UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-15168

In the Matter of

JOHN J. AESOPH, CPA, and
DARREN M. BENNETT, CPA

Respondents.

RESPONDENT DARREN M. BENNETT'S PETITION FOR REVIEW OF ALJ'S INITIAL DECISION

August 11, 2014

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Pursuant to U.S. Securities and Exchange Commission ("SEC" or "Commission") Rule of Practice 410, Respondent Darren M. Bennett hereby petitions the Commission for review of the Initial Decision (the "Initial Decision")[1] rendered by Administrative Law Judge ("ALJ") Carol Fox Foelak in this matter on June 27, 2014.

INTRODUCTION

Despite the failure of dozens of regional banks, the Initial Decision represents the only instance in which accountants practicing before the Commission have been singled out and sanctioned pursuant to Rule 102(e) for audit work performed during the recent banking crisis. In this proceeding, the Division scrutinized the judgments of an audit engagement partner, John J. Aesoph, and an audit senior manager, Mr. Bennett, in connection with the 2008 integrated audit of the financial statements and internal controls over financial reporting of TierOne Corporation ("TierOne"). TierOne was a Lincoln, Nebraska-based bank holding company with a wholly-owned bank subsidiary, TierOne Bank. The Initial Decision focused exclusively on audit conduct pertaining to only one component of TierOne's allowance for lease and loan losses ("ALLL"), a single assertion in TierOne's 2008 financial statements—i.e., TierOne's fair value estimates for impaired loans pursuant to Statement of Financial Accounting Standards No. 114 ("FAS 114").

The record is undisputed that Mr. Bennett devoted hundreds of hours to the 2008 integrated audit of TierOne's financial statements and internal controls and that he ably supervised the work of an engagement team that devoted thousands of hours of work and prepared thousands of pages of workpapers, including dozens relating to the ALLL and FAS 114 estimates. (JPF ¶ 435.) Further, it is undisputed that Mr. Bennett and the engagement team

[1] Cited hereinafter as "ID at __." References to Respondents' Joint Proposed Findings of Fact & Conclusions of Law (Dec. 10, 2013) are cited herein as "JPF ¶ __."

properly identified financial statement risks and focused significant effort in addressing those risks. They went above and beyond in performing the audit, exercising heightened scrutiny by, *inter alia*, reviewing and performing substantive procedures regarding every impaired loan. (JPF ¶¶ 322-24.) Indeed, the Division's own expert acknowledged that Mr. Bennett (1) was "technically competent" and knowledgeable with respect to the relevant accounting principles, (*see* JPF ¶¶ 20, 471), (2) performed the functions expected of a senior manager (*id.* ¶ 30), (3) appropriately assessed risks relating to the ALLL (*id.* ¶¶ 176-77, 473), (4) appropriately selected a methodology to test the ALLL process (*id.* ¶¶ 80-83, 218-221, 223-231, 306-07, 471, 475), and (5) exhibited due care by engaging the assistance of a credit risk specialist multiple times, by evaluating regulatory findings critical of TierOne in consultation with regulatory specialists, by closely monitoring TierOne management's responses to those findings through the audit period, and by communicating directly with the regulator (*id.* ¶¶ 191, 200, 203, 490-91).

Nevertheless, the Initial Decision dismisses Mr. Bennett's efforts by evaluating the conduct of Mr. Bennett against an incorrect and impermissibly "novel" interpretation of the governing accounting principles and auditing standards that was unsupported by the record evidence. The Initial Decision exacerbates that error by (1) disregarding record evidence based upon a misapplication of audit documentation standards, and (2) ignoring and failing to weigh critical record evidence submitted by Respondents, including the testimony of expert witnesses on issues such as the applicable professional standards, without any reasoned explanation for doing so. These errors were compounded by the Initial Decision's improper reliance on hindsight to second-guess the judgments made by Mr. Bennett and the engagement team. The Initial Decision further misapplies the standards embodied in Rule 102(e) to its truncated and myopic review of the record to impose an unnecessary and unwarranted sanction that punishes

Mr. Bennett for exercising his professional judgment in a manner that failed to predict the novel interpretation of the professional standards adopted in the Initial Decision and for mounting a defense to avoid a sanction that would have a devastating impact on his career as an auditor.

The Initial Decision warrants review as it reflects arbitrary and capricious decision-making and denies Mr. Bennett the ability to practice his livelihood before the Commission for six months based upon erroneous legal and factual determinations made in a context where further Commission review is important.

First, the ruling against Mr. Bennett derives from a misapprehension, misunderstanding and misapplication of applicable accounting principles and auditing standards regarding fair value estimates and the role of appraisals in the context of an accounting estimate with a range of reasonableness. The Initial Decision misconstrues and misapplies FAS 157 and related guidance issued by the Commission's Office of the Chief Accountant ("OCA") and the Financial Accounting Standards Board ("FASB") Staff, which confirm that fair value determinations depend on information from orderly transactions rather than the distressed and forced liquidation sales that were prevalent in many of TierOne's markets at the end of 2008. The Initial Decision likewise misconstrues auditing standards pertinent to testing of the ALLL, including its erroneous view that Mr. Bennett and the engagement team were required to reach conclusions about the reasonableness of each of TierOne's fair value estimates. The ruling then improperly applies these novel and incorrect standards to the conduct of Mr. Bennett. As a result, the ruling is based on the retroactive application of standards of which Mr. Bennett was *not* provided due notice. These errors infected the Initial Decision's analysis and its assessment of Mr. Bennett's conduct, and warrant reversal.

Second, the Initial Decision is arbitrary, capricious and contrary to law because it fails to address material and pertinent evidence submitted by Mr. Bennett, including expert testimony from a member of the Auditing Standards Board, demonstrating that his conduct was reasonable under the applicable auditing standards. Indeed, the Initial Decision erroneously invokes audit documentation standards as an evidentiary rule to reject undisputed evidence of work performed by the engagement team. The failure to assess evidence, and the improper rejection of pertinent evidence, resulted in erroneous determinations that are unsupported by substantial evidence when measured against the record as a whole, as required by the Administrative Procedure Act and due process.

Third, the Initial Decision misapplies the standards of Rule 102(e). It fails to measure Mr. Bennett's conduct against the actions a reasonable senior manager—who did not withhold pertinent information from his superiors and whose work was reviewed and approved at every step by those superiors—would have taken at the time. As the Commission has explained, Rule 102(e) "does not permit judgment by hindsight, but rather compares the actions taken by an accountant at the time of the violation with the actions a reasonable accountant should have taken if faced with the same situation." Amendment to Rule 102(e), Exchange Act Release No. 33-7593, 63 Fed. Reg. 57,164, 57,168 (Oct. 26, 1998) ("Rule 102(e) Release"). Nevertheless, the Initial Decision makes no effort to explain how Mr. Bennett's conduct can be deemed "highly unreasonable conduct" within the meaning of Rule 102(e). In addition, the Initial Decision conflates Rule 102(e)'s two standards for non-intentional conduct, concluding that Mr. Bennett is liable for a *single* instance of supposedly "highly unreasonable conduct" and "repeated" instances of "unreasonable" conduct based upon the very same conduct. This ruling renders the distinction between these two Rule 102(e) standards meaningless.

Finally, when Mr. Bennett's conduct is compared to the few instances in which other non-partner audit staff were sanctioned—for truly egregious conduct as contemplated by Rule 102(e)—the fact that he received a sanction at all constitutes an arbitrary and capricious decision. Imposition of a sanction against Mr. Bennett is particularly inappropriate where, as here, there is no dispute that Mr. Bennett acted diligently and in good faith and where the Division affirmatively has alleged that Mr. Bennett was operating as a victim of fraud by TierOne. The Initial Decision's imposition of a sanction to be served at the end of the appellate process based, in part, on Mr. Bennett's exercise of his right to present a defense to the Division's charges is fundamentally unfair and unlawful. In all events, the Initial Decision fails to justify why any sanction for Mr. Bennett is required to protect the integrity of the Commission's processes.

These errors, individually and collectively, warrant review by the Commission.

BACKGROUND

An understanding of the issues presented in this Petition for Review requires a brief discussion of the applicable legal standards under Rule 102(e), the 2008 audit of TierOne, and the pertinent rulings in the Initial Decision.

A. Applicable Legal Standards

Rule 102(e), in its current form, was adopted by the Commission in response to criticism leveled by the D.C. Circuit regarding the Commission's definition of "improper conduct" necessary to violate Rule 102. Rule 102(e) Release, 63 Fed. Reg. at 57,164 & n.4 (citing *Checkosky v. SEC*, 139 F.3d 221 (D.C. Cir. 1998) ("*Checkosky II*")). The D.C. Circuit had explained that clear limits regarding the requirements for "improper conduct" were critical because "[a] proceeding under Rule [102(e)] threatens 'to deprive a person of a way of life to which he has devoted years of preparation and on which he and his family have come to rely.'"

Checkosky v. SEC, 23 F.3d 452, 479 (D.C. Cir. 1994) (per curiam) (Randolph, J.) ("*Checkosky I*") (quoting Henry J. Friendly, *Some Kind of Hearing*, 123 U. PA. L. REV. 1267, 1297 (1975)).

As relevant here, Rule 102(e)(1)(iv), as amended, defines negligent "improper professional conduct" as either (1) "[a] single instance of highly unreasonable conduct that results in a violation of applicable professional standards in circumstances in which an accountant knows, or should know, that heightened scrutiny is warranted" or (2) "[r]epeated instances of unreasonable conduct, each resulting in a violation of applicable professional standards, that indicate a lack of competence to practice before the Commission." 17 C.F.R. § 201.102(e)(1)(iv). In adopting this amendment to Rule 102(e), the Commission explained that the Rule was "not intended to cover all forms of professional misconduct" but instead only to address "that category of professional conduct that threatens harm to the Commission's processes." Rule 102(e) Release, 63 Fed. Reg. at 57,165. For example, "[a] single judgment error . . . even if unreasonable when made, may not indicate a lack of competence to practice before the Commission." *Id.* at 57,166. Likewise, even "'repeated instances' may not always demonstrate a lack of competence to practice before the Commission." *Id.* at 57,169.

The Commission further clarified that it "does not seek to use Rule 102(e)(1)(iv) to establish new standards for the accounting profession." *Id.* at 57,166. Indeed, Rule 102(e) "does not permit judgment by hindsight but rather compares the actions taken by an accountant at the time of the violation with *the actions a reasonable accountant should have taken* if faced with the same situation." *Id.* at 57,168 (emphasis added). And, in assessing whether conduct is "highly unreasonable," "[t]he conduct at issue is measured *by the degree of the departure from professional standards*," *id.* at 57,167, rather than "the impact of a violation on financial statements filed with the Commission" or "the risk of harm posed by the conduct." *Id.* at 57,168 (emphasis added).

B. <u>The 2008 Audit</u>

The record demonstrates that Mr. Bennett in his role as the senior manager on the engagement team appropriately planned and supervised the performance of extensive work around the ALLL, including evaluating the reasonableness of TierOne's FAS 114 fair value estimates for impaired loans. (*E.g.*, JPF ¶¶ 30-32, 161-85, 317-61.) At year-end 2008, TierOne's total loan portfolio amounted to $2.8 billion, comprised mostly of loans not deemed impaired. (JPF ¶ 117.) TierOne's net impaired loan balance totaled $170 million. (JPF ¶ 121.) FAS 114 reserves for these impaired loans totaled $16.4 million at year-end 2008 after charge-offs of $40.4 million in 2008. (JPF ¶ 121.)

With the team, Mr. Bennett identified and assessed financial statement risks, including that the ALLL might be insufficient and that loan collateral might be overvalued. (*E.g.*, JPF ¶¶ 172-85, 237-51, 474.) He carefully considered the report of examination issued by TierOne's regulator, the Office of Thrift Supervision ("OTS"), consulted with other senior KPMG auditors and regulatory and credit specialists in the process, monitored TierOne's responses to the regulatory concerns that had been raised, and prior to issuance of the audit opinions communicated directly with the OTS Field Manager in charge of the TierOne examination. (*E.g.*, JPF ¶¶ 186-217.)

The record also demonstrates that, with the engagement team, Mr. Bennett appropriately focused on TierOne's ALLL estimation process by planning and performing enhanced audit procedures in light of their risk assessments. (*E.g.*, JPF ¶¶ 161, 218-398.) The team identified and tested key controls, including review of every one of the FAS 114 loan estimates made by the Controller and review of the ALLL by the Asset Classification Committee ("ACC"), of which the Controller was a member. (*E.g.*, JPF ¶¶ 237-51, 277-304.) The team performed extensive substantive audit procedures regarding the reasonableness of the ALLL, including the reasonableness of the FAS 114 reserves. (*E.g.*, JPF ¶¶ 305-98.) These procedures included, *inter alia*, reviewing *every one* of the fifty-four loan relationships management evaluated for impairment at year-end. (JPF ¶¶ 322-23; *see also id.* ¶ 324.) The team also engaged a KPMG credit risk specialist to assist on three separate occasions during 2008, even though it was not required. (*E.g.*, JPF ¶¶ 252-60.) And the team considered the risk of management bias and observed significant evidence of a lack of such bias. (*E.g.*, JPF ¶¶ 399-411.) Mr. Bennett and the team also determined that the losses TierOne recorded on its FAS 114 loans in 2008 were not inconsistent with market data. (JPF ¶¶ 373-77, 381.)

After Mr. Bennett personally completed hundreds of hours of audit work, and supervised even more work performed by others on the team—consulting throughout with his supervising partners—he concluded that the audit met professional standards and that the team had obtained sufficient evidence to issue the audit opinions in question. (*See, e.g.*, JPF ¶¶ 28-38, 182, 360, 396.) His supervising partners agreed. Mr. Aesoph, the engagement partner with 13 years of experience, along with Terence Kenney, the SEC concurring review partner with 30 years of experience, reached the same conclusion before authorizing issuance of the audit opinions. (*See, e.g.*, JPF ¶¶ 8, 14, 32-34, 360, 396.)

C. <u>The ALJ's Initial Decision</u>

The Initial Decision "denies [Mr.] Bennett the privilege of appearing or practicing before the Commission as an accountant for six months." (ID at 1.) The Initial Decision imposes this sanction even though it recognized and found that Mr. Bennett is "highly regarded" at KPMG, has "significant experience, recognized risks associated with the ALLL, worked longer hours on the 2008 audit than on the previous audit, and adequately concluded other areas of the audit."

(ID at 37; *id.* at 31 (noting that other aspects of the audit were performed "to the highest professional standards").) Specifically, the Initial Decision concludes that Mr. Bennett violated Rule 102(e) only with respect to the audit team's consideration of one component of TierOne's ALLL, which was "a balance-sheet reserve account intended to cover known and inherent losses in TierOne's loan portfolio." (ID at 7.)

The Initial Decision acknowledges that Mr. Bennett "gained understanding of how TierOne Management conducted its accounting and performed walkthroughs of the entire loan process of initiating, authorizing, processing, recording, and reporting individual transactions (or estimates) and controls, including antifraud controls." (ID at 11.) Likewise, the Initial Decision acknowledges that Mr. Bennett "reviewed management's documented analysis explaining its ALLL process (ALLL Memo)" and that he and the team "performed various procedures in their substantive review and test of management's ALLL estimate, as documented in the work papers." (*Id.*) The Initial Decision concluded, however, that Mr. Bennett's conduct violated Rule 102(e) with regard to the integrated audit of TierOne's internal controls over financial reporting (ID at 26-28), and the process used by management to develop the component of the ALLL estimate as to FAS 114 loans. (ID at 29-35.)

First, the Initial Decision acknowledges that Respondents "identified the risk of the ALLL being improperly calculated or monitored, or inadequate, as a risk at the financial statement level that could result in a material misstatement or material weakness," that the "ALLL had an identified risk of error and an identified risk of fraud," and that "collateral overvaluation" was "a specific risk point associated with the reserve estimates for FAS 114 loans." (ID at 28.) The Initial Decision recognized that Respondents tested TierOne's internal controls as to the "risk of collateral overvaluation," but then concludes that the audit failed to "address the risk associated with the reliability or validity of appraisals in valuing collateral for FAS 114 loans at year-end." (*Id.*) The Initial Decision acknowledged that Respondents tested the "high-level reviews performed by management [of TierOne] and the ACC," but concluded that these efforts were nevertheless inadequate.

Second, the Initial Decision acknowledges that "the auditors reviewed the templates prepared by TierOne" that contained "management's fair value collateral estimates per appraisal for the FAS 114 loans and reserve estimate calculations." (*Id.* at 30.) The Initial Decision concludes, however, that the audit was inadequate because impaired loans were "valued at year-end 2008 using older or undiscounted appraisals from the first half of 2008 or earlier, despite continued market declines in the second half of 2008 in several of those geographic markets." (*Id.*) As a result, the Initial Decision concludes that "Respondents' procedures in evaluating TierOne's FAS 114 estimates fell short of professional standards" (*id.* at 31), because "they failed to obtain sufficient competent evidence to support their audit judgments regarding TierOne's estimates, and the work papers do not reflect the due care and professional skepticism required of this high risk and material area of the audit." (*Id.*) In doing so, the Initial Decision dismisses unrebutted evidence showing that (1) "they reviewed loan files in connection with the FAS 114 loans," (2) "their understanding of FAS 157 informed their conclusion that management's estimates were reasonable" (*e.g.*, "pricing indices that included [distressed sales and foreclosures] were not indicative of fair value") (*id.* at 32), and (3) "TierOne management deceived them with false representations" and by failing "to disclose information relating to its impaired loans" (*id.* at 34).[2]

[2] The Initial Decision also notes that Respondents learned, after the issuance of their audit report, of new appraisals from January and February 2009 relating to FAS 114 loans in Nevada that resulted in recognized losses of $3.6 million in the first quarter of 2009. (ID at 34-35.) According to the Initial Decision, "Respondents should have conducted further inquiry and investigation to appropriately determine whether the new appraisals would have

Third, the Initial Decision concludes, in brief, that "Respondents' course of conduct related to the audit, taken as a whole, constituted 'a single instance of highly unreasonable conduct' within the meaning of [Rule 102(e)]." (ID at 36.) The Initial Decision explains that "heightened scrutiny was warranted over the ALLL in general and the FAS 114 portion in particular," but that Respondents' "procedures in testing TierOne's internal control over financial reporting and evaluating the FAS 114 estimates failed to sufficiently address these issues." *Id.* The Initial Decision does not attempt to define what conduct the applicable professional standards required or evaluate Mr. Bennett's conduct based on "the degree of the departure from professional standards." Rule 102(e) Release, 63 Fed. Reg. at 57,167.

Finally, the Initial Decision, in a footnote, includes an alternative ruling that the same conduct identified as a "***single***" instance of "highly unreasonable conduct" also provides a basis for the separate conclusion that respondent is liable for "***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.'" (ID at 36 n.38 (emphasis added).) Specifically, without addressing what conduct professional standards required, the Initial Decision concludes that "failure to identify a material weakness in TierOne's internal control over financial reporting constitutes one course of such conduct" and "the failure to evaluate the FAS 114 portion of the ALLL in accordance with professional standards is another course of such conduct." (*Id.*)

REASONS FOR GRANTING REVIEW

Review by the Commission is necessary because the Initial Decision presents questions regarding the application and construction of important professional standards applicable to

affected their report and the importance investors would have attached to the information before concluding that no additional steps were required." (ID at 35.)

auditors practicing before the Commission in the context of unprecedented market uncertainty associated with the recent banking crisis. Presented with these challenging and unprecedented circumstances, the record reflects that Mr. Bennett and the audit team applied heightened scrutiny to their audit of TierOne, properly identified the relevant areas of risk, and diligently evaluated TierOne's efforts to address those risks. The Initial Decision sanctions Mr. Bennett and denies him the ability to practice before the Commission for a period of six months. The Initial Decision's determination that Mr. Bennett violated Rule 102(e) and imposition of a devastating sanction is based upon clearly erroneous findings of fact, erroneous conclusions of law, and the misapplication and misapprehension of the applicable professional standards. Review is necessary to address these errors and to resolve issues of law and policy that unquestionably are important for the Commission to decide. *See* Rule 411(b)(2).[3]

I. THE INITIAL DECISION MISCONSTRUES AND MISAPPLIES THE PROFESSIONAL STANDARDS APPLICABLE TO THE 2008 AUDIT.

Review is necessary because the Initial Decision's erroneous views of the professional standards applicable to the 2008 audit permeate and infect its analysis and evaluation of Mr. Bennett's conduct. Indeed, in violation of the APA, due process and the requirements of Rule 102(e), Mr. Bennett was denied notice of the standards against which his conduct was judged because the Initial Decision erroneously interprets the professional standards applicable to the 2008 audit and impermissibly applies those novel interpretations retroactively to the conduct of Mr. Bennett. The Initial Decision responds to Mr. Bennett's objection on this issue by concluding that such "rulemaking by enforcement" is appropriate under Rule 102(e).

> Additionally, "rulemaking by enforcement" is not "impermissible." "[T]he choice made between proceeding by general rule or by

[3] The Initial Decision also violates due process and the Administrative Procedure Act as it is (1) arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law, (2) contrary to constitutional right, and (3) unsupported by substantial evidence. 5 U.S.C. § 706(2).

> individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *see Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 96 (1995) ("The [Administrative Procedure Act] does not require that all the specific applications of a rule evolve by further, more precise rules rather than by adjudication.").

(ID at 3 (alteration in original).) The Initial Decision is wrong for two reasons. *First*, and foremost, the Commission does not "use Rule 102(e)(1)(iv) to establish new standards for the accounting profession." Rule 102(e) Release, 63 Fed. Reg. at 57,166. Thus, in adopting amendments to Rule 102(e), the Commission squarely rejected the suggestion that Rule 102(e) authorizes "rulemaking by enforcement."

Second, even if "rulemaking by enforcement" had not been rejected by the Commission in all circumstances—and as a matter of policy it has—rulemaking by enforcement is inappropriate here.[4] Rulemaking by enforcement that conflicts with or contradicts applicable standards that are in place is impermissible. *See KPMG v. SEC*, 289 F.3d 109 (D.C. Cir. 2002) (Commission erred in finding auditor violated professional standards where novel interpretation of auditing standard resulted in the denial of fair notice); *see also Gen. Elec. Co. v. EPA*, 53 F.3d 1324, 1329-34 (D.C. Cir. 1995) (reversing agency's finding of liability and related fine where agency interpretation was "so far from a reasonable person's understanding of the regulations that they could not have fairly informed [company] of the agency's perspective" and therefore violated company's due process rights).

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[4] The Initial Decision also invades the purview of the Public Company Accounting Oversight Board ("PCAOB") pursuant to the Sarbanes-Oxley Act. With respect to rulemaking, the PCAOB is vested with authority to promulgate standards governing the auditing profession. 15 U.S.C. § 7213(a)(1). The Commission may amend PCAOB rules only as permitted by statute. *See* 15 U.S.C. § 7217(b)(3); *id.* § 7217(b)(5) (incorporating the requirements of 15 U.S.C. § 78s(c)). The Financial Accounting Standards Board ("FASB") and the SEC's Office of the Chief Accountant ("OCA") are vested with authority to promulgate accounting principles. Any accounting "rule or regulation of general application other than an interpretive rule" must be accompanied by standard notice-and-comment procedures subject to certain exceptions that are not applicable here. 17 C.F.R. § 201.192(b).

A. <u>The Initial Decision Misconstrues The Standards For Estimating Fair Value.</u>

The Initial Decision's determinations that Mr. Bennett violated Rule 102(e) are predicated on an asserted failure to require TierOne to obtain "new" or "current" appraisals of property securing its FAS 114 loans. The applicable standards governing Mr. Bennett's conduct nowhere required him to insist that TierOne obtain "new" appraisals in connection with estimating fair value. (JPF ¶¶ 67-68, 96; *see also* JPF ¶ 86 ("the auditor does not function as an appraiser and is not expected to substitute his or her judgment for that of the entity's management" (quoting AU § 328.38 (Resp'ts Ex. 60))).) Indeed, the applicable standards warn that auditors, exercising professional judgment, have good reasons, reflected in FAS 157, for not requiring that such appraisals be obtained depending on market conditions. Applied here, the Initial Decision's determinations that Mr. Bennett violated Rule 102(e) should be reviewed by the Commission because they retroactively impose new obligations on accountants through this enforcement proceeding in violation of the limits on Rule 102(e) and the requirements of the Administrative Procedures Act and due process.

In evaluating Mr. Bennett's judgments with respect to TierOne's fair value estimates for impaired loans, the Initial Decision disregards that an accounting estimate such as TierOne's ALLL is inherently imprecise with no single right number. The auditor's responsibility is to assess whether management's estimate is within a *reasonable* range. (AU § 312.36 (Resp'ts Ex. 57); AU § 342.01, .03 (effective 2008) (Resp'ts Ex. 61), JPF ¶ 45.) Instead, the Initial Decision fixates on the existence, or lack, of "current" appraisals and ignores that an auditor exercises professional judgment in applying relevant accounting guidance. Indeed, the auditing standards recognize that professional judgment affects all facets of the audit, including the selection of the "areas to be tested and the nature, timing, and extent of the tests to be performed," the interpretation of "the results of audit testing," and the evaluation of "audit evidence," including the evaluation of "the reasonableness of accounting estimates." AU § 230.11 (effective 2008) (Resp'ts Ex. 55). The Initial Decision ignores the role of professional judgment in the 2008 audit, and provides no indication of what efforts by Mr. Bennett would have been deemed sufficient, in the exercise of professional judgment under the circumstances in the absence of "current" appraisals.

The accounting principles applicable to the fair value estimates in this matter include both FAS 157 and guidance on the application of FAS 157—*Clarifications on Fair Value Accounting*—issued by the Commission's Office of the Chief Accountant ("OCA") and the Financial Accounting Standards Board ("FASB") Staff. (JPF ¶¶ 53-69.) Under FAS 157, a fair value measurement assumes the exchange of the loan in an "orderly transaction," which "is a transaction that assumes exposure to the market for a period prior to the measurement date to allow for marketing activities that are usual and customary for transactions involving such assets or liabilities." (JPF ¶ 55 (quoting FAS 157 ¶ 7 (Resp'ts Ex. 45)).) An "orderly transaction" is "not a forced transaction (for example, a forced liquidation or distress sale)." (*Id.*) As clarified by the OCA and FASB, "[d]istressed or forced liquidation sales are not orderly transactions, and thus the fact that a transaction is distressed or forced should be considered when weighing the available evidence." (JPF ¶¶ 58-59 (quoting SEC Release No. 2008-234, Clarifications on Fair Value Accounting at 2 (Resp'ts Ex. 66)).)[5] For these reasons, the SEC Chief Accountant and the FASB Staff jointly explained in September 2008 that "[t]he results of disorderly transactions are not determinative when measuring fair value" (JPF ¶ 59 (quoting SEC Release No. 2008-234, Clarifications on Fair Value Accounting at 1 (Resp'ts Ex. 66)).)

[5] The Initial Decision improperly rejects Mr. Bennett's challenge to the testimony of the Division's expert witness Professor Anjan Thakor. (ID at 4.) Dr. Thakor is not a certified public accountant and was not qualified to opine on accounting matters in general or to modify the requirements of FAS 157 in particular. His view that market prices are conclusive in determining fair value is directly contrary to FAS 157.

Contrary to FAS 157 and its related guidance, the Initial Decision is built on the premise that TierOne was required to obtain "current" appraisals in estimating the fair value of its FAS 114 loans. (*See, e.g.*, ID at 3.) That conflicts with and contradicts the guidance applicable to Mr. Bennett's conduct at the time. TierOne was not required by GAAP to obtain current appraisals for impaired loans or to obtain updated appraisals on any periodic basis. (JPF ¶ 68.) Rather, the accounting principles make clear—and the Division conceded elsewhere[6]—that TierOne was to measure impairment based on all reasonably available information, and that information might not include an appraisal at all. (JPF ¶ 93.) In doing so, TierOne relied on "Level 3" unobservable inputs, which FAS 157 explains are imprecise and require a company to exercise significant judgment by developing its "own assumptions about the assumptions that market participants would use." (JPF ¶¶ 61-65, 118 (quoting FAS 157 ¶ 30 (Resp'ts Ex. 45)).)

Indeed, before the ALJ, the Division advanced conflicting interpretations of the accounting guidance, which the Initial Decision failed to reconcile.

> Bennett also contends that the Division's interpretations of accounting principles and auditing standards contravene accepted interpretations within the profession, and a Rule 102(e) finding based on the Division's "novel interpretations" would amount to impermissible rulemaking by enforcement, violating his due process rights by depriving him of notice of the standards against which his professional conduct is to be judged. He states that the Division suggested in its closing argument that "fair value" measurements ought not to exclude the impact of disorderly sales in times of economic turmoil, which he argues contravenes Statement of Financial Accounting Standards No. (FAS) 157. Respondents' liability in this Rule 102(e) proceeding is predicated on PCAOB auditing standards of which they had ample notice. *See Marrie v. SEC*, 374 F.3d 1196, 1203-06 (D.C. Cir. 2004). They raised FAS 157 in defense of the charges. The undersigned does not hold Respondents liable on the basis of including or excluding disorderly transactions in their review of market data.

[6] The Division has admitted in separate actions against TierOne's principals that a "recent appraisal" is *not* necessary to the determination of a fair value estimate. (JPF ¶ 68 n.119.)

(ID at 3.) In professing not to have "h[e]ld Respondents liable on the basis of including or excluding disorderly transactions in their review of market data" (*id.*), the Initial Decision ignores the substance of the ruling against Mr. Bennett. In each instance, the Initial Decision's liability conclusions were predicated on a perceived lack of current appraisals, concluding that the engagement team relied on appraisals from earlier in 2008 "despite contrary market information." (ID at 35, 36; *see also id.* at 28, 30.) The Initial Decision holds Mr. Bennett liable based on a novel standard that mandates "current" appraisals, but that is inconsistent with the skepticism of such appraisals reflected in FAS 157 as interpreted by OCA and FASB. Under FAS 157 and its related guidance, appraisals in the second half of 2008 were not necessarily indicative of fair value pursuant to FAS 157 in light of the prevalence of forced liquidation and distress sales. (JPF ¶ 58.) Retroactive application of this erroneous standard to Mr. Bennett's conduct is improper and should be reviewed because Rule 102(e) is not to be used "to establish new standards for the accounting profession." Rule 102(e) Release, 63 Fed. Reg. at 57,166. The imposition of such a requirement likewise violates the Administrative Procedure Act and the requirements of due process.

B. <u>The Initial Decision Misconstrues The Standards For Auditing And Testing The ALLL Process.</u>

The Initial Decision also applies an erroneous interpretation of the auditing standards pertinent to testing the ALLL process and its component FAS 114 estimates.

An auditor's objective is to obtain reasonable assurance to allow the auditor to express opinions on whether the financial statements are free of material misstatements and whether a material weakness exists. AU § 230.10 (Resp'ts Ex. 55). The auditor does not express an opinion on the reasonableness of a single accounting estimate such as the ALLL, let alone a component thereof. Although management is obligated to establish FAS 114 reserves on a loan-by-loan basis, the auditor's objective is to reach a conclusion regarding the reasonableness of the ALLL in the context of the financial statements *taken as a whole*. AU § 342.04, 07 (effective 2008) (Resp'ts Ex. 61). In doing so, the auditor evaluates whether the ALLL is within a reasonable range because an accounting estimate is inherently imprecise. AU § 312.36 (Resp'ts Ex. 57); AU § 342.01, .03 (effective 2008) (Resp'ts Ex. 61). Professional standards do not require the auditor to *audit* each FAS 114 loan in reaching a conclusion that the ALLL was reasonable. Nor do the standards require the auditor to perform testwork on each FAS 114 loan, or to perform the same testwork on each FAS 114 loan selected for testing. Likewise, the standards do not require the auditor to ensure management has obtained a "current" appraisal at any specific interval in estimating its FAS 114 reserves.

The Initial Decision misconstrues these applicable standards.

> . . . Bennett takes issue with statements made by the Division that, he claims, suggest that the auditors should be responsible for "auditing" each of TierOne's loan loss reserve estimates, whereas under PCAOB standards "[t]he auditor is responsible for evaluating the reasonableness of accounting estimates made by management in the context of the financial statements taken as a whole." AU § 342.04. The Division, however, contends that in order to evaluate the reasonableness of the estimates in the context of the financial statements taken as whole, they were required to evaluate those estimates on a loan-by-loan basis, which Respondents conceded.

(ID at 3-4 (alteration in original).) Contrary to this assertion, Mr. Bennett conceded no such thing. Mr. Bennett acknowledged that when evaluating the FAS 114 estimates, it was appropriate to do so individually given the unique loan characteristics. (*See, e.g.*, JPF ¶ 322. *But see* JPF ¶¶ 412-43, 462.) That is critically distinct from the ALJ's conclusion that auditors are *required* to evaluate each FAS 114 estimate on a loan-by-loan basis—a position that the Division erroneously contended, and the Initial Decision accepted.[7]

This erroneous standard pervades the Initial Decision. While the engagement team did in fact review each FAS 114 template and perform a variety of procedures with respect to each FAS 114 loan, that approach was an exercise of heightened skepticism and due care, not the manifestation of an obligation to "audit" each impaired loan reserve.[8] Penalizing auditors for doing more work—*i.e.*, conducting procedures on each impaired loan—is a misapplication of the auditing standards, and, in all events, is an impermissible effort to impose new auditing obligations through a Rule 102(e) enforcement proceeding. Imposition of liability under these circumstances would send a perverse message that auditors should *not* apply heightened scrutiny for fear that their additional efforts will subject them to hindsight analysis and second-guessing.

C. <u>The Initial Decision Misconstrues and Misapplies AU § 561.</u>

The Initial Decision's determination that circumstances in 2009 triggered AU § 561 is erroneous. Specifically, the Initial Decision asserts that "new appraisals put into question the reliability of the financial statement assertions relating to the FAS 114 portion of the ALLL" and that "[u]nder the circumstances of this case and given the risk of collateral overvaluation, the new appraisals cast doubt on the collateral values that TierOne used at year-end 2008, given that numerous loans, particularly in Nevada, were also valued using older or undiscounted appraisals

[7] The Initial Decision also erroneously concludes that the engagement team was required to document audit conclusions for each individual impaired loan. (*See* ID at 18 n.22.) To the contrary, the audit documentation standards require conclusions for *financial statement assertions*—here, TierOne's ALLL. (JPF ¶ 106 (citing AS No. 3 ¶ 6 (Resp'ts Ex. 49)).) The audit team complied with this standard by documenting their conclusion relating to the ALLL. (*See, e.g.*, JPF ¶¶ 429-41.)

[8] The Division also failed to obtain in its investigation approximately two-thirds of the loan files at issue that the engagement team, indisputably, consulted during the 2008 audit. The Initial Decision concludes in one instance that Mr. Bennett was not deprived of the ability to refer in his defense to loan files obtained by the Division. It proceeds, erroneously, to conclude that Mr. Bennett was not deprived *at all* in his defense, notwithstanding his inability to refer to loan files the Division failed to obtain. (ID at 3.) This erroneous conclusion denied Mr. Bennett his rights under due process and was arbitrary and capricious.

from the first half of 2008 or earlier, despite contrary market information." (ID at 35.) The Initial Decision concludes that "[u]nder AU § 561, Respondents should have conducted further inquiry and investigation to appropriately determine whether the new appraisals would have affected their report and the importance investors would have attached to the information before concluding that no additional steps were required." *Id.* That is wrong.

The discovery of facts existing at the time of the issuance of an audit report, but not known to the auditors at that time, does not automatically require an auditor to undertake further procedures upon discovery of the information. (JPF ¶ 415.) Rather, AU § 561 sets forth the procedures that "should be followed by the 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." (JPF ¶ 414 (quoting AU § 561.01, .04 (emphasis added) (Resp'ts Ex. 63)).) Therefore, an auditor must take further action only "if the nature and effect of the matter are such that . . . his report would have been affected if the information had been known to him at the date of his report and had not been reflected in the financial statements." (JPF ¶ 415 (quoting AU § 561.05 (Resp'ts Ex. 63)).)

Mr. Bennett and the engagement team considered the specific facts and circumstances of the loans for the four borrower relationships for which TierOne received new appraisals during the Q1 2009 quarterly review, along with market trends. (JPF ¶¶ 419-22.) Mr. Bennett and the engagement team determined that the additional losses TierOne recorded in the first quarter 2009 for these loans did not constitute an error in TierOne's December 31, 2008 financial statements. (JPF ¶¶ 419-21.) On this point, neither of the two audit experts who testified at trial supported the conclusion that the two new appraisals received in 2009 would have required a restatement of TierOne's year-end 2008 financial statements or that the cumulative adjustments caused by the appraisals were material to the 2008 financial statements as a whole. (JPF ¶ 424.) In short, even if the losses recorded for these loans should have been recorded in the 2008 financial statements, such amount would not have been material to TierOne's 2008 financial statements taken as a whole—which included an $84 million loan loss provision and $93 million pretax loss—and would not have affected KPMG's 2008 integrated audit opinions.[9] (JPF ¶¶ 423-28.) As a result, the provisions of AU § 561 were not triggered.

II. THE INITIAL DECISION FAILS TO CONSIDER, EVALUATE AND PROPERLY ASSESS THE RELEVANT RECORD EVIDENCE.[10]

Under the Administrative Procedure Act, "[a] sanction may not be imposed . . . except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also* 15 U.S.C. § 78y(a)(4). Further, "an agency violates the APA when it fails to include in its adjudicatory decision a meaningful 'statement of findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record.'" *Checkosky II*, 139 F.3d at 226 (quoting and applying 5 U.S.C. § 557(c)(3)(A)). The Initial Decision violates these requirements by ignoring critical evidence submitted by and favorable to Respondents and by failing to reconcile that evidence with the determinations in the Initial Decision. *See, e.g.*, *Morall v. DEA*, 412 F.3d 165, 178-80 (D.C. Cir. 2005) (setting aside agency decision because petitioner "presented extensive testimony pertaining to each of these disputed facts" but "one would not know it from the [agency's] analysis"); *Lakeland Bus Lines, Inc. v. NLRB*, 347 F.3d 955, 963 (D.C. Cir. 2003) (holding that NLRB's "clipped view of the record"

[9] The Initial Decision does not explain why a reasonable investor would regard the $2.9 million net interest income figure as material to an investment decision given TierOne's disclosure of an $84 million loan loss provision and $93 million pre-tax loss in 2008. (ID at 34-35.)

[10] Mr. Bennett respectfully incorporates the designation of any portion of the Initial Decision that materially disagrees with the Joint Proposed Findings of Fact and Conclusions of Law filed on December 10, 2013.

did not support the conclusion that the employer committed an unfair labor practice); *Landry v. FDIC*, 204 F.3d 1125, 1140 (D.C. Cir. 2000) (explaining that APA requires "consideration of the evidence on *both* sides"); *see also Steadman v. SEC*, 450 U.S. 91, 98 (1981) (citing 5 U.S.C. § 556(d)). In failing to consider and weigh the relevant record evidence, including the testimony and evidence from the expert witnesses, the Initial Decision lacks an adequate evidentiary foundation.

The Initial Decision cannot side-step these requirements through a blanket assertion that "[a]ll arguments, proposed findings, and conclusions that are inconsistent with this Initial Decision were considered and rejected." (ID at 2.) Such boilerplate is inadequate because "[i]f the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable." *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *State Corp. Comm'n v. Fed. Power Comm'n*, 206 F.2d 690, 723 (8th Cir. 1953) ("A mere assertion that the Commission has examined all of the available evidence of record on this subject" is inadequate to satisfy the Administrative Procedure Act (internal quotation marks omitted)); *see also Trailways, Inc. v. ICC*, 673 F.2d 514, 518 (D.C. Cir. 1982) (Section 557(c) of the APA not satisfied by "cursory findings and conclusions").

A. <u>The Initial Decision Misconstrues AS No. 3 To Disregard Critical Evidence.</u>

The Initial Decision improperly misapplies the audit documentation standards of AS No. 3 to reject critical record evidence. AS No. 3 is not a rule of evidence, but rather is an auditing standard that requires auditors to document their work so that an experienced auditor not involved in the audit can understand the nature, timing, extent, and results of the procedures performed, evidence obtained, and conclusions reached. (JPF ¶ 107.) An auditor's documentation involves the exercise of professional judgment, and an auditor need not document every fact considered or conversation had. (JPF ¶¶ 108-09.) Nothing in AS No. 3 precludes testimonial or other documentary evidence that proves work actually was performed, or dictates the weight to be accorded such evidence.

The Initial Decision's reliance on commentary to AS No. 3 (ID at 25) to disregard relevant and probative evidence was arbitrary and capricious and violates fundamental notions of due process. The Initial Decision states:

> [I]f audit documentation does not exist for a particular procedure or conclusion related to a significant matter, it casts doubt as to whether the necessary work was done. AS No. 3, App. A ¶ A10.

(ID at 25 (alteration in original).) That commentary does not justify exclusion from consideration of Mr. Bennett's testimony regarding audit procedures performed and evidence obtained. Nor does it justify exclusion from consideration of workpapers regarding the ALLL outside of those documents pertaining explicitly to FAS 114 loans. (*See* JPF ¶ 111 (the workpapers must be considered as a whole in evaluating the sufficiency of audit documentation).) That is what the Initial Decision does, however, ignoring material and pertinent evidence that corroborated the reasonableness of Mr. Bennett's professional judgments. (*See* ID at 18, 33.)[11]

B. <u>The Initial Decision Fails To Address Critical Expert Testimony Submitted By Mr. Bennett.</u>

At the hearing, Mr. Bennett submitted substantial evidence regarding the key areas of the audit through the expert testimony of Sandra Johnigan (an expert in accounting and auditing) and from Professor Christopher James (an expert in economic analysis). (*See, e.g.*, JPF ¶¶ 455-63; 493-507.) Ms. Johnigan is an experienced bank auditor and member of the AICPA's Auditing Standards Board who reviewed and approved the AICPA's published Audit & Accounting Guide

[11] For example, the Initial Decision relies on AS No. 3 in erroneously concluding that the engagement team failed to perform procedures to corroborate TierOne's 30% loss recognition on Nevada impaired loans, and failed to consider FAS 157. (*Infra* § II(C)(3); *see also infra* § II(C)(1)-(2).)

for Depository and Lending Institutions. (JPF ¶¶ 455-57.) She reviewed all of the 2008 workpapers and observed the entire hearing. Based on the complete record, she testified that Mr. Bennett and the engagement team (i) obtained sufficient, competent evidence to support the conclusion that TierOne's internal controls over the ALLL estimation process were effective, (ii) appropriately audited the ALLL by reviewing and testing management's estimation process, and (iii) complied with AS No. 3 in conducting the 2008 integrated audit. (JPF ¶ 462.) Professor James has held positions with the FDIC and the U.S. Department of Treasury. He testified about the market conditions in 2008 and the impact of disorderly sales on appraisals and pricing indices. Professor James further testified that prices embedded in market indices are not always indicative of fair value and that the methodology employed by the Division's economic analysis expert would lead to a biased and flawed measure of fair value. (JPF ¶¶ 497, 504.)

The Initial Decision acknowledges that these expert witnesses testified at the hearing (ID at 21), but thereafter scrupulously ignores this evidence. The Initial Decision does not address this expert testimony, makes no credibility determinations about these witnesses, makes no effort to explain why their testimony was ignored, and, critically, makes no effort to reconcile the Initial Decision's conclusions with this contrary evidence. *See Morall,* 412 F.3d at 178-80 (granting petition for review where decision ignored relevant evidence that was favorable to the petitioner). For example, the rejection of the testimony of Ms. Johnigan—a bank auditor and member of the Auditing Standards Board— is directly relevant to the sufficiency of the audit documentation. Indeed, AS No. 3 requires an evaluation of documentation by "an experienced auditor" with a "reasonable understanding of audit activities" and who "has studied the company's industry as well as the accounting and auditing issues relevant to the industry." (JPF ¶ 107; AS No. 3 ¶ 6 (Resp'ts Ex. 49).) Ms. Johnigan provided this perspective and concluded that the engagement team's documentation complied with AS No. 3. (*See, e.g.*, JPF ¶ 112 & n.194.) The Initial Decision nowhere addresses her testimony. (*See* JPF ¶¶ 456-58, 462.)[12] The same is true of Ms. Johnigan's testimony about the applicable professional standards and Mr. Bennett's compliance with those standards. (*See* JPF ¶¶ 462-63.) Likewise, the Initial Decision does not address Professor James' testimony about FAS 157 and its relevance to fair value estimates for real estate markets in 2008. (*See* JPF ¶¶ 493-507.) In the absence of consideration or weighing of the expert testimony, the Initial Decision impermissibly substitutes its own opinions regarding the applicable professional standards. The failure of the Initial Decision to address this expert evidence about applicable professional standards and their application to market conditions in 2008 warrants further review by the Commission. *Cf. In re Oprins & McNeeley*, Release No. ID-411, 2010 SEC LEXIS 4450 (Dec. 28, 2010) (addressing the competing expert testimony and resolving disputes among the experts on issues material to the ALJ's ruling).

C. **The Initial Decision Reflects Clearly Erroneous Determinations About Key Aspects of the 2008 Audit.**

The Initial Decision makes clearly erroneous findings about key aspects of the 2008 audit that warrant further review by the Commission.

1. Internal Controls

The Initial Decision's determinations about the audit of TierOne's internal controls are clearly erroneous and unsupported by substantial evidence. According to the Initial Decision, "the record does not indicate that Kellogg or the ACC performed any specific procedures to effectively address collateral overvaluation" (ID at 13), and "[a]s to other ALLL-related controls,

[12] Indeed, the failure to address this evidence had a ripple effect because, as discussed above, the Initial Decision relies upon its misinterpretation of AS No. 3 to disregard evidence about Mr. Bennett's efforts in reviewing TierOne's fair value estimates.

there is no evidence that those controls sufficiently addressed the risk of collateral overvaluation at year-end either." (ID at 28.) These determinations are contrary to the record evidence and should be rejected.

First, there is no dispute that Mr. Bennett and the engagement team identified and tested controls relating to TierOne's ALLL estimation process, which appropriately addressed the risk of collateral overvaluation. This process involved review and approval of each FAS 114 fair value estimate by Mr. Kellogg, TierOne's Controller, and a member of the ACC. (JPF ¶ 244.) As acknowledged by the Division's expert, review by the Controller from "outside the process" of developing the FAS 114 estimates "sounds like it could be an effective control." (Hr'g Tr. 1248:8-1249:1; JPF ¶¶ 277-84 & n.469.) The Initial Decision ignores this critical concession.

Second, the engagement team's control testing included review of both ACC meeting minutes and the materials reviewed by the ACC, all of which confirmed that Mr. Kellogg and the ACC specifically reviewed detailed reports and backup materials regarding individual impaired loans. (*See* JPF ¶¶ 277-304.) This corroborating audit evidence contained extensive information regarding individual impaired loans, including property locations, appraisal dates, collateral value estimates, loss/reserve amounts, and narrative and statistical discussion of recommendations for non-accrual and specific reserves. (JPF ¶¶ 290-96.)[13] Based on these and other procedures, the engagement team appropriately concluded that TierOne had controls that

[13] For example, the Classification of Assets reports provided to the ACC detailed the loan balance, risk rating, appraised value, appraisal date, and analysis from TierOne personnel regarding individual impaired loans. (JPF ¶ 292.) The ACC also reviewed individual credit reviews with specific loan information regarding impaired and other loans. (JPF ¶ 293.) Indeed, many of the loans evaluated for impairment in 2008 were among the credit reviews included in the backup materials provided to the ACC. (*Id.*) As part of their internal control testing, the engagement team further documented Mr. Kellogg's confirmation that the ACC discussed, *inter alia*, FAS 114 impairments. (JPF ¶ 284.)

were designed properly and operating effectively to address the risk that collateral could be overvalued. (JPF ¶¶ 277-304.)[14] The Initial Decision ignores this evidence.

2. <u>Testing of FAS 114 Reserves</u>

The Initial Decision likewise makes clearly erroneous findings about the testing of FAS 114 estimates. *First*, the Initial Decision concludes that the FAS 114 procedures "memo's definition of a current 'appraisal' — 'within the past twelve months' — was inconsistent with TierOne's stated policies and the 2008 economic climate." (ID at 15.) That is wrong. TierOne's Lending Policy provided that loans be supported *either* by current appraisals *or* evaluations, that a new appraisal *may be* required depending on several factors, and that "[c]hanges in market or property conditions . . . could justify an updated *evaluation*." (JPF ¶ 227.) It did not require TierOne to obtain an updated appraisal on any specific periodic basis. Nor did it impose a one-size-fits-all approach to discounting appraisals. (JPF ¶ 227.) Such an approach is contrary to FAS 157 and related guidance from the OCA and FASB. (*See, e.g.*, JPF ¶ 497.)

Second, the Initial Decision makes erroneous findings about loan-specific evidence.

- "At the hearing, Bennett could not identify any loan-specific evidence or documented procedures to support the conclusion that TierOne's fair value estimates for bucket one loans based on undiscounted appraisals from the first half of 2008, as to five borrowers in Nevada and three borrowers in Arizona, were reasonable at year-end 2008." (ID at 17.)

- "At the hearing, when confronted with the undiscounted appraised values that TierOne used for numerous loans, Respondents could not point to loan-specific evidence or documented procedures to support TierOne's decision to not discount such appraisals in the wake of deteriorating market conditions." (ID at 31.)

[14] The Initial Decision's erroneous findings were prejudicial because they provided the predicate for the legal determination that "the absence of a sufficient control addressing collateral overvaluation should have been treated as an indication of material weakness in TierOne's internal control over financial reporting." (ID at 28.) That conclusion is likewise wrong because, as discussed above, there was no requirement that TierOne maintain a control focused specifically on whether appraisals were current at year-end in order to effectively address the risk relating to collateral overvaluation. Indeed, such a control would have been inappropriately myopic in light of the uncontested fact that TierOne was neither required by GAAP to obtain current appraisals for impaired loans nor to obtain updated appraisals on any periodic basis. (JPF ¶ 68.) The accounting principles required impairment to be measured based on all reasonably available information, which might or might not include an appraisal. (JPF ¶ 93.)

- "However, the work papers do not reveal, and Respondents fail to point to, any information in those files that supports the conclusion that TierOne's use of numerous undiscounted appraisals from the first half of 2008 or earlier was reasonable at year-end 2008." (ID at 32.)

To the contrary, Mr. Bennett and the engagement team, exercising their professional judgment, subjected TierOne's impaired loans to rigorous scrutiny through extensive substantive procedures. (JPF ¶¶ 308, 317-318, 322, 350-58, 361.) In addition to credit reviews performed on impaired loans by the credit risk specialist, Mr. Aesoph and Mr. Bennett exercised heightened scrutiny by deciding that the team would perform a variety of substantive procedures with respect to *every one* of the fifty-four loan relationships management evaluated for impairment at year-end. (JPF ¶¶ 322-23; *see also id.* ¶ 324.) Ms. Johnigan's expert report addressed each of these individual loan relationships with detailed loan-specific audit evidence tied directly to the workpapers. (Resp'ts Ex. 42, Johnigan Report at 88-139 Exs. B-C.) Further, Mr. Bennett and the engagement team frequently communicated with management—including Mr. Kellogg, the Controller, David Frances, the Special Assets Executive, and Don Langford, the Chief Credit Officer—to discuss the FAS 114 loans and understand management's rationales and assumptions in estimating fair value, including with respect to discounting appraisals. (JPF ¶¶ 316, 322, 330-34, 372-73; *see also id.* ¶¶ 241, 349.) The audit team assembled corroborating evidence, including third-party appraisals and other materials from the loan files, as well as market data used to compare trends against the actual losses recorded by TierOne, which were not inconsistent. (JPF ¶¶ 310-12, 315, 323, 335-41, 343-45, 348, 372-74, 379 n.671.)[15]

[15] Mr. Bennett and the engagement team reviewed appraisals for approximately two-thirds of the year-end FAS 114 loan relationships, which they documented in the impairment templates with the notation "agreed to appraisal" (JPF ¶ 341), as well as additional documentation from the loans files to corroborate management's rationales and assumptions. These materials included a wealth of information about the background of the loans, the financial condition of the borrowers and guarantors, and the collateral. (JPF ¶¶ 340, 344-46.) As Mr. Bennett explained, the appraisals generally were contained within the loan files, and the audit room at TierOne was "typically filled" with "carts and carts full of loan files" available for the team to consult and review in connection with their test work. (JPF ¶¶ 336-38.) Further, the audit team reviewed hundreds of pages of market data referred to in management's L-

As of year-end, the engagement team observed that management had identified an additional seventeen loans as impaired and recorded charge-offs in the amount of $19.4 million, in the second half of 2008. (JPF ¶¶ 323, 386.) Management continued to establish reserves, through provision expense, including $17 million in the second half of 2008.[16] (JPF ¶ 386.) It obtained approximately twenty new appraisals on a variety of the fifty-four (54) FAS 114 lending relationships in the second half of 2008. (*Id.*) And management applied new or additional discounts to appraised values on certain Nevada impaired loans in the second half of 2008. (*Id.*) The Initial Decision erred in failing to address or credit any of this evidence.

Finally, the Initial Decision erred in its characterization of the documentation of FAS 114 reserves. The Initial Decision asserts that "the rationale for TierOne's decisions not to apply discounts for such loans is largely undocumented, and the auditors' procedures to address this issue are not evident from the work papers." (ID at 31.) That too is wrong. (*See, e.g.*, JPF ¶¶ 317-77, 386.) The engagement team's 2008 documentation includes 19 binders of quarterly review and audit work spanning 7,000 pages. In particular, with respect to the ALLL and FAS 114 loans, the documentation consists of dozens of quarterly and year-end workpapers and upwards of one thousand pages. (JPF ¶ 435.) The 2008 audit documentation relating specifically to TierOne's ALLL and FAS 114 loans spans several hundred pages in the L-series Loan workpapers, and includes several different workpapers that document the procedures performed and conclusions reached. In the L-series workpapers at L-37, which includes a state-by-state evaluation of TierOne's impaired loans, the engagement team documented that TierOne

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30A memorandum and discussed them with Mr. Kellogg, the Controller (JPF ¶¶ 315-16), and reviewed Internal Audit's tie-out of the data and the assumptions on which management relied and, thereafter, discussed the information with the head of Internal Audit (JPF ¶¶ 311-12), to corroborate the reasonableness of management's assumptions and estimates about its FAS 114 reserves. (JPF ¶ 312.)

[16] In addition to the reserves recorded at year-end, Mr. Bennett and the engagement team understood that TierOne's ALLL at June 30, 2008 had been toward the high end of the reasonable range in light of an additional $28.4 million loss provision it recorded in response to the OTS's regulatory findings. (JPF ¶ 197.)

had recorded losses of approximately 30% overall in 2008 on its Nevada portfolio of impaired loans. As Ms. Johnigan explained, the 30% calculation is "apparent" in the L-37 workpaper and further documentation was unnecessary and not required by AS No. 3. (JPF ¶ 437.)[17] Again, the Initial Decision does not address this testimony or related evidence.

3. <u>FAS 157 and Market Indices</u>

The Initial Decision likewise makes clearly erroneous determinations about the engagement team's consideration of FAS 157 and market indices. The Initial Decision states:

- "The weight of the evidence casts doubt on Respondents' contention that either their or management's proffered interpretation of FAS 157—*i.e.*, that appraisals and market information were less indicative of fair value due to increased distressed sales and/or foreclosure in 2008—played any meaningful role in their assessment of TierOne's fair value estimates." (ID at 18.)
- "The record belies Respondents' assertion that, in evaluating TierOne's FAS 114 estimates, they conducted any sort of review consistent with their proffered interpretations of FAS 157." (ID at 33.)
- "[T]heir claimed review of market data should have indicated that management's estimates on numerous loans lacked reasonable support and prompted further inquiry and investigation." (ID at 33.)

These determinations are wrong. There is no dispute that FAS 157 was an applicable accounting principle with respect to estimating the fair value of collateral supporting TierOne's impaired loans. TierOne referenced FAS 157 in its 2008 Form 10-K, and Respondents reviewed and were thoroughly familiar with that accounting principle and TierOne's disclosure during the 2008 integrated audit. (JPF ¶¶ 61, 118-19, 230; *see also* JPF ¶ 479.) Consistent with FAS 157, TierOne's management indicated that they thought current appraisals were not indicative of fair value because they reflected the effect that foreclosures were having in the market. (JPF ¶ 369;

[17] Mr. Bennett reviewed and signed off on all of the ALLL and FAS 114 loan workpapers. Mr. Aesoph reviewed and signed off on nearly every workpaper relating to ALLL—and every workpaper relating the FAS 114 component of ALLL. And Mr. Kenney, the SEC concurring review partner, also signed off on the key workpapers in these areas. (JPF ¶ 436.)

see also JPF ¶ 59 ("[t]he results of disorderly transactions are not determinative when measuring fair value" (quoting SEC Release No. 2008-234, Clarifications on Fair Value Accounting at 2 (Resp'ts Ex. 66)).) Mr. Bennett understood management's position to be that appraisals obtained in the first and second quarters of 2008 were still reasonable estimates of the collateral fair value at December 31, 2008, in part because the market in Nevada in the second-half of 2008 was dominated by distressed sales and foreclosures. During year-end fieldwork, in or about February 2009, Mr. Aesoph and Mr. Bennett inquired of management, in particular Mr. Kellogg, why TierOne had not discounted more Nevada appraisals from the first half of 2008. In response, Mr. Kellogg pointed out that TierOne had recorded losses of approximately 30% overall in 2008 on its Nevada portfolio of impaired loans. Mr. Kellogg also pointed out that an overall 30% loss on the Nevada impaired loans in 2008 was reasonable in light of broad market price declines for 2008 of 33%. (JPF ¶¶ 369-72.) As a result, Mr. Bennett reasonably concluded that these data were not inconsistent with the approximately 30% loan losses recorded by TierOne in 2008 on its Nevada impaired loans. (JPF ¶¶ 373-77, 381.)

Finally, the Initial Decision erroneously concludes that "Respondents' conversation with Kellogg and their related procedures as to the 30% loss recognition are not documented in the work papers." (ID at 19.) That too is wrong. (*See, e.g.*, JPF ¶¶ 372-79.) The audit workpapers show that Respondents knew that TierOne had recorded significant losses (roughly 30%) on Nevada impaired loans in evaluating the reasonableness of the ALLL during the course of the 2008 audit. The Division's own expert acknowledged that (i) the calculations underlying the auditor's analyses based on market data were simple, mathematically accurate and yielded a 30% figure (JPF ¶ 378); (ii) 30% was not inconsistent with the reported market decline in 2008 in Nevada (JPF ¶ 379 n.671); and (iii) the data supporting TierOne's recognition of 30% losses on the Nevada loans were included in the workpapers. (JPF ¶ 378.)[18] Indeed, the workpapers contain numerous references to communications with management, including with respect to the ALLL estimate and impaired loans. (*E.g.*, JPF ¶¶ 322, 373; *see also, e.g.*, JPF ¶¶ 241, 349.) There is no evidentiary basis for concluding that Mr. Bennett did not discuss the "30% loss recognition" with Mr. Kellogg or corroborate that representation with data documented in the audit workpapers.

4. <u>The Existence of Management Fraud</u>

Finally, the Initial Decision clearly errs in its determination about TierOne management's actual belief in the reasonableness of its FAS 114 estimates. The Initial Decision states that "TierOne established provisions to maintain the ALLL at a level management *believed* would cover all known and inherent losses in TierOne's portfolio that were both probable and reasonable to estimate at each reporting date." (ID at 7 (emphasis added).) The undisputed record reflects that TierOne's management engaged in a collusive fraud designed to deceive the auditors, as alleged by the SEC against several senior TierOne executives. Indeed, the Commission sued three of TierOne's senior executives for fraud and deceit of auditors in connection with TierOne's 2008 loan loss reserves. (JPF ¶¶ 442-43.)

That fraud included falsifying TierOne's impaired loan templates, failing to disclose information indicating that FAS 114 reserves may be insufficient, failing to disclose that certain members of management questioned, or doubted, the reasonableness of FAS 114 estimates, and making false statements in management representation letters provided to the auditors.[19] (JPF

[18] The Initial Decision asserts that 30% losses booked on Nevada impaired loans "did not necessarily pertain to market declines in that year alone." (ID at 33.) Even the Division's expert Mr. Barron acknowledged that it would be improper to assume that losses booked in 2008 were the result of losses in a prior period. (JPF ¶ 477.)

[19] Because of the characteristics of fraud, even a properly planned and performed audit may not detect a material misstatement or material weakness in internal control. (JPF ¶ 73; AU § 230.12, .13 (effective 2008) (Resp'ts Ex. 55).)

¶¶ 442-43.) The audit team first learned in April 2010 that TierOne management had hidden an internal analysis showing, on a loan-by-loan basis, a range of estimated impaired loan losses that differed greatly from what had been disclosed to the Bank's auditors or the public. As a result, the audit team determined that it could no longer rely on the representations of TierOne's management, and on that basis, KPMG withdrew its 2008 integrated audit opinions and resigned as TierOne's independent auditor. (JPF ¶ 449.)[20] The Initial Decision's failure to reconcile this evidence with its conclusions renders its analysis arbitrary and capricious.

III. THE INITIAL DECISION MISCONSTRUES AND MISAPPLIES RULE 102(e).

A. <u>The Initial Decision Fails To Identify The Acts A Reasonable Senior Manager Would Have Taken.</u>

The Initial Decision acknowledges that "Respondents' conduct must be compared with actions a reasonable accountant would have taken at the time of the audit, without the benefit of hindsight, and evaluated in light of standards in effect at the time of the conduct at issue . . . ." (ID at 24 (citing *In re Hall & Meyer*, Exchange Act Release No. 61162, 2009 WL 4809215, at *7 n.25 (Dec. 14, 2009); Rule 102(e) Release, 63 Fed. Reg. at 57,168).) It fails, though, to apply that standard when analyzing Mr. Bennett's conduct as a senior manager.[21] The Initial Decision recognizes that Mr. Bennett "reported directly to Aesoph" and "was responsible for supervising

[20] The Initial Decision also concludes that OTS Field Manager Douglas Pittman "gave no indication that . . . TierOne's [remedial] actions [in response to OTS regulatory activity] were effective." (ID at 12-13.) That conclusion disregards undisputed testimony from Mr. Pittman himself, who testified at the hearing that (1) when he had spoken with Mr. Aesoph and Mr. Bennett in February 2009, he had received and reviewed a number of required submissions from the Bank; (2) TierOne management was receptive to the OTS's comments and was complying with the requirement to submit additional information to federal regulators; (3) he believed that management had the ability to address the issues identified by the OTS and was, in fact, appropriately addressing those issues; and (4) TierOne had the ability to perform under all terms of a supervisory agreement it had entered into with the OTS. (JPF ¶¶ 204-10, 400.) It further ignores the acknowledgment by the Division's expert that Mr. Aesoph and Mr. Bennett exercised due care by contacting Mr. Pittman to discuss these matters. (*Id.* ¶ 491.)

[21] The Initial Decision also impermissibly invokes hindsight, relying on events that occurred *after* Mr. Bennett performed his 2008 audit work. (*See, e.g.*, ID at 5 (referring to TierOne's recording of $120 million in loan losses at some unidentified time after the 2008 audit and the conclusions of the Department of Treasury's Office of Inspector General report in 2011).)

the engagement team's day-to-day work, and for performing the audit in accordance with professional standards." (ID at 6.) But nowhere does the Initial Decision explain how Mr. Bennett's conduct departed from what a reasonable senior manager would have done at the time. Nor does the Initial Decision make any mention of what a reasonable senior manager would have done differently, in circumstances where, it is undisputed, the senior manager did not withhold pertinent information from his superiors and his work was reviewed and approved at every step by those superiors. The omission reflects that the Division failed to meet its burden of showing that Mr. Bennett's conduct was unreasonable or highly unreasonable under the circumstances.

Further, the Initial Decision makes no effort to explain how Mr. Bennett's conduct was "highly unreasonable" within the meaning of Rule 102(e). Rule 102(e) requires both that the challenged conduct (i) occurred under circumstances where "heightened scrutiny is warranted" *and* (ii) involve an "instance of highly unreasonable conduct." Here, the Initial Decision does not explain how the conduct of Bennett was "highly unreasonable." That omission is particularly stark since the Commission has made plain that a determination of "highly unreasonable" conduct must be made based on an analysis of "the degree of the departure from professional standards." Rule 102(e) Release, 63 Fed. Reg. at 56,167. The Initial Decision never assesses the conduct of Mr. Bennett against how a reasonable manager would have acted, attempts to measure the "degree of departure" of Mr. Bennett's conduct from the applicable "professional standards," or explains how such a departure qualifies as "highly unreasonable." *See Checkosky II*, 139 F.3d at 225 (rejecting SEC's imposition of sanctions under Rule 102(e) because the Court was "at a loss to know what kind of standard [the agency] is applying or how it is applying that standard to this record" (internal quotation marks omitted)).

B. <u>The Initial Decision Improperly Collapses The Separate Standards For "Unreasonable" and "Highly Unreasonable" Conduct.</u>

The Initial Decision also misapplies the distinct standards of liability for non-intentional, unreasonable conduct under Rule 102(e).

First, the Initial Decision states that Mr. Bennett's "course of conduct related to the audit, taken as a whole," constitutes a "single instance of highly unreasonable conduct." (ID at 36.)[22] It proceeds to set forth the following clarification focusing on impaired loans:

> They knew that heightened scrutiny was warranted over the ALLL in general *and the FAS 114 portion in particular*, collateral overvaluation was a specific risk point, and management continued to rely on older or undiscounted appraisals from the first half of 2008 or earlier at year-end 2008, despite contrary market information. Numerous red flags indicated that management was inept and had an incentive to understate losses. Yet, *their procedures in testing TierOne's internal control over financial reporting and evaluating the FAS 114 estimates failed to sufficiently address these issues*, and KPMG issued a clean audit opinion."

(*Id.* (emphases added).) With respect to the issue of "unreasonable conduct," the Initial Decision relies on the same conduct.

> "The *failure to identify a material weakness in TierOne's internal control over financial reporting* constitutes one course of such conduct, *and the failure to evaluate the FAS 114 portion of the ALLL in accordance with professional standards* is another course of such conduct. Both instances demonstrate a lack of due care and failure to obtain sufficient evidence in a high risk and material area of the audit."

(ID at 36 n.38 (emphases added).) The Initial Decision thus aggregates Mr. Bennett's conduct with respect to the FAS 114 loans within TierOne's ALLL to conclude that he engaged in a *single* instance of highly unreasonable conduct, but disaggregates the same conduct to conclude

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[22] Notably, this is the only instance in which the Initial Decision makes reference to the audit as a whole. It elsewhere makes clear the ALJ was not considering the audit as a whole for purposes of assessing Mr. Bennett's competence. (*See* ID at 31, 37.)

that he engaged in *repeated* instances of unreasonable conduct. This is improper and conflates the separate negligence standards in Rule 102(e).

Second, the narrow scope of this case—addressed to the aspect of the audit directed at the FAS 114 loans within TierOne's ALLL—does not support a sanction for repeated instances of "unreasonable" conduct under Rule 102(e). In amending Rule 102(e), the Commission explained that "a single judgment error, . . . even if unreasonable when made, may not indicate a lack of competence to practice before the Commission" and therefore may not "require Commission action under Rule 102(e)." Rule 102(e) Release, 63 Fed. Reg. at 57,166. Here, the Initial Decision focuses exclusively on one component of a single financial statement assertion (the FAS 114 portion of TierOne's ALLL) within a single audit of TierOne. That determination, even if accepted, should not support liability based on repeated instances of unreasonable conduct under Rule 102(e). *See id.* at 57,169 ("[A] single error that results in an issuer's financial statements being misstated in more than one place would not, by itself, constitute a violation of this subparagraph.").

IV. THE SANCTION IS ARBITRARY AND CAPRICIOUS.

The Commission long ago made clear that "[n]ot every violation of law . . . may be sufficient to justify invocation of the sanctions available under" Rule 102(e). *In re Carter & Johnson*, Exchange Act Release No. 17597, 1981 WL 384414, at *6 (Feb. 28, 1981) (dismissing proceedings). Indeed, sanctions must be "*necessary* to protect the investing public and the Commission from the future impact on its processes of professional conduct." *Id.* at *5 (emphasis added). Further, in deciding as to an appropriate sanction, the "accountant's good faith" may be a relevant consideration. Rule 102(e) Release, 63 Fed. Reg. at 57,170. Moreover, it is insufficient to apply mechanically the six factors set forth in *Steadman v. SEC* in considering a potential sanction. 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on other grounds*, 450 U.S. 91 (1981). Rather, appropriate weight must be given to the relevant mitigating factors, including the collateral impact of sanctions on the respondent. *See, e.g.*, *PAZ Secs., Inc. v. SEC*, 494 F.3d 1059, 1065 (D.C. Cir. 2007).

No sanction was warranted under the *Steadman* factors.[23] Mr. Bennett's conduct was not egregious. According to the Initial Decision, his "lapses" were "negligent," and "occurred in a single audit." (ID at 37.) Further, it is fundamentally unfair to impose a sanction on Mr. Bennett because he advanced a "vigorous defense of the charges." (*Id.*) Likewise, it is unfair to impose a potentially career-ending sanction because Mr. Bennett has not unilaterally abandoned his career as a pubic auditor while he defended himself against the Division's charges. (*Id.*) Indeed, in practical effect, Mr. Bennett already has been denied the ability to practice his profession before the Commission for a period much longer than the six-month sanction during the pendency of these proceedings.

The collateral impact of the sanction ordered in the Initial Decision is devastating to the career of a 36-year old auditor with a long history of exemplary auditing work. At bottom, the Initial Decision imposes a crippling sanction because it concludes, in the stark light of hindsight, that Mr. Bennett's "conduct involved a lack of due care and failure to obtain sufficient evidence to support [his] audit judgments." (ID at 37.) Nothing about Mr. Bennett or his conduct resembles the extreme cases in which the Commission has obtained Rule 102(e) sanctions against non-partners. *See, e.g.*, *In re Oprins & McNeeley*, 2010 SEC LEXIS 4450 (failure to review key audit areas and to inform partner of relevant information); *In re Dohan & Co.*,

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[23] The *Steadman* factors are: "the egregiousness of the defendant's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the defendant's assurances against future violations, the defendant's recognition of the wrongful nature of his conduct, and the likelihood that the defendant's occupation will present opportunities for future violations." ID at 36-37; *Steadman*, 603 F.2d at 1140.

Release No. ID-420, 2011 SEC LEXIS 2205 (June 27, 2011) (failure, despite skyrocketing revenues, to conduct walkthroughs of revenue system or sales cycle). And, to the extent the sanction is based on a finding of deficient audit documentation pursuant to AS No. 3, it is unprecedented under Rule 102(e).

Even if Mr. Bennett fell short of some aspect of professional standards, no one disputes that Mr. Bennett was highly qualified and well-prepared to serve as the senior manager on the 2008 TierOne integrated audit. No one disputes that he was diligent and closely supervised junior professionals on the team. No one disputes that he worked tirelessly, increasing his hours on the 2008 TierOne engagement by approximately 90% compared to the prior year. And no one disputes that he appropriately shared audit evidence with his superiors or that each of his professional judgments was reviewed and approved by multiple KPMG partners who had decades of bank auditing experience between them.[24]

The Division's own expert acknowledged Mr. Bennett's technical competence and knowledge regarding the relevant accounting principles (*see* JPF ¶¶ 20, 471), and concluded that he (1) performed the functions expected of a senior manager (*id.* ¶ 30), (2) appropriately assessed risks relating to the ALLL (*id.* ¶¶ 176-77, 473), (3) appropriately selected a methodology to test the ALLL process (*id.* ¶¶ 80-83, 218-221, 223-231, 306-07, 471, 475), and (4) exhibited due care throughout 2008 audit by engaging the assistance of a credit risk specialist and addressing the OTS's regulatory findings (*id.* ¶¶ 191, 200, 203, 490-91). And Ms. Johnigan testified that, as an experienced bank auditor, she would have wanted Mr. Bennett to serve as the senior manager on her audit engagements. (JPF ¶ 462.) This is not the picture of an incompetent professional who

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[24] Imposition of a sanction under these circumstances would send an inappropriate signal to the auditing profession. Auditors should not be required to exercise their professional judgment against the threat of devastating sanctions imposed against an auditor based on good-faith and diligent efforts in the context of unprecedented economic uncertainty.

poses a threat to the Commission's processes.[25] Further, the conduct at issue in the few precedents in which non-partner auditors were sanctioned under Rule 102(e) does not in any way resemble Mr. Bennett's conduct here.

Accordingly, the sanction against Mr. Bennett is arbitrary and capricious.

CONCLUSION

Based on the foregoing, the Commission should grant Mr. Bennett's petition for review of the Initial Decision. Based upon review of the original record, Mr. Bennett respectfully submits that the Commission should reverse the Initial Decision.

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Respectfully submitted,

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[25] This proceeding and the antecedent investigation already have turned Mr. Bennett's career, and his life, upside down for *years* now. Even if a sanction were warranted, which it is not, no remedial action is necessary to impress upon him the importance of adhering to professional standards. *See Checkosky I*, 23 F.3d at 479 (discussing consequences associated with a sanction under Rule 102(e)).