

III.

On the basis of this Order and Respondent's Offer, the Commission finds¹ that:

A. Summary

1. Bennett engaged in repeated instances of improper professional conduct during the year-end 2008 audit of TierOne Corporation, a holding company for TierOne Bank (collectively "TierOne"). He did so by failing to subject TierOne's loan loss estimates – one of the highest risk areas of the audit – to appropriate scrutiny. Bennett served as the senior manager on the engagement; he had significant responsibility for the audit decisions, the inadequately designed and implemented audit programs, the review of audit workpapers, and the failures to follow audit standards that are the subject of this proceeding.

2. TierOne's loan losses were a critical audit area that warranted heightened scrutiny. Up to and during 2008, as a result of the financial crisis and related real estate market crash, TierOne had been experiencing a dramatic increase in the number of its troubled real estate loans. TierOne estimated its loan losses for a key component of its troubled loan portfolio – large, unique loans accounted for under Financial Accounting Standards Board's Statement of Financial Accounting Standards No. 114 ("FAS 114") – by using the value of the collateral underlying these loans. Rather than get updated appraisals to value the collateral of the loans that TierOne evaluated for impairment under FAS 114 (called here "the bank's FAS 114 loans"), TierOne frequently relied on stale, dated appraisals to which the bank's management sometimes applied a discount. TierOne's determination of the discount amounts, and its decisions not to apply a discount, were not documented, nor were they supported by reliable facts or evidence.

3. Bennett violated numerous Public Company Accounting Oversight Board ("PCAOB") audit standards in both his audit of internal control over financial reporting and his audit of the financial statements. He correctly identified TierOne's loan losses as presenting a fraud risk and a significant risk of material misstatement. The actual audit test work in this area, however, was inadequate considering the associated audit risk and materiality. For example, the internal controls identified and tested by the audit engagement team relating to the allowance for loan and lease losses ("ALLL") did not effectively address one of the most important and riskiest components of the bank's loan loss calculations: management's use of stale and inadequate appraisals to value the collateral underlying the bank's FAS 114 loans. Based on this test work, Bennett had no reasonable basis to conclude that TierOne maintained, in all material respects, effective internal control over financial reporting. Moreover, he failed to adequately identify and evaluate defects in the design and operating effectiveness of controls over collateral valuation that would have been important to the auditors' conclusion about whether TierOne's controls sufficiently addressed the assessed risk of misstatement. Bennett violated PCAOB standards, including specifically Auditing Standard No. 5 ("AS No. 5"), in his audit of internal control over financial reporting.

¹ The findings herein are made pursuant to Respondent's Offer of Settlement and are not binding on any other person or entity in this or any other proceeding.

4. Compounding these flaws in the audit of internal control over financial reporting were Bennett's failures to comply with PCAOB standards in his substantive audit procedures over the bank's FAS 114 loans. The relevant audit work on these loans consisted of checking management's basic math, confirming that appraisals (no matter how stale) existed, reviewing a sample of appraisals, and relying on management's uncorroborated representations concerning property-specific issues, including whether stale appraisals required adjustment. These procedures fell short of the requirements of a number of PCAOB standards, including specifically AU Sections 328 and 342, which address auditing fair value and accounting estimates, respectively. In short, Bennett failed to subject management's estimates to appropriate scrutiny.

5. Bennett failed to obtain sufficient, competent evidential matter to provide assurances that management's estimates were reasonable. He further failed to act with due professional care or appropriate professional skepticism.

6. These failures, along with others detailed below, demonstrate a single instance of highly unreasonable conduct that resulted in a violation of applicable professional standards in which Bennett knew, or should have known, heightened scrutiny was warranted; and repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.

B. Respondent

7. **Darren M. Bennett**, CPA, age 41, is a resident of Elkhorn, Nebraska. Bennett worked as an auditor at KPMG, LLP ("KPMG") from 2001 to 2016. He worked on the TierOne audit each year from 2003 through KPMG's resignation in 2010, with the exception of one year. Bennett was the senior manager for the 2008 TierOne audit. Bennett was also a member of KPMG's financial services practice and served as manager or senior manager on at least four financial services audits in addition to TierOne. Bennett is currently licensed as a CPA in Nebraska. He has previously been licensed as a CPA in North Dakota and South Dakota.

C. Other Relevant Parties

8. **TierOne Corporation**, a Wisconsin corporation, was, during the relevant time period, a holding company for TierOne Bank, a federally-chartered savings bank headquartered in Lincoln, Nebraska. TierOne's common stock was registered with the Commission pursuant to Section 12(b) of the Exchange Act; that registration was revoked by consent on June 4, 2012. Prior to May 7, 2010, TierOne's shares were listed on the NasdaqGS exchange under the stock symbol "TONE." TierOne's common stock was thereafter quoted on OTC Pink, which is operated by OTC Markets Group Inc. On June 4, 2010, TierOne Bank was closed by its primary regulator, the United States Office of Thrift Supervision ("OTS"). The Federal Deposit Insurance Corporation ("FDIC") was named receiver and another bank took over TierOne's assets and deposit accounts. TierOne subsequently filed for Chapter 7 bankruptcy protection on June 24, 2010. In 2014, TierOne's President and Chief Operating Officer, James Laphen, and its Chief Credit Officer, Don Langford, pleaded guilty to federal securities fraud, including conspiring to conceal the bank's true financial position from shareholders, regulators, and KPMG. In 2015, TierOne's Chairman and Chief Executive Officer, Gilbert Lundstrom, was found guilty by a

federal district court jury, later affirmed by the U.S. Court of Appeals for the Eighth Circuit, of conspiring with TierOne management to conceal the bank's true financial condition from shareholders, regulators, and KPMG. Each of these members of management was sentenced to serve time in prison and to pay restitution for their crimes.

9. **KPMG LLP** is a limited liability partnership headquartered in New York, New York, engaged in the business of providing accounting and auditing services. KPMG audited TierOne's 2008 financial statements and internal control over financial reporting as of December 31, 2008 and issued unqualified opinions. KPMG also performed quarterly reviews for TierOne during the relevant time period.

10. **John J. Aesoph**, CPA, age 46, is a resident of Fremont, Nebraska. Aesoph has been an auditor at KPMG since 2001 and a partner at the firm since 2005. He was on the TierOne audit engagement from 2002 through KPMG's resignation in 2010, and was the engagement partner for the 2008 audit. Aesoph is currently licensed as a CPA in Nebraska. He has previously been licensed as a CPA in Idaho, Indiana, Iowa, Kansas, North Dakota, and South Dakota.

D. TierOne's Risky Problem Loan Portfolio

11. TierOne was a century-old thrift bank that had historically focused on residential and agricultural loans in the Nebraska/Iowa/Kansas region. Beginning in about 2004, however, TierOne expanded into high-risk types of lending in regions such as Las Vegas, Florida, and Arizona, which were experiencing unusual, rapid escalation in market values. This strategy made the bank particularly vulnerable to the subsequent fallout from the financial crisis, as these areas were hardest hit by the precipitous fall in real estate prices, which began in late 2006 and early 2007.

12. Throughout 2008, TierOne was experiencing a dramatic rise in high-risk problem loans including land and land development and residential construction. Certain of these problem loans – typically larger and non-homogenous (*i.e.*, not car or residential mortgage loans) – were deemed “impaired” pursuant to FAS 114, meaning it was probable the bank would not recover all amounts as contractually due. TierOne's reported FAS 114 impaired loan balance had increased from less than \$4 million as of December 31, 2006 to nearly \$186 million as of December 31, 2008.

13. In June 2008, the OTS conducted a “risk-focused examination” of the bank that focused on asset quality, credit administration, management, earnings, and the adequacy of ALLL. As a result of that examination, the OTS downgraded the bank's composite CAMELS rating from a one (indicating a financial institution that was “sound in every respect”) to a four (indicating a financial institution with “serious financial or managerial deficiencies” that require close supervisory attention). The OTS provided the bank with a report that deemed the institution to be in troubled condition and board and management performance to be exceptionally poor. OTS concluded that TierOne had experienced a significant deterioration in asset quality due to eroding real estate values in Nevada and Florida, and that poor board and management oversight had exacerbated the problem. The OTS cited data demonstrating that real estate values were declining at unprecedented rates in states and markets where the bank had a concentration of

loans. The OTS also directed TierOne to maintain higher minimum capital ratios. As the auditors were aware, failure to correct the problems identified by the OTS or to meet the heightened capital requirements would result in additional OTS enforcement action.

14. The bank's FAS 114 loans had a negative effect on TierOne's ability to meet the heightened capital requirements mandated by the OTS. Under Generally Accepted Accounting Principles ("GAAP"), TierOne was required to assess probable losses associated with its impaired loans and record those losses in its ALLL. GAAP permits the impairment to be measured using the fair value of the underlying collateral if the loan is collateral dependent, which is the method that was typically utilized by TierOne on its FAS 114 loans. As loan losses increased, the bank's capital was further eroded, directly impacting the OTS capital requirements.

15. In order to assess loan losses for the bank's FAS 114 loans, TierOne prepared loan-by-loan spreadsheets that contained estimates of collateral values and loan impairment determinations. TierOne generally based the valuation on the most recent appraisal in its loan files. If the appraisal was aged, as it typically was, TierOne would sometimes apply a discount to the appraised value. These discounts were determined by an informal committee at the bank. The rationale for applying any particular discount – or for not discounting an appraisal at all – was not documented.

16. In the summer of 2009, after KPMG issued its audit opinion with respect to TierOne's 2008 financial statements and when the OTS began its next annual exam, the bank was forced to get a significant number of updated appraisals and to use those appraisals in its loan loss calculations. In the fall of 2009, TierOne disclosed over \$130 million in additional loan loss provisions. TierOne was shut down by bank regulators on June 4, 2010 and filed for bankruptcy later that month.

17. In April 2010, KPMG resigned as TierOne's auditor. KPMG withdrew its audit opinion relating to TierOne's 2008 financial statements on the basis that they were materially misstated with respect to certain out-of-period adjustments for loan loss reserves. KPMG also withdrew its opinion relating to TierOne's internal control over financial reporting as of the year-end 2008 due to a material weakness in internal control over financial reporting related to the material misstatements.

E. The Auditors Recognized the Risks in TierOne's Problem Loan Portfolio

18. Prior to and during their 2008 audit of TierOne, Bennett was aware of the risk and significance of the bank's loan loss provisions, and of the loan loss component related to the bank's FAS 114 loans specifically.

19. The audit planning document – reviewed and approved by Bennett – identified the ALLL as a risk that could result in a material misstatement of TierOne's financial statements.

20. Compounding the identified risks were numerous red flags and other irregularities that should have triggered Bennett's professional skepticism and led him to investigate further. For example, Bennett was aware that, in connection with its June 2008 examination, the OTS identified a deficiency in TierOne's ALLL representing an approximate 25% increase over the

previously-reported ALLL. TierOne's valuation adjustments on the collateral underlying the bank's FAS 114 loans also were inconsistent with independent market data. Further, despite the market declines, TierOne management often did not get updated appraisals on the collateral underlying the bank's FAS 114 loans, and in the limited instances where TierOne did get updated appraisals or valuations, the collateral value typically showed a significant decline from the amount used by management in the immediately preceding quarter. And despite TierOne's internal policy to do so, the bank often failed to discount Nevada appraisals that were more than six months old.

21. In addition to these red flags, the portion of the ALLL related to the bank's FAS 114 loans was material. PCAOB auditing standards recognize that financial statements are materially misstated when they contain misstatements whose effect, individually or in the aggregate, is important enough to cause the financial statements not to be presented fairly, in all material respects, in conformity with generally accepted accounting principles. AU § 312, ¶ 4.

22. The portion of the ALLL related to the bank's FAS 114 loans was material to the financial statements taken as a whole.

23. Given the risk and materiality of the ALLL related to the bank's FAS 114 loans, and the many red flags, Bennett had heightened responsibilities in auditing this area, and was required to apply professional skepticism in obtaining sufficient competent evidential matter to support their opinions. He failed in these responsibilities.

F. Bennett's Improper Professional Conduct

24. The Commission's Rules allow the Commission to censure or deny, temporarily or permanently, the privilege of appearing or practicing before it in any way certain professionals who violate "applicable professional standards." 17 C.F.R. § 201.102(e). For auditors of issuers such as TierOne, the applicable professional standards include standards issued by the PCAOB.

25. The PCAOB's three general standards of auditing require that an auditor (1) have adequate technical training and proficiency, (2) maintain an independent mental attitude, and (3) act with due professional care in the performance of the audit. AU § 150, ¶ 2. The three basic standards of field work require the auditor to (1) adequately plan and properly supervise the audit, (2) obtain a sufficient understanding of internal control to plan the audit, and (3) obtain sufficient competent evidential matter to afford a reasonable basis for an opinion. AU § 150, ¶ 2. PCAOB standards also require that auditors "must document the procedures performed, evidence obtained, and conclusions reached with respect to relevant financial statement assertions," and such "[a]udit documentation must clearly demonstrate that the work was in fact performed." AS No. 3 ¶ 6.

26. As the senior manager on the engagement team, Bennett contributed significantly to the planning of the audit, the design of tests of controls, and the design and implementation of substantive procedures. Additionally, Bennett was responsible for executing the audit, including directing the audit engagement team on how to conduct the audit. Bennett reviewed the audit workpapers and was responsible for on-site supervision of the audit engagement team. Bennett also played a significant role in gathering and evaluating evidential matter to support the audit of

ALLL, and specifically the valuation of collateral underlying the bank's FAS 114 loans. Bennett was responsible for compliance with PCAOB standards with respect to the supervisory responsibilities that were assigned to him.

27. At the completion of the audit, Bennett signed off that "all necessary auditing procedures were completed," that "support for conclusions was obtained," and that "sufficient appropriate audit evidence was obtained."

28. As detailed below, Bennett's conduct in planning, supervising, and implementing KPMG's audit of TierOne's 2008 financial statements – and specifically the portions of the audit relating to the bank's FAS 114 loans – violated numerous PCAOB standards. Most prominently, the auditors violated the requirements of AS No. 5 regarding audits of internal control over financial reporting, and AU Sections 328 (auditing fair value measurements) and 342 (auditing accounting estimates) related to the substantive audit procedures. Bennett also violated: the third general audit standard (due professional care), *see* AU § 150, ¶ 2; and the third standard of field work (obtaining sufficient competent evidential matter), *see* AU § 150, ¶ 2; AS No. 3; and AU §§ 230, 312, 316, 319, 326, 333, and 561.

29. The KPMG engagement team performed an integrated audit of TierOne, meaning that the audit of TierOne's internal control over financial reporting was integrated with the audit of TierOne's financial statements. When an auditor assesses control risk below the maximum level, as the auditors did here, he or she should obtain sufficient evidential matter to support that assessed level. AU § 319, ¶¶ 80, 90. Moreover, if one or more material weaknesses exist, the company's internal control over financial reporting cannot be considered effective. AS No. 5, ¶ 2. A material weakness is a deficiency, or a combination of deficiencies, in internal control over financial reporting, such that there is a reasonable possibility that a material misstatement of the company's annual or interim financial statements will not be prevented or detected on a timely basis. AS No. 5, Appendix A, ¶ A7.

30. AS No. 5 provides specific requirements for auditing internal control over financial reporting in an integrated audit, including that the auditors should understand likely sources of potential misstatements and focus more of their attention on the areas of highest risk. But the key ALLL control that the audit engagement team identified (the bank's Asset Classification Committee) did not effectively address the riskiest component of the ALLL: the bank's valuation of collateral for the bank's FAS 114 loans with stale appraisals. In addition, the audit engagement team failed to identify or test any effective internal controls to determine whether TierOne was complying with its own policies for updating appraisals. Bennett therefore violated AS No. 5, and further lacked a reasonable basis for the audit's conclusion that there were no material weaknesses in TierOne's internal control over financial reporting.

31. Adding to the failures in connection with auditing TierOne's internal control over ALLL was Bennett's deficient substantive audit procedures. Specifically, the audit engagement team failed to follow PCAOB standards in reviewing the reasonableness of management's estimates of the value of the collateral underlying the bank's FAS 114 loans – one of the riskiest and most critical elements of the bank's FAS 114 loss estimate calculation. The audit engagement team relied principally on the most recent (and often stale) appraisals given them and on management's uncorroborated representations of current value. The audit engagement

team relied on these representations despite evidence that management's estimates were biased and inconsistent with independent market data. Bennett was directly involved in the audit engagement team's FAS 114 test work. Specifically: Bennett initially reviewed the individual spreadsheets prepared by TierOne that purported to justify the valuation of the underlying collateral of the bank's FAS 114 loans; Bennett supervised the audit test work and collection of evidential matter, including meeting directly with management to discuss management's estimates of the value of collateral; and Bennett approved the audit engagement team's FAS 114 test work prior to passing it to Aesoph. By failing to subject management's estimates to appropriate scrutiny, Bennett violated PCAOB standards. Bennett failed to obtain sufficient, competent evidential matter to provide assurances that management's estimates were reasonable. He further failed to act with due professional care or appropriate professional skepticism.

32. TierOne estimated the value of the collateral underlying the bank's FAS 114 loans on a loan-by-loan basis because the bank's FAS 114 portfolio was made up of large, non-homogenous loans. Therefore, the audit engagement team performed a loan-by-loan review of the bank's FAS 114 loan portfolio to test whether management's estimates of value were reasonable. However, the substantive audit procedures and the evidence obtained from those procedures were insufficient to meet PCAOB standards.

33. The audit engagement team obtained and reviewed each of the more than fifty FAS 114 spreadsheets prepared by the bank. Most of the audit work was simply "ticking and tying": recalculating figures, agreeing charge off amounts, and tying reported appraisal values to the actual appraisals.

34. The audit engagement team did, however, obtain a sample of original appraisals from management for additional testing. Specifically, the audit engagement team assumed that appraisals less than a year old were "current" (regardless of the market). For appraisals older than a year, they inquired whether a discount was applied to the appraised value, and if not, they inquired why TierOne didn't think it was necessary or appropriate. In addition, Bennett and members of the audit engagement team discussed with management a sample of FAS 114 calculations and recent trends, and "leveraged" information from certain loan reviews.² Following this test work, Bennett also reviewed and discussed the bank's FAS 114 spreadsheets with Aesoph to ensure that Aesoph was satisfied with the audit engagement team's conclusions. Based on the entirety of these procedures, the auditors concluded that "the FAS 114 calculations appear to be properly prepared and adequately supported at 12/31/08." Bennett lacked a reasonable basis for this conclusion.

35. Bennett relied on an unsupported – and unsupported – assumption that appraisals less than a year old were "current," without regard to the property's location or stage of development, and that market conditions had not materially deteriorated throughout the year. Many of the markets in which TierOne's collateral was located were seeing significant

² Although the auditors may have "leveraged" the aspects of the loan reviews that arguably supported their conclusions as to the reasonableness of management's valuations of certain of the bank's FAS 114 loans, they ignored information in those same loan reviews that contradicted management's valuation assessment.

continuing quarterly declines in the value of real estate. In addition, many of the properties that served as collateral were under development and in varying stages of completion. TierOne's lending policy cautioned against relying on aged appraisals in these markets. According to the policy, "[i]n a rapidly escalating or deteriorating market, a[n appraisal] value may be valid for only a few months." Despite this policy, Bennett arbitrarily assumed that only appraisals older than a year potentially needed adjusting.

36. In addition, the test work over management's valuation estimates was insufficient. Again, according to its audit program, the audit engagement team would "inquire" of management whether discounts had been applied to older appraisals, and if not, why not. But uncorroborated management representations are not sufficient evidence in a high risk audit area.

37. In addition to appraisal information, TierOne's FAS 114 worksheets sporadically contained references to other information in support of management's estimates of the fair value of the collateral. This information included, for example, asking prices, borrower development plans and status, estimated costs to complete, offers to purchase, and other information. The auditors failed to obtain independent corroboration of any of this information.

38. Bennett also failed to recognize bias in management's loan loss estimates on its FAS 114 loans.

39. Finally, the auditors failed to investigate facts discovered after the date of their report on the 2008 financial statements that may have affected the 2008 financial statements.

40. PCAOB audit standards set out a number of steps that should be taken by an auditor who, "subsequent to the date of the report upon audited financial statements, becomes aware that facts may have existed at that date which might have affected the report had he or she then been aware of such facts." AU § 561, ¶ 1. As an initial matter, "[w]hen the auditor becomes aware of information which relates to financial statements previously reported on by him, but which was not known to him at the date of his report, and which is of such a nature and from such a source that he would have investigated it had it come to his attention during the course of his audit, he should, as soon as practicable, undertake to determine whether the information is reliable and whether the facts existed at the date of his report." AU § 561, ¶ 4. If in fact the information is reliable and existed at the date of the report, other steps may be required. AU § 561, ¶¶ 5-8. "Subsequent events affecting the realization of assets . . . ordinarily will require adjustment of the financial statements . . ." AU § 560, ¶ 7.

41. During KPMG's 2009 quarterly reviews, the engagement team learned of several borrower relationships that had new appraisals or valuations that likely existed at the date of KPMG's 2008 audit report, issued on March 12, 2009. In each case, that new valuation showed a significant decline from management's estimate at year end.

42. Despite learning that there were new appraisals and valuation assessments which were dated prior to the issuance of the 2008 audit report, Bennett failed to perform the procedures required by AU § 561. Rather, Bennett assumed he had no reason to investigate because, he claims, he received representations from management shortly before issuing the audit opinion that no new appraisals had been received that impacted the 2008 financial

statements. This is, however, precisely what should have triggered AU § 561: new information came to light after the audit report was issued that was inconsistent with previous information and, for that matter, management's purported representations that all new appraisals had been given to KPMG. Bennett had an obligation to investigate, but failed to do so.

G. Violations

43. As described in detail above, Bennett violated numerous PCAOB audit standards, failed to obtain sufficient competent evidential matter to support his audit conclusions, and failed to exercise due professional care and appropriate professional skepticism.

44. Specifically, Bennett violated: the third general audit standard (due professional care), *see* AU § 150, ¶ 2; the third standard of field work (competent evidential matter), *see* AU § 150, ¶ 2; AS Nos. 3 and 5; and AU §§ 230, 312, 316, 319, 326, 328, 333, 342, and 561.

45. Bennett engaged in improper professional conduct, as defined in Section 4C of the Exchange Act and Rule 102(e)(1)(ii), in that his conduct constituted negligent conduct consisting of (1) a single instance of highly unreasonable conduct that resulted in a violation of applicable professional standards in which Bennett knew, or should have known, that heightened scrutiny was warranted, or (2) repeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission.

IV.

46. On August 5, 2016, the Commission issued an Opinion finding that Bennett engaged in improper professional conduct in the audit of TierOne's financial statements and issued an Order denying Bennett the privilege of appearing or practicing before the Commission as an accountant with a right to apply for reinstatement after two years.

47. On October 3, 2016, Bennett filed in the U.S. Court of Appeals for the Eighth Circuit a petition for review of the Opinion and Order.

48. On June 27, 2018, the U.S. Court of Appeals for the Eighth Circuit vacated the Commission's Opinion and Order in light of the decision of the Supreme Court in *Lucia v. Securities and Exchange Commission*, 138 S. Ct. 2044, ___ U.S. ___ (June 21, 2018).

49. The Commission finds that Bennett engaged in improper professional conduct. Nonetheless, in light of the facts and circumstances present here, we have determined, as an exercise of our equitable discretion, not to impose a suspension or other sanction pursuant to Rule 102(e)(1)(ii). It is therefore ORDERED that no suspension or other sanction pursuant to Rule 102(e)(1)(ii) shall be imposed.

By the Commission.

Brent J. Fields
Secretary