not matter what "kind[] of banking entity" Goldman Sachs is. (*Id.*) Plaintiff misses the point: Congress defined "depository institution" and "depository institution holding company" separately, and made Section 1831j applicable to the former but not the latter. (*See* Mov. Br. 11 n.10.) Because Plaintiff did not report a violation by a "depository institution," the Court must dismiss her "whistleblower" allegations for failure to state a claim.

IV. The Board of Governors and the New York Fed Make Examination Decisions.

Plaintiff never addresses the arguments that "refusing to change her examination findings" is not actionable because (a) bank examinations, including their reports and conclusions, are entrusted by statute to the Board of Governors and the New York Fed, not to Plaintiff or any individual employee, and (b) Section 1831j protects the *provision of information*, not a disagreement between an employee and other more senior officials over the supervisory consequences of that information. (Mov. Br. 11-12.) At most, Plaintiff suggests that dismissal of her claims would create a chilling effect on "bank examiners everywhere" who would "succumb to improper pressure to change their examination findings." (Opp. Br. 16.) But she fails as a matter of law to point out where a bank examiner derives the right to a final say on the substance of an examination report. *Cf. Cosgrove*, 1999 U.S. Dist. LEXIS 7420 at *48-49 (observing the same legal lacuna in a case brought by a Federal Home Loan Bank examiner).

V. Plaintiff's Allegations are Implausible.

Plaintiff never explains the multiple contradictions within the Amended Complaint, or responds to Defendants' argument that they render her whistleblower claim implausible. (Mov. Br. 12-16.) Instead, she refers to arguments based on "facts not in evidence" (Opp. Br. 1), but never identifies those arguments or those facts. To avoid any doubt, each of the contradictions cataloged in the Moving Brief arises from the Amended Complaint and the documents that Plaintiff attached to it. For example,

- Despite her repeated allegations and statements that Goldman Sachs had no firmwide conflict of interest policy, Plaintiff's exhibits show that Goldman Sachs had published its firmwide conflict of interest policy (and other conflict of interest policies) on its public website. (AC Ex. at 55-56.)

- Plaintiff's exhibits show further that Mr. Silva *agreed* with Plaintiff that Goldman Sachs's policies could be improved, putting the lie to any suggestion that he was trying to protect the status quo. (AC Ex. at 55.)

- Plaintiff's exhibits also demonstrate that Mr. Silva raised Plaintiff's concerns to a committee of the Board of Governors, which is fundamentally inconsistent with an allegation of a cover-up. (AC Ex. at 55.)

These contradictions are not trivial; they challenge directly the notion that Plaintiff was fired for being a "whistleblower." And, for the purpose of a motion to dismiss, they provide a sound basis for the Court to conclude that Plaintiff's claim lacks "common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

VI. Plaintiff's State Law Claims Must Be Dismissed.

Consumer Protection Law. As established in the Moving Brief, the touchstone of Section 349 liability is "consumer-oriented conduct." (Mov. Br. 17.) Plaintiff responds that Defendants' alleged conduct "affects" consumer activity (Opp. Br. 14), but does not and cannot allege any conduct *oriented* toward consumers. This is hardly surprising because examinations of financial institutions are government supervisory duties, not consumer transactions. (Mov. Br. 17.)[11]

Breach of contract. Courts have routinely held that the Federal Reserve Act creates an "at will" employment relationship between a Reserve Bank and its employees, which is inherently inconsistent with contractual employment. (Mov. Br. 19-20.) Indeed, many of these courts enforced the "at will" employment arrangement *after* many federal anti-discrimination laws were already in place—defeating Plaintiff's argument that federal anti-discrimination statutes have wholly abrogated an "at will" relationship (Opp. Br. 14). As for the alleged contract with Mr. Kim, Plaintiff concedes that, at most, he broke a promise to be a good mentor (Opp. Br. 15), not that he breached an enforceable contract.

Wrongful termination. Plaintiff ignores black letter law that "New York does not recognize a tort of wrongful discharge for at-will employment." *Caruso v. City of New York*, No. 06 Civ. 5997, 2013 U.S. Dist. LEXIS 138643, at *77 (S.D.N.Y. Sept. 26, 2013) (Abrams, *J*.). *Accord Sullivan v. Harnisch*, 19 N.Y.3d 259, 261 (2012) ("New York common law does not recognize a cause of action for the wrongful discharge of an at-will employee."). Moreover, there is no basis to conclude that state employment law—either statutory or common law—

[11] In addition, Plaintiff's outrage about "denying . . . full disclosure" through a "cover-up" (*id*. at 13-14) only illustrates two of the many contradictions in her pleading. If supervisory examinations are confidential, how would they be disclosed to the public? And if the state of Goldman Sachs's policies were publicly available and the subject of mass media scrutiny, how could the New York Fed "cover up" what was already publicly known? (Mov. Br. 16.)

should supersede the right of a Federal Reserve Bank to "dismiss[] at pleasure" any employee, which was established by Congress. 12 U.S.C. § 341 (Fifth). (*See also* Mov. Br. 17-18, 21 (discussing the application of the Supremacy Clause to state regulation of federal instrumentalities).)

Negligence in Employment. Plaintiff asserts that the New York Fed "knew or should have known" about "prior events" that demonstrated a propensity for conduct (Opp. Br. 17), but still fails to mention what those events were. Plaintiff therefore presents nothing more than a bare legal conclusion, which is insufficient to state a claim. *See Ashcroft*, 556 U.S. at 678.

Conspiracy. Plaintiff agrees that her conspiracy claim is duplicative of her other claims, and succeeds or fails for the same reasons. (Opp. Br. 18; Mov. Br. 22.)

CONCLUSION

For the reasons set forth herein, the Amended Complaint should be dismissed, without leave to replead again, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Dated: February 4, 2014
New York, New York

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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CARMEN M. SEGARRA,

Plaintiff,

v. 13 CV 07173 (RA)

THE FEDERAL RESERVE BANK OF NEW YORK,

Defendant.

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New York, N.Y.
April 4, 2014
4:04 p.m.

Before:

HON. RONNIE ABRAMS,

District Judge

APPEARANCES

STENGLE LAW
Attorney for Plaintiff
BY: LINDA J. STENGLE, ESQ.

FEDERAL RESERVE BANK OF NEW YORK
Attorneys for Defendant
BY: THOMAS M. NOONE, ESQ.
DAVID L. GROSS, ESQ.

(In open court)

(Case called)

MS. STENGLE: Linda Stengle for Carmen Segarra.

THE COURT: Good afternoon, Ms. Stengle.

MS. STENGLE: Good afternoon.

MR. NOONE: Thomas Noone and David Gross for defendants.

THE COURT: Good afternoon to both of you. We are here for oral argument on defendant's motion to dismiss the complaint. I'll hear first from defendants.

MR. NOONE: Thank you, your Honor, and good afternoon. Defendants contend that plaintiff has not stated a claim under federal law or state law, and consequently, this case must be dismissed. And with the Court's permission, I'd like to focus my very brief comments on plaintiff's federal claim, which rises under Section 1831j. I'd be very happy to take questions on the State law claims.

THE COURT: Sure.

MR. NOONE: Plaintiff has proposed a consistent course of interpretation of Section 1831j that, in our view, would have this Court expand that statute beyond the plain meaning of its own terms, and this occurs in at least three respects.

First, she asks the Court to find liability against individual defendants when every court, so far as I'm aware, to have considered the statute has concluded that the statute creates liability only for employer entities, not for individuals.

Second, plaintiff asks this Court to expand the statute to cover violations of a supervisory letter beyond the plain text of the phrase "law or regulation."

And, third, plaintiff asks this Court to expand coverage to cover reporting of violations by a holding company, where the statute expressly uses the term "depository institution."

It's important to note that Congress could have expanded the statute in those directions, if it had chosen, but it made some pretty clear choices, as is reflected in the text. We are left to deal with the statute as Congress wrote it, not as might be most beneficial to any whistleblower under any circumstance.

THE COURT: Let me just ask you a question. What could happen to a bank if it acts in a way that's inconsistent with SR08-08?

MR. NOONE: Well, I think there would -- in the course of the ordinary supervisory process, your Honor, there could be findings that the bank needed to improve certain of its compliance programs, which is the topic that SR08-08 addresses, and from there, I think it would depend on what the bank does. It could go into some sort of formal enforcement matter, or it could resolve itself purely as a result of making some findings.

THE COURT: Could it be fined? Could anything else happen as a result just of the violation of 08-08?

MR. NOONE: I don't believe so, your Honor. We're several steps removed from any formal action that would require a fine or anything like that. Now, sometimes banks voluntarily undertake, or under consent undertake to reform its procedures, which are very costly. But in terms of implementing a civil monetary penalty, that's a requirement that's under a statute and we're several steps removed.

THE COURT: Okay. Please proceed.

MR. NOONE: Your Honor, I'd also draw the Court's attention to a second line of argument that we raise, which stresses the plausibility of the plaintiff's claim. I understand that plausibility has a really low bar, but there are several meanings. And we think there are several instances in this case where the plaintiff has failed to state common sense claims. For starters, her own exhibit shows --

THE COURT: Before we get to that, can we talk for a minute more about 08-08?

MR. NOONE: Of course, your Honor.

THE COURT: What you describe is an advisory letter and what the plaintiff argues is a regulation. So plaintiff alleges that she was fired for seeking to disclose that Goldman Sachs violated SR08-08, which I understand you argue isn't a law or regulation.

What about the argument that Goldman's alleged lack of a conflict of interest policy is gross a mismanagement or abuse of authority under 1831j(a)(2)?

MR. NOONE: Well, your Honor, I think that the gross mismanagement section of the statute is a term of art, and as it's -- I think we indicated in a footnote in our opening brief, as it's been applied in the context of other whistleblower statutes, it means matters that are absolutely unambiguous, where no reasonable minds can disagree. Here, I think what we have is a situation where the plaintiff viewed the state of the policy as violating SR08-08 and her supervisors disagreed. So I think there, on its face, you've got something that is not gross mismanagement.

THE COURT: Let me ask you one more question. I want to read a sentence from one of the cases that you cite as the Chrysler Corporation versus Brown case, which states, "The central distinction among agency regulations found in the APA is that between substantive rules, on the one hand, and interpretive rules, general statements of policy or rules of agency organization, procedure or practice, on the other." And that's 441 US at 301.

Now, you're arguing that SR08-08 falls into the second category, but the Supreme Court there seems to use the term "regulations" to encompass both types of agency statements. So why not adopt the same construction?

MR. NOONE: Well, your Honor, I think where agencies issue guidance, they're not following the procedural prerequisites of the APA, which require public notice and comment. And so that's one reason why they shouldn't -- guidance or form of advisory letter shouldn't be interpreted as a law or regulation. But I think we can also look to other tests or clues that courts have determined over the years that are indicative of whether something is mere guidance or regulation.

The first one, which the DC Circuit believes it almost creates a presumption that something is guidance or regulation, is codification in the Code of Federal Regulations, which under statute, must contain all agency promulgations that have a legal effect. SR08-08 does not appear in Code of Federal Regulations.

But another test, which then Judge Scalia proposed on the DC Circuit, is to look at the substance of the document itself. For example, does it use "may" versus "must," "shall" versus "should"? And in any of those contexts, under any of those standards, SR08-08 is very clearly guidance. I posit to the Court that to include SR08-08 under the phrase "law regulation," has some real consequences, which I'd like to explore.

The first one, I think, would be that it means that for years the Board of Governors of the Federal Reserve System has been issuing letters that are, frankly, illegal. It's been promulgating law regulation without going through the steps that the APA prescribes it should.

Another consequence, your Honor, might be that it's very difficult, under plaintiff's view, to draw the line as to what is covered under the statute and what isn't. Congress drew a line, I think, at law or regulation, but if we include other agency promulgations in that phrase, that is, we render that phrase pretty much a euphemism, which means something other than what it says.

But what about speeches that are given by the members of the Board of Governors? They outline very important policy considerations. They offer guidance to supervise banks over enforcement actions that are coming, and we know that they're very important because they have the power to shift markets. What about those?

Or beyond that, what about other agency policies or guidance? What about the U.S. Attorney's Manual, which very recently the Supreme Court examined and said, well, on its face, it says it's only offering guidance and we'll consider it as such.

I think that we -- I hate to paint a parade of horribles for the Court, but I think that the statute provides a very clear line between what is covered and what isn't, and I think we should follow what Congress wrote.

I'd also point the Court to footnote 8 in our reply brief, in which we provide a list of examples -- these are illustrative and not exhaustive -- how Congress, when it chooses, includes guidance, orders, internal operating rules, interpretive rules that are within the Federal Bank Rules, and here, it just has chosen not to.

THE COURT: Thanks. You may proceed.

MR. NOONE: Getting back to your Honor on the plausibility arguments. I've mentioned, or started to mention that the policy that we're arguing about here is alleged to be nonexistent, but as the exhibits to the complaint point out, was actually on Sachs' public website, or at least some version of it was.

Moreover, plaintiff's pleadings and exhibits shows that her supervisors took her claim seriously. She had access to her direct supervisor, to the two most senior examiners on the team, as her exhibits to her complaint show. The most senior member of the team, Mike Silva, raised her views to the committee of the board of operators. That's what the OC means at the end of plaintiff's exhibits. Those actions wouldn't have occurred if they hadn't taken her serious, if they were looking to just shutdown her blowing the whistle.

And in the end, I think what we're back to here is a disagreement that arises pretty ordinarily in the context of supervised employment, where a junior examiner reaches a conclusion that more senior examiners disagree with, and I don't think that actually belongs in the statute.

THE COURT: Thank you.

MR. NOONE: Thank you, your Honor.

THE COURT: Miss Stengle?

MS. STENGLE: Thank you, your Honor. Carmen Segarra is a senior bank examiner. I just want to make that correction.

We are asking the Court to order the defendants to answer the complaint in its entirety, and we're asking you to lift the stay on discovery. Defendants asked for a stay on discovery. We understand the reasons for granting it, but what concerns me is, today, they want to put facts into evidence that argue conveniently for them, such as, what does OC mean? I have no idea what that means. Mike Silva's status as most senior, we would dispute that. Goldman Sachs' identity. Whether or not there's a consumer protection aspect of federal bank examination work.

All of these things, there are no stipulations. We've not agreed to any of this. We are submitting, we'd like to go forward into discovery to find out if these assertions that are being made by the defendants are true, or whether the plaintiff's version of the facts, as made in the complaint, are true.

We all understand in this room that the standard is that if there is a dispute in the facts at this point in the proceeding, deference must be given to the plaintiff's interpretation. I would just like to say we have some great stuff that we would love to put into evidence, your Honor, some very compelling things. There's audiotapes, there's some amazingly -- my client's demeanor will come forward in the audio. She's polished, she's deferential, she's respectful, she's meek. She's a very small woman.

There's just things that don't come out in this aspect of the -- in this point in the process that defendants would have you, you know, argue against, or that she's some kind of like, I don't know, like a run-amuck, power-mad monster, and the evidence will show that she's not, that she was very deferential.

This was not merely a dispute. What this was was the defendants -- our allegations are that they're fixing bank examinations to benefit their friends. They wanted my client to destroy evidence that supported her bank examination. She was just at the point of uploading her bank examination findings into the central system. Mike Silva berated her in like three hours, I think, of trying to bully her to get her to change her examination findings, which is obstruction.

She refused, very deferentially, meekly. Even said, hey, you guys are higher up on the food chain than I am -- this is not an exact quote -- but you guys are higher up on the food chain, go ahead, like, whatever you want to do with my findings, go ahead and do them, but I can't change them. And she was right. Because that's criminal obstruction. Obstruction, is a crime.

THE COURT: Let's just focus on what you've alleged in the complaint.

MS. STENGLE: Sure.

THE COURT: So the only federal --

MS. STENGLE: I alleged obstruction.

THE COURT: Let's just -- so I'm just going to ask you to walk me through it. So Count One of the complaint is the only federal cause of action, and it's based on 12 United States Code Section 1831j(a)(2), which provides that no federal banking agency, federal home loan bank, federal reserve bank or any person who is performing, directly or indirectly, any function or service on behalf of the corporation, may discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions or privileges of employment because the employee, or any person acting pursuant to the request of the employee, provided information to any such agency or bank or to the attorney general, regarding any possible violation of any law or regulation, gross mismanagement, a gross waste of fund, an abuse of authority or substantial and specific danger to public health or safety, and then it goes on.

And so my question is, your Count One is based on this violation; so walk me through, in your view, what the violation was. It was providing information to whom? And what is the law or regulation? My understanding is that your argument is that the law or regulation is SR08-08, and your view is that that's a regulation and not an advisory letter, as defendants argue; is that correct?

MS. STENGLE: I think that's four things. The SR08-08 and the tight focus by the defendants on SR08-08 is a real red herring. The courts make distinctions between procedures and substance in court cases. Bank examiners have similar issues. SR08 is a substantive issue. It's an issue of substance for the bank examination. The issue that we are complaining of and the conduct that we are complaining of is that when she was recording her findings --

THE COURT: To whom, to her supervisors?

MS. STENGLE: To her supervisors and to the Federal Reserve Board of Governors, through their computer reporting system. I don't remember -- I don't even know what it's called, to tell you the truth. But there was an upload of the report that was supposed to go in, and it was -- her bank examination consisted of much more than SR08-08.

There's the Santander transactions, there's the Solyndra transaction, there's a very unfortunate Kinder Morgan conflict of interest that was discussed by a judge in the Delaware court chancery. She had much more than SR08-08. Nonetheless, she reported several violations.

In fact, one of the transactions is Goldman Sachs was fraudulently misrepresenting overseas that it had federal reserve approval of the transaction when it did not, and that is detailed in the complaint. Michael Koh, who's one of the defendants, when she discussed that with Michael Koh, he says Goldman Sachs does this all the time. And other people at the Federal Reserve, when she discussed it with them, said that they should -- we should send them a letter of sanction reprimand on this. So there were numerous things.

THE COURT: Let me just stop you there. Let's just say, for the sake of argument, not indicating which way I'll rule in any way, let's say I were to conclude that SR08-08 is not a law or regulation. Point me to the law or regulation that is alleged in the complaint to have been violated? What was she providing information about? What violation of what law or what regulation?

MS. STENGLE: Of course, I don't have the complaint in front of me. There's a huge paragraph of just one statute after another where she articulated what she was complaining of. There's the fraudulent misrepresentation, and there's the self-dealing in Kinder Morgan, the Kinder Morgan transaction, and there was withholding and -- of information from the

Federal Reserve itself.

THE COURT: I'm sorry, we're going to try and print the amended complaint so that you can answer the question. Can we try and do that?

MS. STENGLE: Thank you so much.

THE COURT: Sorry, I have a trial in another courtroom right now; so we've moved our printer. So, unfortunately, I don't have it. I apologize.

MS. STENGLE: I apologize, your Honor.

THE COURT: Mr. Noone is gracious enough to share his copy. Thank you.

MS. STENGLE: So you'd like me to walk you through paragraph by paragraph?

THE COURT: I'm not asking you to walk me through paragraph by paragraph. I'm looking at Count One, which is the only count that deals with a federal cause of action.

MS. STENGLE: Right.

THE COURT: And so when I look at this, I see in Paragraph 151, that you have alleged defendants terminated Carmen for finding Goldman did not have a firm-wide conflict of interest practices in compliance with SR08-08, and for refusing to change her examination findings, and that's what you allege.

So again, my question is, if the Court were to determine that that is an advisory letter and not a law or regulation, what law or regulation was she providing information about or what violation of a law or regulation was she providing information about?

MS. STENGLE: Okay. Well, unfortunately, or fortunately, the Count One incorporates all the preceding factual paragraphs, and there are numerous instances articulated in here, your Honor, and I can go through some examples of those. Let me see. The Santander transaction was failure by Goldman to perform AML due diligence, and then concomitant with that, there was a misrepresentation made to bank examiners about AML due diligence being done.

So there are two violations of law there. There's the failure to do AML due diligence, which is regulatory. There's the withholding of the information from the bank examiners and the misrepresentation from bank examiners, which is obstruction, which is a criminal federal law.

THE COURT: All right. You may proceed.

MS. STENGLE: Okay. So there's all sorts of things. The 67 is fraudulent misrepresentation of the approval of the Santander transaction.

THE COURT: And, in your view, you intended to incorporate that into Count One?

MS. STENGLE: I articulate that specifically in the first paragraph of Count One.

THE COURT: You can go on.

MS. STENGLE: Okay. And, you know, so I get very concerned. SR08-08 is founded on several regulations, laws, statutes. None of this stuff that she was reporting on -- I mean, it seems very complicated and you can, you know, like, have red herrings all over the place, but the issue here really was Goldman was participating in self-dealing without disclosure. And that's what she was looking at, and that's what she was reporting.

And when she refused to change her bank examination findings, she was punished by the defendants through termination. That's obstruction. Obstruction is a federal criminal law. SR08, substance of the examination, is part of the allegation, but there's the procedural aspect that went crazily awry and that's what defendants are guilty of.

THE COURT: All right. Mr. Noone, would you like to respond?

MR. NOONE: Thank you, your Honor. We've had now two opportunities to plead this claim, and on both occasions, plaintiff has provided two reasons why she was fired, and both of those reasons are squarely routed in SR08-08.

I point the Court not only to Paragraph 151, but the same allegation appears other places, Paragraph 133 of the amended complaint and it's Paragraph 97 of the original complaint. I don't see how we get away from the gravamen of the complaint here to expand to the litany of citations that plaintiff has provided in the amended complaint, many of which the fed doesn't even have oversight for.

Your Honor took the time to go through the words of section 1831j, and there's a very key word there, which is "because." The plaintiff has got to allege that she was fired because of a particular report, and the only allegation about that is contained in Paragraph 151, and that report has to do with section -- sorry, SR08-08. So I don't think -- I think we're getting very far afield.

MS. STENGLE: I disagree. I'm not even sure where to start. Okay. So SR08-08 was found -- was one portion of the substance of the bank examination. Obstruction of those examination findings is a federal crime. 12 U.S.C. 1831j is a relevant statute here.

THE COURT: But your argument is that, which I don't think is entirely clear the way the complaint is drafted --

MS. STENGLE: Okay.

THE COURT: -- or in your opposition, in addition, but so I understand your argument now is that she was fired not only for concluding that Goldman did not have a firm-wide conflict of interest practice, and compliance with SR08-08, and refusing to change her examination findings, but also what, for providing information about these other alleged violations of law or regulation?

MS. STENGLE: Yes. And I apologize that it's not clear. I mean, she had a fairly extensive examination of

Goldman. She was assigned to multiple areas. I've articulated that in the complaint. They had numerous violations and problems that came up during the examination, and she was on the -- I guess, on the eve of concluding this six-month process and uploading the report into the Federal Reserve's centralized computer reporting system.

She was -- Michael Koh and Michael Silva brought her into a room and tried to bully her into changing her report, and she refused, and she was fired for refusing to change her report. So it's obstruction. It's just -- It's that simple. And she did not want to participate in that criminal activity.

One of the things she talks about is she realized, and I articulate this in the complaint, too, she realized that if she wanted to comply with Michael Silva's request to change her report, she would have to go back and cover up six months of examination records, meeting minutes, requests for production of documents. And she realized that that was a criminal act that they were asking her to engage in, and she said no, very meekly, very mildly, no. Like, if you guys want to do something with the report, if you want to supervise and issue recommendations or even issue the report, or whatever, to Goldman, that's you. I can't go back and wash this away.

THE COURT: Show me again where in the complaint this allegation is with regard to how this is a violation of 12 United States Code 1831? I mean, you're not claiming a First

Amendment retaliation argument, right?

I mean, your only federal claim here that you've alleged in the complaint -- my job is just to look at the complaint, right -- is 12 United States Code 1831. So I'm just asking you to show me where those allegations are in the complaint.

MS. STENGLE: Can I have a complaint?

THE COURT: Well, borrow Mr. Noone's copy again. Thank you.

MR. NOONE: It's still on the table.

MS. STENGLE: All right. So paragraph 4, Paragraph 7.

THE COURT: Well, so --

MS. STENGLE: Abuse of authority, your Honor.

THE COURT: But, again, these allegations are not about providing information pursuant to the statute you cite, which is what you rely on, which is 1831j, but other activity.

MS. STENGLE: Just bear with me, your Honor. Paragraph 41, paragraph 42 clarifies it, paragraph 48, paragraph 53, paragraph 55, paragraph 57, paragraph 60, paragraph 61, paragraph 64.

THE COURT: And some of these, specifically -- many of these -- I haven't looked at all of them yet -- don't refer to any particular violation. 61 refers specifically to SR08-08. But, again, you can keep going and then I'll just ask the defendants to respond.

MS. STENGLE: I will say we did go over 12 U.S.C. code 1831j(a)(2) and it's very broad. It says any possible -- it says, regarding any possible violation of any law or regulation, gross mismanagement, a gross waste of funds, an abuse of authority or substantial and present danger to public health and safety. It's very broad.

So when we were articulating this, we were articulating everything. Let me see. Paragraph 67, 68, 69, paragraph 70, paragraph 71, paragraph 72, paragraph 73. Paragraph 75 discusses more about the scope of the substance of the examination. Paragraph 76.

THE COURT: All right. Well, we don't need to go through the whole thing. I'll give defendants another opportunity, if there's anything, any response you want to make to those particular --

MR. NOONE: No, thank you, your Honor.

THE COURT: -- citations? Okay. Anything else from you, Miss Stengle?

MS. STENGLE: I did incorporate intentionally and I explicitly said, incorporation of the paragraphs up to the count. I've never seen -- I'm used to pleading fraud and misconduct with particular area in accordance with 9B; so I can appreciate that this is detailed. And, you know, I can appreciate that people might want to skip to the CliffNotes version and just go to the counts but the factual allegations --

THE COURT: No, no. I want to go through it all absolutely.

MS. STENGLE: There were several problems that she articulated and reported in here.

THE COURT: Okay.

MS. STENGLE: And 12 U.S.C. 1831j, on a very easy read, defendants say it doesn't apply to them. Clearly it applies to them in No. 2. The enforcement, she may file a civil action. There's no limitation against who she can file a civil action on. She's in Federal Court, which is where she is supposed to be.

THE COURT: All right. Thank you very much. I'll reserve decision. Have a very nice weekend.

MR. NOONE: Thank you, your Honor.

MS. STENGLE: Thank you.

(Adjourned)

e430segc Telephone Conference

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
------------------------------x

SEGARRA,

Plaintiff,

v. 13CV7173

THE FEDERAL RESERVE BANK OF NEW YORK, et al,

Defendant.

------------------------------x

New York, N.Y.
April 3, 2014
5:30 p.m.

Before:

HON. RONNIE ABRAMS,

District Judge

APPEARANCES

LINDA STENGLE
Attorney for Plaintiff

DAVID GROSS, TOM NOONE
Attorneys for Defendant

(In chambers)

THE COURT: Thank you all for making yourself available on such short notice.

I wanted to let you know I have a court reporter here and I just wanted to advise you of something.

It has just come to my attention that my husband, who is a partner at the law firm of Davis Polk is presently representing Goldman Sachs on various I think small matters, but on matters in an advisory capacity. I was not aware of that until today, so I apologize for the late notice.

I wanted to let you know this. And if either side -- I don't need to know who -- but has any desire to have me recuse myself, I am happy to entertain that request.

Again, I don't need to know who is making the request, but before the argument tomorrow, I wanted to let you know that. I'm perfectly willing to put off the argument for a few days to give you the time to think about it.

Or, Miss Stengel, if you want to talk to your client about it. But I also didn't want to inconvenience you. And so as soon as I found this out, I tried to, you know, get you on the phone to advise you of this.

MS. STENGLE: We're not going to ask that you recuse yourself, Judge.

MR. GROSS: Judge, we also are not going to ask that you recuse yourself.

THE COURT: Okay. And so do you all want to go forward with the argument, or are you sure's you don't want any time to think about this.

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MS. STENGLE: Yeah we're not going -- I can tell you that we're not going to ask you to recuse yourself.

THE COURT: Okay. Okay, all right.

Well, then, I will see you all tomorrow afternoon at 4:00.

All right, thank you very much.

ALL COUNSEL: Thank you, your Honor.

THE COURT: Bye.

(Adjourned)

FEDERAL RESERVE BANK *of* NEW YORK

33 LIBERTY STREET, NEW YORK, NY 10045-0001

DAVID L. GROSS
COUNSEL AND VICE PRESIDENT

April 16, 2014

FILED ON ECF

Hon. Ronnie Abrams, U.S.D.J.
United States District Court
for the Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square, Room 2203
New York, NY 10007

Re: *Carmen Segarra v. Federal Reserve Bank of New York*, No. 13-CV-7173 (RA)

Dear Judge Abrams:

On behalf of the Federal Reserve Bank of New York (the "New York Fed"), Michael Silva, Michael Koh, and Johnathon Kim (collectively, the "Defendants"), I write in response to three documents filed by Plaintiff within the last few days: (1) an April 11, 2014 letter responding to questions raised at oral argument on April 4, 2014; (2) an April 11, 2014 letter requesting additional disclosures by the Court; and (3) a motion for leave to file a Second Amended Complaint ("SAC"), which was submitted on Monday, April 14, 2014.

Plaintiff's Supplemental Responses to Questions from Oral Argument

As discussed at oral argument, Plaintiff has repeatedly alleged that she was fired for two reasons: (1) providing information that Goldman Sachs violated SR 08-08, and (2) refusing to change her examination findings about SR 08-08. (SAC ¶¶ 133, 151; AC ¶¶ 133, 151; Compl. ¶ 97.) To be clear, in both instances in which Plaintiff allegedly refused to change "her findings," those findings concerned violations of SR 08-08 by Goldman Sachs. (AC ¶¶ 61 (meeting minutes addressing SR 08-08) and 136 (report addressing SR 08-08).) Thus, according to her own pleadings, reports about violations of *other* authorities—including the approximately 40 authorities cited in paragraph 139 of the Amended Complaint—did not cause Plaintiff's termination and are therefore not relevant. (Mov. Br. 8 n.7.) Beyond that, violations allegedly committed by The Goldman Sachs Group, Inc. are not actionable because that entity is not a depository institution, as required by Section 1831j. (Mov. Br. 11; Reply Br. 7.)

Request for Additional Disclosures

The time has passed for a motion for recusal or a request for the Court's personal financial information—assuming, *arguendo*, that such a request would ever be permissible. During the April 3, 2014 teleconference, this Court disclosed, in an abundance of caution, *any* *possible* basis for *any possible* argument about the appearance of impropriety, much less an actual conflict of interest. The Court further advised that "if this is an issue, at all, for you, *this is your opportunity to raise it*." (Transcript of April 3, 2014 Teleconference 3:15-16 (emphasis added).)[1] The Court also offered to postpone oral argument so the parties could consider a motion for recusal. (*Id.* at 2:16-19.) Nonetheless, Plaintiff's counsel *twice* stated that there would be no such motion:

> MS. STENGLE: We're not going to ask that you recuse yourself, Judge.
>
> . . .
>
> MS. STENGLE: Yeah we're not going—I can tell you that we're not going to ask you to recuse yourself.

(*Id.* at 2:22-23, 3:21-22.) Counsel for Defendants reached the same conclusion. (*Id.* at 2:24-25.) One week after oral argument, however, amid a flurry of attempts to restate answers to the Court's questions and replead the complaint, Plaintiff's request for additional disclosures raises concerns about the appearance of a different sort of impropriety: forum shopping. *Cf. In re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988) ("In deciding whether to recuse himself, the trial judge must carefully weigh the policy of promoting public confidence in the judiciary against the possibility that those questioning his impartiality might be seeking to avoid the adverse consequences of his presiding over their case."). Under these circumstances, the Court should deny Plaintiff's request for additional disclosures and proceed with the case.

Motion for Leave to Replead

We respectfully oppose Plaintiff's motion for leave to replead for two reasons. *First*, the motion is untimely. We recall that at the December 12, 2013 status conference the Court offered Plaintiff an opportunity to make any additional amendments before Defendants filed another motion to dismiss, and warned that any subsequent motions to amend would likely be denied. There is, unfortunately, no transcript of that proceeding, but the Court's instruction makes sense. Plaintiff filed her Amended Complaint in lieu of opposing Defendants' motion to dismiss the original complaint. She therefore had every opportunity to review the arguments against her claims and adjust her pleadings accordingly.

Second, the proposed amendments would be futile. *See Krys v. Pigott*, __ F.3d __, No. 12-3575, 2014 U.S. App. LEXIS 6666, at *14 (2d Cir. Apr. 11, 2014) ("Leave to amend may properly be denied if the amendment would be futile, as when the proposed new pleading fails to state a claim on which relief can be granted."). The Second Amended Complaint would add sub-paragraph 150(a), which merely summarizes provisions cited elsewhere in the document. No other changes are proposed. This lone amendment, however, does not alter the essence of

[1] A copy of the April 3, 2014 transcript is attached for ease of reference.

Plaintiff's Section 1831j claim—that she was fired because (1) she provided information about violations of SR 08-08 by Goldman Sachs, and (2) refused to change her written conclusions about those alleged violations. (SAC ¶¶ 133, 151.) Indeed, Plaintiff's counsel characterizes the amendment as "merely cosmetic." (April 11, 2014 Letter from Linda J. Stengle, Docket No. 41.) Because the proposed amendment would not remedy any of the underlying deficiencies identified in the Moving Brief, Plaintiff's motion should be denied and the Amended Complaint should be dismissed with prejudice.

Thank you for your consideration of these arguments.

Respectfully submitted,

David Gross

David Gross

cc: Linda J. Stengle, Esq., Counsel for Plaintiff (via ECF and e-mail) e430segc Telephone Conference

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
------------------------------x

SEGARRA,

Plaintiff,

v. 13CV7173

THE FEDERAL RESERVE BANK OF NEW YORK, et al,

Defendant.

------------------------------x

New York, N.Y.
April 3, 2014
5:30 p.m.

Before:

HON. RONNIE ABRAMS,

District Judge

APPEARANCES

LINDA STENGLE
Attorney for Plaintiff

DAVID GROSS, TOM NOONE
Attorneys for Defendant

(In chambers)

THE COURT: Thank you all for making yourself available on such short notice.

I wanted to let you know I have a court reporter here and I just wanted to advise you of something.

It has just come to my attention that my husband, who is a partner at the law firm of Davis Polk is presently representing Goldman Sachs on various I think small matters, but on matters in an advisory capacity. I was not aware of that until today, so I apologize for the late notice.

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MS. STENGLE: Yeah we're not going -- I can tell you that we're not going to ask you to recuse yourself.

THE COURT: Okay. Okay, all right.

Well, then, I will see you all tomorrow afternoon at 4:00.

All right, thank you very much.

ALL COUNSEL: Thank you, your Honor.

THE COURT: Bye.

(Adjourned)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CARMEN SEGARRA,
Plaintiff,

-v-

FEDERAL RESERVE BANK OF NEW YORK, MICHAEL SILVA, MICHAEL KOH, and JOHNATHON KIM,
Defendants.

No. 13 Civ. 7173 (RA)

OPINION AND ORDER

RONNIE ABRAMS, United States District Judge:

Plaintiff Carmen Segarra was employed as a Senior Bank Examiner by Defendant Federal Reserve Bank of New York ("FRBNY") until she was terminated on May 23, 2012. She alleges that FRBNY fired her because she concluded that the subject of her examination, The Goldman Sachs Group, Inc. ("Goldman Sachs") did not have a firmwide conflict-of-interest policy. In the instant action she asserts that Defendants violated the whistleblower protection provisions of the Federal Deposit Insurance Act ("FDIA"), 12 U.S.C. § 1831j, and raises various state law claims.

Before the Court is Defendants' motion to dismiss the First Amended Complaint ("FAC") under Fed. R. Civ. P. 12(b)(6) and Plaintiff's motion seeking leave to file a Second Amended Complaint. For the following reasons, the Court concludes that Plaintiff has failed to state a claim under § 1831j and declines to exercise supplemental jurisdiction over her remaining state law claims. It also concludes that filing a Second Amended Complaint would be futile and denies Plaintiff's motion to do so.

BACKGROUND

Defendant FRBNY is one of twelve Reserve Banks that, together with the Board of Governors, comprise the Federal Reserve System. (FAC ¶¶ 15, 17.) Among other tasks, the Federal Reserve System is responsible for developing and executing the nation's monetary policy, supervising and regulating banking institutions, and assisting the federal government in its financing operations. (Id. ¶ 16.) In its supervisory role, it "evaluate[s] the overall safety and soundness" of banking organizations by assessing an "organization's risk-management systems, financial condition, and compliance with applicable banking laws and regulations." (Id. ¶ 26.)

Segarra, a lawyer, was hired by FRBNY as a Senior Bank Examiner on October 31, 2011, after serving in a variety of positions for several major banking institutions. (Id. ¶ 14.) Defendant Johnathon Kim, who was Segarra's supervisor, met with her shortly after she arrived and explained that she would be examining Goldman Sachs's conflict-of-interest policy and the firm's role in several transactions that had attracted the attention of regulators. (Id. ¶ 35.) The remaining Defendants named in this action—Michael Silva and Michael Koh—were "responsible for managing the relationship between Goldman and Defendant FRBNY, not for performing examinations of Goldman," although, according to Plaintiff, they "frequently and improperly held themselves out as having supervisory authority over Carmen's work as a bank examiner." (Id. ¶¶ 42-43.)

Plaintiff alleges that Defendant Kim instructed her to use a document known as "SR 08-08" as "the basis for her investigation of Goldman." (Id. ¶ 35.) As described in the following sections, the parties dispute the proper characterization of SR 08-08—a dispute that has important consequences for Plaintiff's claim. Defendants assert that SR 08-08 is "an advisory letter published in 2008 by the Board of Governors' Division of Bank Supervision and

Regulation (hence, 'SR')," which "contains 'clarification as to the Federal Reserve's views' regarding 'a firmwide approach to compliance risk management and oversight.'" (Defs.' Mem. of Law at 4 (quoting Declaration of David Gross ("Gross Decl.") Ex. A at 2).) Plaintiff, on the other hand, asserts that this document is a regulation "promulgated . . . under the [Federal Reserve] Board's authority to issue banking supervision regulations." (FAC ¶ 38.) The parties agree, however, that SR 08-08 states that "[o]rganizations supervised by the Federal Reserve, regardless of size and complexity, should have effective compliance risk management programs," and that the document provides a list of the components of an effective risk management program. (Id. ¶ 39; Gross Decl. Ex. A at 3.))

Plaintiff's FAC provides a discursive account of the seven months she spent at FRBNY and includes a number of conclusory allegations (see, e.g., FAC ¶ 139), and over fifty pages of handwritten notes and meeting minutes (id. at App. A). The gravamen of the FAC, however, can be summarized as follows: Plaintiff concluded that Goldman Sachs lacked a conflict-of-interest program that complied with SR 08-08; Defendants Kim, Koh, and Silva obstructed her examination and ultimately asked her to change her conclusions; and Plaintiff was terminated from FRBNY because she refused to comply. (See, e.g., id. ¶ 133.)

In particular, Plaintiff alleges that at a meeting on December 8, 2011, Goldman Sachs "stated it had no firmwide conflict of interest policy." (Id. ¶ 51.) Later that day, at an "impromptu meeting" among FRBNY personnel, Defendant Silva "expressed concern that Goldman would suffer significant financial harm if consumers and clients learned the extent of Goldman's noncompliance with rules on conflict of interest." (Id. ¶ 57.) Plaintiff further alleges that after additional discussions with Goldman Sachs, she met with FRBNY's "Legal and Compliance risk team," which "agreed Goldman's failure to comply with SR 08-08 warranted mention in the annual report and/or examination letter to be issued by FRBNY to Goldman." (Id. ¶ 99.) When Plaintiff explained this conclusion in an email to Silva, Koh, and Kim, Kim responded that Plaintiff's "email was 'premature.'" (Id. ¶ 121.) Several days later, "Defendants Silva and Koh met with Carmen and attempted to force her to change the findings of her examination of Goldman. They said they did not believe her finding that Goldman had no conflict of interest policy was 'credible.'" (Id. ¶ 126.) Three days after Plaintiff refused to change her findings, she was terminated from FRBNY "because her bank examination found that Goldman had no conflict of interest program in compliance with SR08-08 and because Carmen refused Defendants' unlawful request to change her examination findings." (Id. ¶ 133.)

Plaintiff filed the instant action on October 10, 2013, and filed the FAC on December 4, 2013. (Dkt. nos. 1, 24.) Defendants moved to dismiss, and the Court heard oral argument on the motion on April 4, 2014.

LEGAL STANDARD

To withstand a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp v. Twombly, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. Although the Court must credit each allegation in the FAC, it need not accept as true "a legal conclusion couched as a factual allegation." Id.

DISCUSSION

In the FAC, Plaintiff asserts six causes of action: (1) a violation of the FDIA whistleblower protection statute, 12 U.S.C. § 1831j; (2) a violation of New York General

Business Law § 349, which prohibits "deceptive acts and practices" directed at consumers; (3) "wrongful termination in violation of public policy"; (4) breach of an implied-in-fact employment contract; (5) negligence in employment against FRBNY; and (6) "conspiracy."[1]

1. Plaintiff's FDIA Whistleblower Claim

In her sole federal cause of action, Plaintiff alleges that she engaged in a protected activity in her employment as a bank examiner and was fired as a result, in violation of 12 U.S.C. § 1831j. As relevant here, § 1831j provides:

> (2) Employees of banking agencies
>
> No Federal banking agency, Federal home loan bank, Federal reserve bank, or any person who is performing, directly or indirectly, any function or service on behalf of the Corporation may discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to the request of the employee) provided information to any such agency or bank or to the Attorney General regarding any possible violation of any law or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety by—
>
> (A) any depository institution or any such bank or agency;
>
> (B) any director, officer, or employee of any depository institution or any such bank;
>
> (C) any officer or employee of the agency which employs such employee; or
>
> (D) the person, or any officer or employee of the person, who employs such employee.

12 U.S.C. § 1831j(a)(2). Whistleblower protection was first added to the FDIA in 1989 after the savings and loan crisis, see Financial Institutions Reform, Recovery, and Enforcement Act of

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[1] Although a government employee may be entitled to First Amendment protection when she speaks out "as a citizen on a matter of public concern," the Supreme Court has concluded that a government employee is not entitled to such protection "based on speech made pursuant to the employee's official duties." Garcetti v. Ceballos, 547 U.S. 410, 413, 418 (2006). Perhaps for this reason, Plaintiff has not alleged a First Amendment retaliation claim.

1989, Pub. L. No. 101-73, § 932, 103 Stat. 183, 494, and this provision assumed its current form through amendments in the early 1990s, see Resolution Trust Corporation Completion Act, Pub. L. No. 103-204, § 21, 107 Stat. 2369, 2406 (1993); Federal Deposit Insurance Corporation Improvement Act of 1991, Pub. L. No. 102-242, § 251, 105 Stat. 2236, 2332.

A. Plaintiff's § 1831j Claim Against Defendants Silva, Koh, and Kim: Whether the Statute Provides for Individual Liability

Drawing on the text of the statute and case law interpreting it, Defendants first assert that claims against individual employees are not cognizable under § 1831j. Rather, they argue, the statute provides a cause of action only against the institution, agency, or bank that employed the aggrieved plaintiff. (Defs.' Mem. of Law at 7-8.) The Court agrees.

The first sentence of 1831j(a)(2) defines which actors are subject to its provisions: "No federal banking agency, Federal home loan bank, [or] Federal reserve bank" may terminate or discriminate against an employee for engaging in protected activity. Although the statute also encompasses "any person who is performing, directly or indirectly, any function or service on behalf of the [Federal Deposit Insurance] Corporation," that phrase was not added until 1993, and the legislative history surrounding its addition makes clear that Congress added it only to "includ[e] FDIC contractors in the whistleblower protections of such section." H.R. Rep. No. 103-103, pt. 1, at 36 (1993), reprinted in 1993 U.S.C.C.A.N. 3040, 3052. Nowhere does Plaintiff argue that any of the individual Defendants in this case were acting "on behalf of" the FDIC, and the inclusion of this singular exception for FDIC contractors only reinforces the Court's conclusion that the statute does not apply to individuals.

A separate provision in § 1831j provides further evidence that Congress did not intend the statute to reach individual employees. This subsection, entitled "Remedies," provides:

> If the district court determines that a violation of subsection (a) of this

> section has occurred, it may order the depository institution, Federal home loan bank, Federal Reserve bank, or Federal banking agency which committed the violation—
>
> > **(1)** to reinstate the employee to his former position;
> >
> > **(2)** to pay compensatory damages; or
> >
> > **(3)** take other appropriate actions to remedy any past discrimination.

12 U.S.C. § 1831j(c). This provision is additional evidence that Congress contemplated that only the institution or agency employing the whistleblowing plaintiff could be held liable. Nowhere does the statute provide for remedies against individuals.

A holding that § 1831j does not permit individual liability is consistent with the conclusion of the only other court in this Circuit to have addressed the issue. See Cosgrove v. Fed. Home Loan Bank of N.Y., No. 90 Civ. 6455(RPP), 1999 WL 163218, at *7 (S.D.N.Y. Mar. 23, 1999) ("Because Section 1831j has no provision imposing liability upon individuals or permitting remedies against individuals, a private cause of action under Section 1831j can only proceed against one of the federal agencies identified in Section 1831j(a)(2) or against a federally-insured depository institution."). Other district courts have also declined to hold individuals liable under § 1831j, see Rouse v. Farmers State Bank of Jewell, IA, 866 F. Supp. 1191, 1203-04 (N.D. Iowa 1994); Hicks v. Resolution Trust Corp., 767 F. Supp. 167, 171-72 (N.D. Ill. 1991), and Plaintiff has not cited any case that held otherwise. Accordingly, the Court dismisses the § 1831j claim against Defendants Koh, Silva, and Kim.

B. Plaintiff's § 1831j Claim Against FRBNY: Defining the Protected Activity

In order to be a "whistleblower" entitled to protection under § 1831j, Segarra must allege that FRBNY retaliated against her because she "provided information" about "any possible violation of any law or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 12 U.S.C. § 1831j(a)(2). Segarra therefore must plausibly allege at least two elements: that she "provided information" about one of the five enumerated grounds of wrongdoing and that she faced adverse action as a result.

The FAC alleges that "Defendants terminated Carmen for finding Goldman did not have a firmwide conflicts of interest practice[ ] in compliance with SR 08-08 and for refusing to change her examination findings." (FAC ¶ 151.) Plaintiff devotes much of her opposition brief to arguing that SR 08-08 is a regulation. (See Pl.'s Opp. at 4-9.) Defendants, on the other hand, argue that SR 08-08 "is an *advisory letter*, not a regulation," (Defs.' Mem. of Law at 9), thus asserting that even if Plaintiff provided information about Goldman Sachs's noncompliance with SR 08-08, that information did not relate to a "possible violation of any law or regulation."[2] The Court addresses this dispute in the following section.

Plaintiff's other allegation—that she was fired because she "refus[ed] to change her examination findings"—does not assert a protected activity within the scope of § 1831j. Section 1831j emphasizes the provision of information: employees may not be subjected to adverse action "because" they "provided information" about one of the enumerated types of wrongdoing. 12 U.S.C. § 1831j(a)(2). An individual "provides" information when she discloses it or makes it available to others. See, e.g., Merriam-Webster Online Dictionary, http://www.merriam-webster.com/dictionary/provide (last visited April 23, 2014) (defining "provide," in relevant part, as "to make (something) available : to supply"). Section 1831j's protections attach when an

[2] Nowhere does Plaintiff plausibly allege that she was terminated for providing information about "gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety." 12 U.S.C. § 1831j. The FAC does allege that "[i]n acts that constitute gross mismanagement, Defendant FRBNY and Defendant Kim failed to ensure that Carmen's bank activities continued without interference from relationship managers Silva and Koh." (FAC ¶ 78.) Plaintiff does not specify, however, to whom she reported this alleged "gross mismanagement" or whether such a disclosure played any role in her termination.

individual discloses protected information to a third party, not when she is asked to alter that information.

An employee's allegation that she was asked to change the results of her investigation is by no means irrelevant to her whistleblower claim. Proof of such a request may be persuasive evidence that an employee was fired because she disclosed protected information and not for some other reason. Moreover, federal law imposes criminal penalties on anyone who "corruptly obstructs" a federal bank examination, see 18 U.S.C. § 1517, and on anyone who makes a false statement with intent to deceive a bank examiner, see id. § 1005.[3] Congress did create a private right of action against "the directors or officers of any member bank" who "knowingly violate" 18 U.S.C. § 1005 (and certain other criminal provisions). See 12 U.S.C. § 503. None of the Defendants named in this action, however, are "the directors or officers of any member bank,"[4] and in any event, Plaintiff does not purport to bring a cause of action under 12 U.S.C. § 503.

In sum, to state a claim under § 1831j, Plaintiff must plausibly allege that she "provided information" about the violation of a "law or regulation." Plaintiff has alleged that she was terminated because she provided information about a possible violation of SR 08-08. Therefore, the question before the Court is whether SR 08-08 is a "law or regulation." To answer that question, the Court first examines the proper construction of the phrase "law or regulation" and then considers whether SR 08-08 falls within the meaning of that phrase.

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[3] Plaintiff, as a private citizen, cannot enforce these criminal laws through a civil lawsuit. See, e.g., Hill v. Didio, 191 Fed. App'x 13, 14-15 (2d Cir. 2006) ("As a general matter, we have long recognized that crimes are prosecuted by the government, not by private parties."); Davis v. Countrywide Home Loans, No. 09 Civ. 8606(RJS)(HBP), 2010 WL 3219306 (S.D.N.Y. July 23, 2010), report and recommendation adopted, 2010 WL 3219304 (S.D.N.Y. Aug. 13, 2010) ("18 U.S.C. § 1005 does not provide a private right of action.").

[4] The term "member bank" is defined as "any national bank, State bank, or bank or trust company which has become a member of one of the Federal reserve banks." 12 U.S.C. § 221. Plaintiff has not cited any authority suggesting that FRBNY is a "member bank," or that—even if it were—any of the individual Defendants are "directors or officers" of FRBNY.

i. The Reach of 1831j

A "central distinction" in administrative law is between those agency pronouncements that amount to "substantive rules" and those that are merely "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." Chrysler Corp. v. Brown, 441 U.S. 281, 301 (1979). The former category of agency actions creates new obligations or rights, N.Y.C. Emps.' Ret. Sys. v. S.E.C., 45 F.3d 7, 12 (2d Cir. 1995); must be subjected to the Administrative Procedure Act's notice-and-comment procedures, see 5 U.S.C. § 553(b)-(d); and carries the force of law, N.Y.C. Emps.' Ret. Sys., 45 F.3d at 12. The latter category—of interpretative rules and general policy statements—merely clarifies existing law, see id.; need not undergo notice and comment, see 5 U.S.C. § 553(b)(3)(A); and "lack the force of law," Christensen v. Harris County, 529 U.S. 576, 587 (2000).

The first question, therefore, is whether Congress's protection for individuals who "provide information" about "any possible violation of any law or regulation" extends to individuals who provide information about noncompliance with advisory letters and other agency guidance. In the Court's view, Congress did not intend the statute to stretch so far.

When Congress did intend to encompass the full panoply of agency action—interpretations, guidance, and policy statements—it said so. Throughout Title 12, Congress distinguishes between "regulations" on the one hand and "policies," "interpretations," and "guidance" on the other. See, e.g., 12 U.S.C. § 24a(f)(2) ("[T]he term 'equity capital' includes . . . any debt instrument issued by a financial subsidiary, if the instrument qualifies as capital of the subsidiary under any Federal or State *law, regulation, or interpretation* applicable to the subsidiary."); id. § 1463(c) ("The *regulations* of the Comptroller and the *policies* of the Comptroller and the Corporation governing the safe and sound operation of savings associations, including *regulations and policies* governing asset classification and appraisals, shall be no less stringent than those established by the Comptroller for national banks."); id. § 1843(k)(4)(G)(ii) (describing an action as "financial in nature" if it is one that "the Board [of Governors] has determined, under *regulations prescribed or interpretations issued* . . . to be usual in connection with the transaction of banking"); id. § 1852(d) ("The Board *shall issue regulations* implementing this section . . . . The Board *may issue interpretations or guidance* regarding the application of this section to an individual financial company or to financial companies in general.") (emphasis added throughout). Either Congress intended the phrase "law or regulation" to encompass nonbinding agency actions and was simply imprecise in its drafting, or it meant for the phrase to include only those pronouncements that carry with them the force of law. The Court adopts the latter interpretation.

This conclusion is consistent with the Third Circuit's decision in Matter of Seidman, 37 F.3d 911, 930-32 (3d Cir. 1994), which also construed the phrase "law or regulation" as used in a different provision of Title 12. In Seidman, the Court addressed 12 U.S.C. § 1818(e)(1)(A)(i)(I), which permits federal banking agencies to remove a regulated bank's officers or directors from office upon a showing that the individual has "violated any law or regulation." The agency in Seidman concluded that the individual director had violated 12 C.F.R. § 571.7(b), which provided that each director of a savings association "has a fundamental duty to avoid placing himself or herself in a position which creates, or which leads to or could lead to, a conflict of interest or appearance of a conflict of interest." The Third Circuit noted that although the provision was published in the Code of Federal Regulations, it had not been subjected to notice and comment, was expressly labeled a "Statement of Policy," and "impose[d] no specific substantive requirements." Seidman, 37 F.3d at 930-32. The Court thus concluded that the relevant agency provision was "no more than a statement of policy that a director of a banking institution, like Seidman, should use as a guide for personal conduct, not a rule whose violation triggers the severe penalty section 1818(e) imposes." Id. at 932. Accordingly, the Court "reject[ed] the [agency's] conclusion that section 571.7(b)'s 'Statement of Policy' is a 'regulation or law' within the meaning of section 1818(e)(1)(A)(i)(I)." Id.

Similarly, in United States v. Reeves, 891 F. Supp. 2d 690 (D.N.J. 2012), the District of New Jersey addressed a provision of the Lacey Act that made it unlawful to transport in interstate commerce any wildlife taken "in violation of any law or regulation of any State." Id. at 693 (quoting 16 U.S.C. § 3372(a)(2)(A)). The government charged the defendant with violating this provision, alleging that he harvested oysters in violation of the "Terms and Conditions" incorporated as part of "the annual New Jersey licensing agreement." Id. at 696. Noting that the oyster-harvesting restrictions had not been subjected to notice-and-comment or otherwise promulgated in accordance with the procedures of the state's Administrative Procedure Act, the Court concluded that the "Terms and Conditions cannot be considered a law or regulation of the State of New Jersey during the time period charged in the Indictment." Id. at 708.

Both Reeves and Seidman construed the phrase "law or regulation" in the context of a statute that punished individuals; here, by contrast, the statute protects federal bank examiners. Policy considerations might favor a broad construction of the phrase "law or regulation," particularly given that Congress in 1993 expanded the statute to protect examiners from being fired because they disclosed information about "gross mismanagement" or an "abuse of authority." If Congress had wanted to extend protection even more broadly, however, it could easily have said so—and indeed did say so in other provisions of Title 12. Moreover, as Defendants rightly point out (see Tr. of Oral Argument, April 4, 2014 ("4/4/14 Tr.") 7:5-22), expanding § 1831j beyond its text creates difficult line-drawing problems: could an employee claim whistleblower protection for reporting noncompliance with an agency policy or with a speech given by a member of the Federal Reserve's Board of Governors that outlines an important policy consideration? The Court thus concludes that the phrase "regulation" encompasses only those agency pronouncements that carry with them the force of law, as the Third Circuit held in Seidman and the District Court held in Reeves.

ii. Whether SR 08-08 Carries the Force of Law

To determine whether an agency pronouncement is a binding, substantive rule or a nonbinding statement of general policy or other guidance, courts look to three factors. First, courts consider whether the statement purports to create new substantive obligations, which can be determined by looking at the text of the pronouncement. See Brock v. Cathedral Bluffs Shale Oil Co., 796 F.2d 533, 538 (D.C. Cir. 1986) (Scalia, *J.*) ("We have, for example, given decisive weight to the agency's choice between the words 'may' and 'will.'"). Second, courts look to whether the pronouncement has been subjected to notice and comment. See 5 U.S.C. 553; N.Y.C. Emps.' Ret. Sys. v. S.E.C., 45 F.3d 7, 11-12 (2d Cir. 1995). Third, courts consider whether the statement has been published in the Code of Federal Regulations, which, as then-Judge Scalia explained, is the "real dividing point between regulations and general statements of policy." Brock, 796 F.2d at 539.

Here, Defendants assert—and nowhere does Plaintiff dispute—that SR 08-08 was not subjected to notice and comment and is not published in the Code of Federal Regulations. (See Defs.' Mem. of Law at 10.) Nor does the text of SR 08-08 purport to establish binding obligations.[5] Although the letter at times speaks of what banks "should" do, nowhere does it say

[5] Plaintiff's Amended Complaint repeatedly references SR 08-08 and quotes a substantial portion of it. (See Am. Compl. ¶ 39.) The Court therefore may consider the letter in its entirety on this motion to dismiss. See, e.g.,

what they "must" or "will" do. Instead, it "encourages" banking institutions to ensure sufficient resources are dedicated to compliance programs; outlines the Federal Reserve's "expectations"; and "clarifies Federal Reserve views applicable to large banking organizations with complex compliance profiles." (Gross Decl. Ex. A at 2.) None of the three factors outlined above suggests that this letter carries with it the force of law.

In response, Plaintiff argues that FRBNY has treated SR 08-08 as a binding regulation, enforcing it in the course of consent decrees it has entered into with the banks it supervises. Examination of these consent decrees, however, reveals that Plaintiff is mistaken. Although each of the consent decrees requires the supervised bank to submit a compliance plan that is consistent with SR 08-08, nowhere do the agreements suggest that SR 08-08 is an otherwise binding regulation. Instead, each of the consent decrees expressly refers to SR 08-08 as "guidance." See In re The Goldman Sachs Grp., Inc. et al., No. 11-112-B-HC, ¶¶ 12(d), 16(b) (Sept. 1, 2011); In re Citigroup Inc., No. 13-004-B-HC, ¶ 3(i) (Mar. 21, 2013); In re JP Morgan Chase & Co., No. 13-002-B-HC, ¶ 3(g) (Jan. 14, 2013); In re Morgan Stanley, No. 12-015-B-HC, ¶¶ 11(d), 15(b) (Apr. 2, 2012); In re Bank of America Corp., No. 11-029-B-HC, ¶ 3(b) (Apr. 13, 2011); In re JP Morgan Chase & Co. et al., No. 11-023-B-HC, 7(b) (Apr. 13, 2011); In re Wells Fargo & Co., No. 11-025-B-HC, ¶ 3(b) (Apr. 13, 2011); In re HSBC North Am. Holdings, Inc., No. 10-202-B-HC, ¶ 5(n) (Oct. 4, 2010).

Plaintiff also asserts that FRBNY "has received instructions" from the Board of Governors of the Federal Reserve ("Board of Governors") "to enforce SR 08-08 as a binding regulation," and that FRBNY should therefore be estopped from arguing that SR 08-08 "is anything other than a binding regulation." (Pl.'s Opp. at 7.) In support of this argument, Plaintiff relies on a report that the Board of Governors produced outlining its review of

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New York Life Ins. Co. v. United States, 724 F.3d 256, 258 n.1 (2d Cir. 2013).

FRBNY's Bank Supervision Group. (Id. (citing Declaration of Linda Stengle, Jan. 24, 2014, ("Stengle Decl.") Ex. B).) The report Plaintiff cites, however, simply notes that FRBNY's "examination teams need to perform more work to determine compliance with *SR 08-08 Compliance Risk Management Programs*." (Stengle Decl. Ex. B at 9.) Nowhere does the report suggest that SR 08-08 is a binding regulation; indeed, like the consent decrees described above, the report expressly refers to SR 08-08 as "guidance." (Id.)

The Court expresses no conclusion as to whether Goldman Sachs was or was not in compliance with SR 08-08. Rather, it concludes only that SR 08-08 is an advisory letter that does not carry with it the force of law. Assuming as true the allegations in Plaintiff's FAC, Plaintiff nonetheless did not reveal a violation of a "law or regulation" when she disclosed that Goldman Sachs was not in compliance with SR 08-08. This "finding" may well have been important, but it did not fall into one of the categories that Congress determined was entitled to protection. Under the facts alleged in the FAC, Plaintiff is thus not a "whistleblower" within the meaning of § 1831j.

2. Plaintiff's Assertions of Other Protected Activities and Her Motion To Amend

At oral argument on the instant motion, in response to questions raised by the Court, Plaintiff raised an additional argument. She asserted that she was fired because her examination revealed that Goldman Sachs violated a number of other laws and regulations—not just that it had failed to comply with SR 08-08. (See 4/4/14 Tr. 17:17-24.) One week after oral argument, Plaintiff's counsel submitted a letter to the Court reiterating this position and "point[ing] out allegations made in the complaint that do not depend upon SR08-08." (Dkt. no. 40 at 2.) Three days later, Plaintiff submitted a motion seeking leave to file a Second Amended Complaint ("SAC"). (Dkt. no. 42.)

Plaintiff's argument is unsupported by the allegations of the FAC, and review of her proposed SAC shows that her amendment would be futile.

The FAC does allege that Defendants "had notice from Carmen that Goldman's compliance problems uncovered by Carmen during her examinations also violated other federal laws, rules and regulations," and proceeds to list over fifteen different statutory and regulatory provisions that Goldman Sachs allegedly violated. (FAC ¶ 139.) Assuming—as the Court must for purposes of this motion—that Goldman Sachs did violate these laws, and assuming further that Plaintiff conveyed this information to Defendants, the FAC omits a crucial allegation: that Plaintiff was fired because she reported these violations. The FAC alleges only that "Defendants terminated Carmen for finding Goldman did not have a firmwide conflicts of interest practice[ ] in compliance with SR 08-08 and for refusing to change her examination findings." (Id. ¶ 151; see also ¶ 5 ("[Defendants] fired [Plaintiff] because they suddenly, after months of receiving relevant information, changed their position and said Carmen's finding that Goldman Sachs had no firmwide conflict of interest policy in compliance with SR 08-08 was not credible."); id. ¶ 133 ("Defendants terminated Carmen because her bank examination found that Goldman had no conflict of interest program in compliance with SR 08-08 and because Carmen refused Defendants' unlawful request to change her examination findings.").)[6]

Insofar as Plaintiff argues that Defendants' request "to change her examination findings" related to these other alleged violations, that assertion too is contradicted by the FAC, which makes clear that the alleged request to change her findings related only to her conclusion about

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[6] Additionally, paragraph 134 of the FAC alleges that Plaintiff notified "Defendant FRBNY" that "Defendants and others" had acted in violation of the criminal laws prohibiting the obstruction of a federal bank examination, "among other rules and regulations." Plaintiff does not allege whom she told about these alleged violations, nor does she allege any facts from which the Court can infer that she was fired as a result of any such disclosure. Furthermore, any assertion that this disclosure was the basis for her termination would be inconsistent with the other allegations in the FAC. See, e.g., FAC ¶ 5 ("Specifically, [Defendants] fired [Segarra] because they suddenly, after months of receiving relevant information, changed their position and said Carmen's finding that Goldman Sachs had no firmwide conflict of interest policy in compliance with SR 08-08 was not credible.").

SR 08-08. (See, e.g., id. ¶ 115 ("Consistent with the decision of the Legal and Compliance risk team on March 21, 2012, Carmen was finalizing her report and preparing language that would be used to describe Goldman's noncompliance with SR 08-08 in the annual letter to Goldman and the annual report of the bank examiners' activities."); id. ¶ 116 ("Defendants knew Goldman had no firmwide conflict of interest policy in compliance with SR 08-08. Defendants also knew Carmen planned to identify Goldman's failure to comply with SR 08-08 in the annual report . . . ."); id. ¶ 117 ("Defendants agreed they needed to prevent Carmen from issuing an examination finding that Goldman had no conflict of interest program that complied with SR 08-08."); id. ¶ 126 ("On May 15, 2012, Defendants Silva and Koh met with Carmen and attempted to force her to change the findings of her examination of Goldman. They said they did not believe her finding that Goldman had no conflict of interest policy was 'credible.' Defendants Silva and Kim told Carmen that she had to 'come off of that position.'"); id. ¶ 129 ("Carmen told Defendants Silva and Koh she did not believe it was responsible or proper to change her findings to say Goldman had a firmwide conflict of interest policy when so much evidence existed showing Goldman's non-compliance.").) The lack of a causal connection—between Plaintiff's alleged disclosure of these violations and her termination—is fatal to the FAC.

Plaintiff's proposed SAC does nothing to address this defect. Indeed, Plaintiff's motion seeking leave to amend acknowledges that "the proposed changes are merely cosmetic." (Dkt. no. 42 at 2 ¶ 7.) The only proposed change is the addition of a new paragraph under Count One—Plaintiff's § 1831j claim—that simply cross references earlier paragraphs of the FAC describing alleged violations that Plaintiff "reported." (Id. at 33-34 ¶ 150a.)

Plaintiff's motion to amend misses the point. The shortcoming in the FAC is not some technical defect resulting from Plaintiff's failure to use certain magic words or to clearly incorporate allegations made elsewhere in the FAC. The problem is deeper: Plaintiff has failed to allege that she was terminated *because* she "reported" violations of anything other than SR 08-08. This shortcoming could not be cured by the addition of a bare generic phrase claiming that she was fired for reporting other violations. Even less could it be cured when any such allegations would be inconsistent with the other allegations in the FAC. Here, the paragraph that follows the new language in the proposed SAC remains unchanged, and states that "Defendants terminated Carmen for finding Goldman did not have a firmwide conflicts of interest practice[ ] in compliance with SR 08-08 and for refusing to change her examination findings." (Id. at 34 ¶ 151.) Also unchanged are the paragraphs that make clear that Plaintiff's "examination findings" relate to alleged violations of SR 08-08. (See, e.g., id. at 25 ¶¶ 115-17.)

Plaintiff has had ample time to adjust her complaint to address Defendants' arguments. After Plaintiff filed her initial Complaint and Defendants moved to dismiss, Plaintiff elected to file the FAC. (Dkt. nos. 18-19, 22-23.) Defendants then filed the instant motion to dismiss, making essentially identical arguments to their earlier motion. (Compare dkt. no. 19 with dkt. no. 34.) Plaintiff's opposition to the motion focused on whether SR 08-08 was a regulation (Pl.'s Opp. at 4-9), and nowhere did it mention any other "law or regulation" that could have formed the basis for Plaintiff's § 1831j claim. Now, after full briefing and oral argument on the motion, and in violation of Rule 5C of this Court's Individual Rules & Practices in Civil Cases—which requires plaintiffs to state whether they wish to rely on the attacked pleading or submit an amended pleading within fourteen days after the filing of a motion to dismiss—Plaintiff has asked for a second opportunity to amend her complaint.

Recognizing that Rule 15(a)(2) provides that courts should "freely give leave" to amend "when justice so requires," Fed. R. Civ. P. 15(a)(2), this Court has reviewed the SAC to determine if it, unlike the FAC, "has alleged sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. at 678. In spite of the sufficient notice Plaintiff has been provided of the deficiencies in the FAC, and ample opportunity to seek to cure them—including in the proposed SAC[7]—Plaintiff has failed to do so. Because the proposed SAC would not withstand a renewed motion to dismiss, the Court concludes that granting leave to amend would be futile and denies Plaintiff's motion. See, e.g., Lucente v. Int'l Bus. Machs. Corp., 310 F.3d 243, 258 (2d Cir. 2002).[8]

3. Plaintiff's State Law Claims

Plaintiff invoked the Court's jurisdiction by asserting that the FAC raised a federal question. (FAC ¶ 10.) Because the Court concludes that Plaintiff has failed to state a claim under 18 U.S.C. § 1831j—her only federal cause of action[9]—it concludes that this is the "the usual case in which all federal-law claims are eliminated before trial" such that it should "declin[e] to exercise jurisdiction over the remaining state-law claims." Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988); see also Kolari v. New York-Prebyterian Hosp., 455 F.3d 118, 119 (2d Cir. 2006). It therefore dismisses her state law claims without prejudice.

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[7] At oral argument Defendants again notified Plaintiff of the shortcoming in her argument, addressing the issue as follows: "Your Honor took the time to go through the words of section 1831j, and there's a very key word there, which is 'because.' The plaintiff has got to allege that she was fired because of a particular report, and the only allegation about that is contained in Paragraph 151, and that report has to do with . . . SR08-08." (4/4/14 Tr. 17:2-7). Plaintiff's proposed Second Amended Complaint—submitted over one week after oral argument—still does not address this shortcoming.

[8] Defendants offer an alternative basis for granting their motion to dismiss the § 1831j claim. As relevant here, § 1831j only protects individuals who provide information about wrongdoing at a "depository institution" or federal agency. See 12 U.S.C. § 1831j(a)(2). Defendants assert that Goldman Sachs is not a "depository institution," but rather a "depository institution holding company"—a separately-defined term. See id. § 1813(c)(1) (defining "depository institution"); id. § 1813(w)(1) (defining "depository institution holding company"). The Court declines to reach this argument in light of its conclusion that Plaintiff has failed plausibly to allege that she was terminated because she provided information concerning the violation of a "law or regulation."

[9] The basis for Count Six of the FAC—"conspiracy"—is less than clear. Presumably, Plaintiff seeks to allege a civil conspiracy, but to do so she would need to "plead specific wrongful acts which constitute an independent tort." John's Insulation, Inc. v. Siska Constr. Co., 774 F. Supp. 156, 161 (S.D.N.Y. 1991). The only claim based in federal law is the § 1831j whistleblower claim, which, for the reasons described above, fails to state a plausible claim.

Plaintiff may re-file these claims in state court.

4. Plaintiff's Request for "a More Complete Disclosure"

One final matter bears mention. The day before oral argument on Defendants' motion to dismiss, the Court held a telephone conference with the parties, at which a court reporter was present. During the conference, the Court explained that it had just come to her attention that her husband, who is a partner in a large law firm, was representing Goldman Sachs in an advisory capacity. (Transcript of April 3, 2014 Conference ("4/3/14 Tr.") 2:6-9.) The Court then stated:

> "I wanted to let you know this. And if either side—I don't need to know who—but has any desire to have me recuse myself, I am happy to entertain that request. Again, I don't need to know who is making the request, but before the argument tomorrow, I wanted to let you know that. I'm perfectly willing to put off the argument for a few days to give you the time to think about it. Or, Miss Stengel, if you want to talk to your client about it. But I also didn't want to inconvenience you. And so as soon as I found this out, I tried to . . . get you on the phone to advise you of this."

(Id. at 2:11-21.) Plaintiff's counsel responded as follows: "We're not going to ask that you recuse yourself, Judge." (Id. at 2:22-23.) Defendants' counsel similarly indicated that they would not seek recusal. (Id. at 2:24-25.)

The Court then asked if counsel wanted "to go forward with the argument, or are you sure[ ] you don't want any time to think about this." (Id. at 3:1-3.) Plaintiff's counsel responded: "I'm fine going forward tomorrow." (Id. at 3:1-4.) After addressing a question as to whether the conversation was on the record—which it was—the Court reiterated:

> Again, if this is an issue, at all, for you, this is your opportunity to raise it. And again, if you need time to think about it, I'm more than happy to put the argument off for a few days, a week. You can think about it. I don't need to know who made the request, I just need to know that someone made it. But I'm really just leaving that to you.

(Id. at 3:15-16.) At that point, Plaintiff's counsel again replied "[y]eah we're not going—I can tell you that we're not going to ask you to recuse yourself." (Id. 3:21-22). The following day, the Court held oral argument on Defendants' motion to dismiss, at which it posed repeated questions to Plaintiff regarding the sufficiency of her allegations. At no time prior to or during the argument on April 4, 2014, did Plaintiff's counsel withdraw her previous statements that she was not seeking recusal or additional time to consider whether to file such a motion. Nor did she seek any additional information or "disclosures" from the Court.

One week after oral argument—on the same date Plaintiff submitted a letter seeking to "provide a more complete response to the questions asked" at oral argument and to "address[ ] [the Court's] concerns and requests" (dkt. no. 40 at 1, 3), Plaintiff submitted an application for "a more complete disclosure of both Judge Abrams's husband's relationship with Goldman Sachs and Judge Abrams's prior working relationship with defense attorney Thomas Noone,"[10] (dkt. no. 41 at 1.) In particular, Plaintiff now seeks information regarding the "commencement date of Husband's present work for Goldman Sachs" and "historical relationship, if any between Husband and Goldman Sachs." (Id. at 2.)[11]

Although Plaintiff has not filed a recusal motion, the letter before the Court implicates one of the well-established prerequisites of such a motion: that it be made "at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim." Gil Enterprises, Inc. v. Delvy, 79 F.3d 241, 247 (2d Cir. 1996). Requiring a prompt application "avoids the risk that a party is holding back a recusal application as a fall-back position in the event of adverse rulings on pending matters." In re Int'l Bus. Machines Corp., 45 F.3d 641, 643 (2d Cir. 1995). Because of the potential for "judge-shopping," the Second Circuit has explained,

[10] As the Court explained at the April 3, 2014 telephone conference (and had previously disclosed at an earlier conference): "I used to work with Tom Noone when I was at the law firm of Davis Polk, we didn't work together closely, but I know him from there." (Tr. 3:12-14.)

[11] Plaintiff cites no authority for the proposition that discovery is permissible in the context of a recusal motion. See Order, Morisseau v. DLA Piper, No. 06 Civ. 13255(LAK) (S.D.N.Y. Dec. 21, 2007), ECF No. 152 ("No basis has been shown for conducting discovery in support of the threatened [recusal] motion, assuming without deciding that discovery ever is permissible in connection with such a motion.").

parties' attempts to seek recusal must be "scrutinized with care." In re Aguinda, 241 F.3d 194, 201 (2d Cir. 2001). "Litigants are entitled to an unbiased judge; not to a judge of their own choosing." In re Drexel Burnham Lambert Inc., 861 F.2d 1307, 1312 (2d Cir. 1988).

Here, the timing of Plaintiff's requests suggests that she is engaging in precisely the type of "judge-shopping" the Second Circuit has cautioned against. Although the Court indicated that it would entertain any recusal request and offered to postpone oral argument, Plaintiff's counsel twice stated that she would not be asking the Court to recuse itself (id. 2:22, 3:21-22), and that she was "fine with going forward tomorrow" with the oral argument (id. 3:4). There was no qualification or hesitation.

"Permitting a party to obtain a do-over through recusal is unfair to the other parties and undermines public confidence in the judicial system." Six West Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp., No. 97 Civ. 5499(LAP), 2003 WL 282187, at *7 (S.D.N.Y. Feb. 7, 2003), aff'd without opinion, 124 Fed. App'x 73 (2d Cir. 2005). Although at the time of Plaintiff's request the Court had not yet issued a decision, Plaintiff's change of position emerged only after she "sample[d] the temper of the court" at oral argument and appears to have anticipated its ruling. In re Martin-Trigona, 573 F. Supp. 1237, 1245 (D. Conn. 1983). Such an attempt to engage in judicial game-playing strikes at the core of our legal system. The Court denies this request.

CONCLUSION

The Federal Reserve plays a central role in supervising the safety and soundness of our nation's banking institutions. Any claim that a Federal Reserve employee has been wrongfully terminated for concluding that a prominent financial institution had failed to adhere to appropriate standards deserves the closest scrutiny. In this case, however, even assuming

Plaintiff's factual allegations are true—as the Court must on a motion to dismiss—Plaintiff has failed to state a cause of action. By enacting 12 U.S.C. § 1831j, Congress sought to protect employees of banking agencies from retaliation for providing certain types of information. But the scope of this protection is not unlimited. The law only protects those who adequately allege that they have suffered retaliation for providing information regarding a possible violation of a "law or regulation," as distinct from what the law treats as advisory guidance. Plaintiff has not done so here. Nor, according to the Supreme Court, does the First Amendment provide protection. Although a government employee may be entitled to First Amendment protection when she speaks out "as a citizen on a matter of public concern," the Supreme Court has concluded that a government employee is not entitled to such protection "based on speech made pursuant to the employee's official duties." Garcetti v. Ceballos, 547 U.S. 410, 413, 418 (2006).

Accordingly, the Court grants Defendants' motion to dismiss the First Amended Complaint. Count One fails to state a claim under 12 U.S.C. § 1831j, and the Court declines to exercise jurisdiction over the remaining state-law claims. Plaintiff's motion seeking leave to file a Second Amended Complaint is denied, as are the other requests made in her April 11, 2014 letters.

The Clerk of Court is respectfully requested to terminate the motions pending at docket numbers 33 and 42 and to close the case.

SO ORDERED.

Dated: April 23, 2014
New York, New York

Ronnie Abrams
United States District Judge