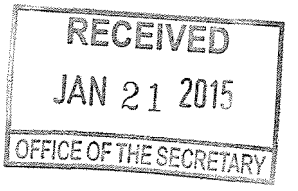
UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION



ADMINISTRATIVE PROCEEDING
File No. 3-15873

In the Matter of

THOMAS R. DELANEY II and
CHARLES W. YANCEY

Respondents.

RESPONDENT THOMAS R. DELANEY II's REPLY TO DIVISIONS FINDINGS OF FACT AND CONCLUSIONS OF LAW

Respondent Thomas R. Delaney II ("Delaney"), by and through counsel, submits this Response to the Division of Enforcement's ("Division") Post-Hearing Proposed Findings of Fact and Conclusions of Law, pursuant to this Court's Post-Hearing Order dated November 13, 2014 ("Order").

GLOBAL OBJECTION

Pursuant to Section 5(c) of the Order, "the purpose of the parties' proposed findings of fact and conclusions of law is to adduce, but not argue, the facts and law that the undersigned should rely on to decide this proceeding. Any proposed findings of fact or conclusions of law that contain such argument will be stricken." Delaney globally objects to the inclusion of argument contained in numerous of the Division's Proposed Findings of Fact and Conclusions of Law. Delaney further requests that this Court strike any Proposed Finding of Fact or Conclusion of Law that contains impermissible argument.

	DIVISION'S PROPOSED FINDING OF FACT	DELANEY'S RESPONSE
1	The primary mission of the Securities and Exchange Commission is protection of investors.	**Response** No dispute.
2	One of the ways the Commission protects investors is by implementing rules and regulations. The purpose of those rules and regulations is to protect investors.	**Response** No dispute.
3	Compliance with the securities laws is extremely important. Market integrity, market structure, and investor protection depend on compliance with the securities laws.	**Response** No dispute.
4	In the securities industry, a business must be operated within the guidelines of the rules.	**Response** Dispute: Vague and ambiguous. **Support** The terms "business" and "guidelines" and "rules" are undefined in the record.
5	If there is a conflict between the securities laws and industry practice, the securities laws trump.	**Response** Dispute: Legal conclusion. **Support** The term "trump" is undefined in the record. Furthermore, there is substantial evidence in the record that Delaney understood and followed the securities laws and this Proposed Finding of Fact implies to the contrary.

6	Penson Financial Services, Inc. ("PFSI") was a North Carolina corporation with a principal place of business in Dallas, Texas. It was a broker-dealer registered with the Commission. From at least 2010 to 2012, PFSI was one of the largest clearing firms in the United States as measured by the number of correspondent brokers for which it cleared. PFSI was a wholly-owned subsidiary of SAI Holdings, Inc., which in turn was a wholly-owned subsidiary of Penson Worldwide, Inc. ("PWI"). PFSI filed a Form BDW, which was effective in October 2012, and then declared bankruptcy in January 2013.	**Response** Dispute: See Stipulated FOF 3 and 103 - Division's Proposed FOF 6 is identical to the previously Stipulated and Ordered FOF 3 except that the without following appropriate procedures, the Division apparently proposes to combine it with Stipulated FOF 103 by changing it from "Penson" as stipulated and ordered, to "Penson Financial Services, Inc. ("PSFI")." **Support** See also Delaney's Response to the Division's Proposed FOF 7 and 8 below. Stipulated FOF 3. Penson was a North Carolina corporation with a principal place of business in Dallas, Texas. It was a broker-dealer registered with the Commission, which, from at least 2010 to 2012, was one of the largest clearing firms in the United States as measured by the number of correspondent brokers for which it cleared. Penson was a wholly-owned subsidiary of SAI Holdings, Inc., which in turn was a wholly-owned subsidiary of Penson Worldwide, Inc. ("PWI"). Penson filed a Form BDW, which was effective in October 2012, and then declared bankruptcy in January 2013. A bankruptcy plan implementing Penson's liquidation was approved in July 2013.
7	PFSI operated under a parent company, Penson Worldwide, Inc. ("PWI").	**Response** Dispute: The Division's statement is redundant of Stipulated FOF 3 previously stipulated to by all parties and the Division's Proposed FOF 6. There is no basis for a separate or additional finding of fact. **Support** Stipulated FOF 3. Penson was a North Carolina corporation with a principal place of business in Dallas, Texas. It was a broker-dealer registered with the Commission, which, from at least 2010 to 2012, was one of the largest clearing firms in the United States as measured by the number of correspondent brokers for which it cleared. **Penson was a wholly-owned subsidiary of SAI Holdings, Inc., which in turn was a wholly-owned subsidiary of Penson Worldwide, Inc. ("PWI")**. Penson filed a Form BDW, which was effective in October 2012, and then declared bankruptcy in January 2013. A bankruptcy plan implementing Penson's liquidation was approved in July 2013.
8	During the relevant time period, PWI was a public company; it had a number of subsidiaries, including: PFSI; Penson Financial Services, London; Penson	**Response** Dispute: The Division's statement is redundant of Stipulated FOF 103 previously stipulated to by all parties. There is no basis for a separate or additional

	Financial Services, Canada; and Nexus Technologies.	finding of fact. **Support** Stipulated FOF 103. PWI was a public company; it had a number of subsidiaries, including: PFSI; Penson Financial Services, London; Penson Financial Services, Canada; and Nexus Technologies.
9	Yancey, 58, of Colleyville, Texas, was the President and CEO of Penson from at least October 2008 through February 2012. Yancey is currently a Managing Director at a registered broker-dealer. Yancey holds Series 7, 24, 55, and 63 licenses.	**Response** Dispute: The Division's statement is redundant of Stipulated FOF 2 previously stipulated to by all parties. There is no basis for a separate or additional finding of fact. **Support** Stipulated FOF 2. Yancey, 58, of Colleyville, Texas, was the President/CEO of Penson from at least October 2008 through February 2012. Yancey is currently a Managing Director at a registered broker/dealer. Yancey holds Series 7, 24, 55, and 63 licenses.
10	Delaney, 45, of Colleyville, Texas, was the CCO at Penson from at least October 2008 through April 2011. Delaney currently works in compliance at a registered broker-dealer. He holds Series 4, 7, 24, 27, 53, and 63 licenses.	**Response** Dispute: The Division's statement is redundant of Stipulated FOF 1 previously stipulated to by all parties. There is no basis for a separate or additional finding of fact. **Support** Stipulated FOF 1. Delaney, 45, of Colleyville, Texas, was the CCO at Penson from at least October 2008 through April 2011. Delaney currently works in compliance at a registered broker-dealer. He holds Series 4, 7, 24, 27, 53, and 63 licenses. See also Stipulated FOF 58 and discussion regarding the Division's Proposed Finding of Fact 322 below.
11	Michael Johnson, the Senior Vice President of Stock Loan, was an associated person of PFSI. He had primary authority and responsibility within Stock Loan for its operational practices. Johnson knew that Rule 204T(a)/204(a) required PFSI to close-out CNS failures to deliver for long sales, including long sales of loaned securities, by market open T+6. From October 2008 through November 2011, the Johnson knew PFSI was at times violating Rule 204T(a)/204(a) in connection with long sales of loaned securities.	**Response** Dispute: The Division's statement is largely redundant of Stipulated FOF 41 previously stipulated to by all parties. There is no basis for a separate or additional finding of fact. The Division apparently proposes to alter Stipulated FOF 41 as bolded below. **Support** Stipulated FOF 41. Michael Johnson, the Senior Vice President of Stock Loan, was an associated person of Penson. He had primary authority and responsibility within Stock Loan for its operational practices **and for the Department's WSPs, which WSPs were incorporated into Penson's WSPs.** The Senior Vice

		President of Stock Loan knew that Rule 204T(a)/204(a) required Penson to close out CNS failures to deliver for long sales, including long sales of loaned securities, by market open T+6. From October 2008 through November 2011, the Senior Vice President of Stock Loan knew Penson was at times violating Rule 204T(a)/204(a) in connection with long sales of loaned securities.
12	Mike Johnson was charged by the Commission for willfully aiding and abetting the Rule 204 violations at issue in this matter, and settled his case on a neither admit nor deny basis.	**Response** Dispute: The Division's statement is redundant of Stipulated FOF 104 previously stipulated to by all parties. There is no basis for a separate or additional finding of fact. **Support** Stipulated FOF 104. Mike Johnson was charged by the Commission for willfully aiding and abetting the Rule 204 violations at issue in this matter, and settled his case on a neither admit nor deny basis.
13	Johnson was a hostile witness toward the Division; he believes he was mistreated during the charging and settlement process, and continues to believe this matter is nothing but a "witch hunt."	**Response** Dispute: Dispute: Overly broad and not supported by testimony. The Division's statement consists of impermissible argument in violation of the Nov. 13, 2014 Post-Hearing Order ("Post-Hearing Order"), at ¶ 5(c) and should be stricken. There is nothing in the record stating that Johnson was a "hostile" witness or that the Division sought permission to treat him as a hostile witness. The Division should not be allowed to characterize his testimony through a finding of fact. The credibility of a witness is reserved for the Court in this matter. **Support** **Tr. 562:24 – 563:11 [Johnson]** Q Okay. My last question, Mr. Johnson: Did you settle with the SEC in or about March of this year? A Yes. Q Do you think you were treated fairly in that process? A No. Q Why not? A Based on FINRA's finding with Merrill Lynch Pro yesterday that came out. And they got a 6 million fine for numerous violations from 2008 forward. They didn't name people. I think this whole thing has been a witch hunt, and none of us -- I only settled because my wife and I are both ill. And I disagree with the whole thing.

		Proposed Counterstatement Johnson ~~was a hostile witness toward the Division;~~ **testified that** he believes he was mistreated during the charging and settlement process and ~~continues to believe this matter is nothing but~~ **that it "has been** a witch hunt."
14	Rudy DeLaSierra began working at PFSI in March 2000. He joined the Stock Loan department in June 2000. He became Vice President of Stock Loan in approximately 2006. He was involved in all functions of the department.	**Response** Dispute: The Division's statement is largely redundant of Stipulated FOF 105 previously stipulated to by all parties. There is no basis for a separate finding of fact. Additionally, the Division's statement mischaracterizes the scope of the supporting testimony. **Support** Stipulated FOF 105. Rudy DeLaSierra began working at PFSI in March 2000. He joined the Stock Loan department in June 2000. He became Vice President of Stock Loan in approximately 2006. **Tr. 203:8 – 204:15 [DeLaSierra]** Q Okay. What did you do at Stock Loan at Penson? A What was my role there? Q Yes, sir. A When I -- when I started there, it was all functions. We were operations, including recalls, handling rate changes, some sales lending, the box, our inventory, and borrowing securities as well and also short sale locates. Q So you did all the functions in Stock Lending? A Yes. **Proposed Counterstatement** DeLaSierra testified that when he started in the Stock Loan department at Penson, he performed all functions in Stock Lending.
15	DeLaSierra has entered into a cooperation agreement with the Commission, which requires him to testify truthfully in this proceeding.	**Response** Dispute: Incomplete reference to the record. **Support** **Tr. 342:8-13 [DeLaSierra]** 8 Q Mr. DeLaSierra, you have a cooperation 9 agreement in this case? 10 A Yes, I do. 11 Q And you still have a fear of being charged in 12 this case? 13 A Yes. I don't know what's going to happen. See also Ex. 446, paragraph 28

		Proposed Counterstatement DeLaSierra has entered into a cooperation agreement with the Commission, which requires him to testify truthfully in this proceeding. **As part of the cooperation agreement, the Division has agreed to reserve recommendation of an enforcement action against him until after his testimony in this matter. During his testimony before the Court, Mr. DeLaSierra was afraid of being charged by the Commission.**
16	Lindsey Wetzig began working at PFSI out of college in March 2000. In 2004, he joined the Stock Loan group. In approximately 2006 or 2007, he was promoted to Operations Manager of the Stock Loan group.	**Response** Dispute: The Division's statement is redundant of Stipulated FOF 106 previously stipulated to by all parties. There is no basis for a separate or additional finding of fact. **Support** Stipulated FOF 106. Lindsey Wetzig began working at PFSI out of college in March 2000. In 2004, he joined the Stock Loan group. In approximately 2006 or 2007, he was promoted to Operations Manager of the Stock Loan group.
17	Wetzig was charged by the Commission for his role in the Rule 204 violations at issue in this matter, and settled his case.	**Response** Dispute: Incomplete reference to the record. **Support** **Tr. at 403:15-22 [Wetzig]** 15 You settled with the Division, in this matter, 16 didn't you? 17 A That is correct. 18 Q And does your settlement agreement identify 19 that you intentionally -- it has facts showing that you 20 intentionally violated Rule 204, correct? 21 A No. I don't believe that it intentionally is 22 in there. **Tr. at 404:7-16 [Wetzig]** 7 Q Well, you didn't -- no disgorgement was 8 ordered, correct? 9 A That's correct. 10 Q No penalties, correct? 11 A That's correct. 12 Q No -- no bars, right? 13 A Correct. 14 Q And you agreed to cooperate in -- in that 15 settlement agreement, didn't you? 16 A Correct.

		Exhibits 247 and 248 are Mr. Wetzig's Offer of Settlement and Order in this matter. **Proposed Counterstatement** Wetzig negotiated an agreed Offer of Settlement on February 28, 2014, consenting to the entry of a cease-and-desist-order without admitting or denying any of the findings, except as to jurisdiction. An order was entered against him on that basis on May 19, 2014.
18	Eric Alaniz was a PFSI compliance department employee from 2009 through 2011. One of Alaniz' responsibilities was to conduct 3012 testing.	**Response** No dispute.
19	Holly Hasty was a PFSI compliance department employee.	**Response** No dispute.
20	Kim Miller was a PFSI compliance department employee from 2000 until 2012. One of Kim Miller's responsibilities was to provide information in response to requests from regulators and other outside sources.	**Response** Dispute: The Division cites to Stipulated FOF 10, which does not support the Division's statement. Instead, the Division's statement is redundant of Stipulated FOF 107 previously stipulated to by all parties. There is no basis for a separate finding of fact. **Support** Stipulated FOF 107. Kim Miller was a PFSI compliance department employee from 2000 until 2012. One of Kim Miller's responsibilities was to provide information in response to requests from regulators and other outside sources.
21	Phil Pendergraft was one of the creators of Penson.	**Response** No dispute.
22	From 2008 to 2011, Pendergraft was chief executive officer and a member of the board of directors of PWI.	**Response** No dispute.
23	During the Division's investigation of this matter, Yancey encouraged the Division to take testimony from Pendergraft in order to properly understand the supervisory structure over Johnson and Stock Loan.	**Response** Dispute: Accuracy of statement. **Support** **Tr. 992:7-10 [Yancey]** Q All right. So in your Wells submission, you said that not speaking to Mr. Pendergraft lacked prudence and logic, right? A These are the words of my lawyers. **Proposed Counterstatement** During the Division's investigation of this matter,

		Yancey's lawyers – through his wells submission – encouraged the Division to take testimony from Pendergraft in order to properly understand the supervisory structure over Johnson and Stock Loan.
24	Bart McCain began working at PFSI in 2006. He was PFSI's chief administrative officer, and also served as PFSI's chief financial officer for a time. McCain also served as the PWI interim treasurer in 2011 and interim chief financial officer in 2012.	**Response** Dispute: Division's statement is redundant of Stipulated FOF 108 previously stipulated to by all parties. There is no basis for a separate or additional finding of fact. **Support** Stipulated FOF 108. Bart McCain began working at PFSI in 2006. He was PFSI's chief administrative officer, and also served as PFSI's chief financial officer for a time. McCain also served as the PWI interim treasurer in 2011 and interim chief financial officer in 2012.
25	Yancey was instrumental in securing every job McCain had in the securities industry, including hiring McCain to work at PFSI.	**Response** No dispute.
26	McCain and Yancey have a close personal and professional relationship. McCain considers Yancey his dearest friend, and feels indebted to Yancey for, among other things, the bonus payments he received while at PFSI.	**Response** No dispute.
27	In contrast to his loyalty to Yancey, McCain was hostile toward Pendergraft.	**Response** Dispute: The Division's statement consists of impermissible argument and should be stricken. *See* Post-Hearing Order ¶ 5(c). **Support** **Tr. 2177:8-19 [McCain]** A Phil, I believe, was a -- until, say, 2012, just before the Apex transaction, I believe Phil to be a very honorable person, but in retrospect, the way the transition from -- or the transition of me into the CFO role and the way that occurred, and his departure within six to eight weeks after that, I felt like he fled the company when it was just, frankly, teetering. He made representations to me that my role would be interim. He made representations that we were going to survive after the Apex transaction. And neither of those were true. Very disappointed. He left me holding the bag, frankly. **Proposed Counterstatement**

		McCain testified that he was disappointed in Pendergraft's actions regarding McCain's transition to Chief Financial Officer at PWI in 2012.
28	Brian Gover began working at PFSI in April, 2007. Over time he managed several departments, including the buy-ins department. In April 2012, Gover moved into the compliance department at PFSI. He is currently the Chief Compliance Officer of Apex Clearing.	**Response** Dispute: The Division's statement is redundant of Stipulated FOF 109 previously stipulated to by all parties. There is no basis for a separate or additional finding of fact. **Support** Stipulated FOF 109. Brian Gover began working at PFSI in April, 2007. Over time he managed several departments, including the buy-ins department. In April 2012, Gover moved into the compliance department at PFSI. He is currently the Chief Compliance Officer of Apex Clearing.
29	Summer Poldrack and Angel Shofner were PFSI employees in the Buy-ins department during the relevant time period.	**Response** Dispute: The Division's statement is redundant of Stipulated FOF 110 previously stipulated to by all parties. There is no basis for a separate or additional finding of fact. **Support** Stipulated FOF 110. Summer Poldrack and Angel Shofner were PFSI employees in the Buy-ins Department during the relevant time period.
30	The Depository Trust and Clearing Corporation ("DTCC") operates the National Securities Clearing Corporation ("NSCC"), a clearing agency registered with the Commission that clears and settles the majority of United States transactions in equities. When NSCC members purchase or sell securities on the exchanges, the exchanges send the trade information to the NSCC. NSCC operates the Continuous Net Settlement ("CNS"). NSCC member clearing firms receive reports that, as of at least close of business T+1, notify the firms of transactions scheduled to clear and settle by close of business T+3. CNS also sends reports to the firms listing net fails to deliver in each security as of T+3.	**Response** Dispute: The Division's statement is redundant of Stipulated FOF 5 previously stipulated to by all parties. There is no basis for a separate or additional finding of fact. **Support** Stipulated FOF 5. The Depository Trust and Clearing Corporation ("DTCC") operates the National Securities Clearing Corporation ("NSCC"), a clearing agency registered with the Commission that clears and settles the majority of United States transactions in equities. When NSCC members purchase or sell securities on the exchanges, the exchanges send the trade information to the NSCC. NSCC operates the Continuous Net Settlement ("CNS"). NSCC member clearing firms receive reports that, as of at least close of business T+1, notify the firms of transactions scheduled to clear and settle by close of business T+3. CNS also sends reports to the firms listing net fails to deliver in each security as of T+3.

31	If a trade fails to settle, there are consequences to the buyer of the shares, and to the market more generally. For example, the buyer does not receive certain rights that come along with owning shares.	**Response** Dispute: Conclusion of law. **Support** **Tr. at 1072:23-1074:25[Harris]** 23 Q Okay. So this concerns a bit of a red herring, 24 right, as it applies to this case? Do you agree with 25 that statement, yes or no? 1 A Why the Commission adopted these rules is not 2 relevant to the -- to the settlement of this case or to 3 its conclusion. 4 Q And there's no additional risk to a buyer if I 5 close out a position by purchasing or borrowing on at 6 market open T+6 or sometime during the day on T+6, 7 correct? 8 A I'm sorry. So the -- from the point of view of 9 the buyer who is looking to receive shares, your question 10 is, does it make any difference to the buyer whether the 11 purchase takes place -- whether the shares are delivered 12 through CNS at the beginning of the day or at the end of 13 the day. . . . . 6 And doesn't the NSCC act as a central 7 counter-party for both the buyer and seller in this 8 process? 9 A That's my understanding. 10 Q And isn't that to protect the buyer from the 11 very situation you're talking about, the risks of 12 bankruptcy? 13 A Yes. It does protect the buyer, but the NSCC 14 itself has to be protected. 15 Q Okay. But you indicated in your report, didn't 16 you, Pages 62 and 118, that there was -- that failure to 17 delivers create risk to the buyer, not NSCC, right? 18 A Yes, that's correct. 19 Q Okay. And that there is -- there's really not 20 a risk to the buyer, is there, in this type of situation? 21 A Well, the risk to the buyer is derived from the 22 risk to NSCC if it gets kicked out of NSCC. **Tr. at 1606:17 – 1610:25 [Sirri]** 17 Q Very good. Very good. And do you recall

		18 Professor Harris' assertions in his report and during 19 his testimony regarding the adverse consequences to 20 buyers and risk, systemic risk I believe it was, from 21 failure to deliver positions? 22 A I believe he mentioned both in his testimony, 23 systemic risk and certain other consequences. 24 Q Do you recall what some of those consequences 25 were? 1 A I believe he spoke about voting, about not 2 having the benefits of the ownership being voting, the 3 ability to lend the shares, there may have been 4 something else as well. And he also mentioned that 5 systemic risk would be a concern. 6 Q Okay. Do you have a response to that, and 7 does this slide detail some of your responses to that? . . . . 18 Q And on your third bullet point you indicate 19 "Isolated fails to deliver at brokers have a minimal 20 effect on systemic risk, in part due to the design of 21 CNS and NSCC." What do you mean by that? 22 A There can be fails to deliver. In that 23 situation, the receiving broker will often not get the 24 shares they want. In that world, Professor Harris 25 makes the point that that broker is exposed to a 1 certain amount of risk if the shares don't settle by 2 T+3 or say the morning of T+4. There's two points I 3 wanted to make. The first is that by that point the 4 counterparty to the trade is NSCC. NSCC becomes the 5 counterparty to the trade as the central counterparty 6 on the midnight of T+1, so the trade is locked in and 7 guaranteed by the NSCC. That's a pretty strong 8 guarantee. So the nonperformance of the fail to 9 deliver position does not affect the fail to receive 10 position. 11 I think Professor Harris also raised the 12 point that there could be a concern for NSCC. I 13 certainly take his point. I just want to point out 14 that he does say if allowed to grow, it would have to 15 be very large for that to be a serious, serious 16 problem. NSCC being a key part of our clearance 17 system, if NSCC were to fail, we would have a very, 18 very large problem on our hands of course, representing 19 NSCC is part of the depository. So my point is 20 isolated failures are highly unlikely to cause a 21 problem. 22 Q And if NSCC was to fail, an isolated failure

		23 is probably meaningless, right? 24 A You're going to have a lot more problems than 25 an isolated failure in NSCC. See also **Exhibit 239** – Expert Report of Professor Lawrence Harris, and **Exhibit 454** - Expert Report of Professor Erik Sirri: The NSCC system is designed to eliminate any risk to investors. *Pet Quarters, Inc. et al v. Depository Trust and Clearing Corporation, et al.*, 559 F. 3d 1722 (8th Cir. 2009). ("Before 1981, a buyer who was the victim of a failure to deliver could wait for the seller to cure the failure through delivery, or could buy the stock on the open market and charge the seller for the difference between the agreed price and the price the buyer paid in the market. NSCC created the automated Stock Borrow Program in 1981 to cover such failures to deliver. Under this program the seller can electronically borrow the number of shares of undelivered stock from other members' accounts and deliver the borrowed shares to the purchaser. The rules governing the program were developed by NSCC and approved by the Commission under its Section 17A authority. According to the Stock Borrow Program rules, a member who wishes to participate in the program notifies NSCC daily which securities it has on deposit at DTC that it is making available to the program. If a seller fails to deliver shares of a security by the settlement date, NSCC's account will not have enough shares to meet all of its delivery obligations. In that situation, the program automatically borrows shares from loaning members and covers the sale without the buyer ever knowing that a failure to deliver has occurred. The DTC system records a book entry increasing the buyer's security entitlement position, and the buyer receives all voting and trading rights as with a normal purchase").
32	Rule 204T/204 was adopted to, among other things, address prolonged failures to deliver. Rule 204T became effective on September 18, 2008 and Rule 204 became effective on July 31, 2009.	**Response** Dispute: The Division's statement is redundant of Stipulated FOF 4 previously stipulated to by all parties. There is no basis for a separate or additional finding of fact. **Support** Stipulated FOF 4. Rule 204T/204 was adopted to, among other things, address prolonged failures to deliver. Rule 204T became effective on September 18,

		2008 and Rule 204 became effective on July 31, 2009.
33	At all relevant times, PFSI was a clearing firm, i.e., a participant of a registered clearing agency and a member of NSCC. As a clearing firm, PFSI had obligations under Rule 204(a) to close-out CNS failures to deliver resulting from long sales no later than market open T+6.	**Response** Dispute: The Division's statement is redundant of Stipulated FOF 6 previously stipulated to by all parties. There is no basis for a separate or additional finding of fact. **Support** Stipulated FOF 6. At all relevant times, Penson was a clearing firm, i.e., a participant of a registered clearing agency and a member of NSCC. As a clearing firm, Penson had obligations under Rule 204(a) to close out CNS failures to deliver resulting from long sales no later than market open T+6.
34	No PWI entity other than PFSI had close-out obligations under Rule 204.	**Response** Dispute: The Division's statement is redundant of Stipulated FOF 111 previously stipulated to by all parties. There is no basis for a separate or additional finding of fact. **Support** Stipulated FOF 111. No PWI entity other than PFSI had close out obligations under Rule 204.
35	From October 2008 until November 2011, PFSI failed to close-out CNS failures to deliver resulting from long sales of loaned securities by market open T+6. The relevant long sales originated with securities held in customer margin accounts. Under the Commission's customer protection rule, PFSI is permitted, subject to certain conditions and limitations, to re-hypothecate margin securities to third parties. PFSI re-hypothecated margin securities according to the terms of the Master Securities Lending Agreement ("MSLA") developed by the Securities Industry and Financial Markets Association ("SIFMA").	**Response** Dispute: The Division's statement is redundant of Stipulated FOF 7 previously stipulated to by all parties. There is no basis for a separate or additional finding of fact. **Support** Stipulated FOF 7. From October 2008 until November 2011, Penson failed to close out CNS failures to deliver resulting from long sales of loaned securities by market open T+6. The relevant long sales originated with securities held in customer margin accounts. Under the Commission's customer protection rule, Penson is permitted, subject to certain conditions and limitations, to re-hypothecate margin securities to third parties. Penson re-hypothecated margin securities according to the terms of the Master Securities Lending Agreement ("MSLA") developed by the Securities Industry and Financial Markets Association ("SIFMA").

36	When a margin customer sold the hypothecated securities that were out on loan, PFSI issued account-level recalls to the borrowers on T+3, i.e., three business days after execution of the margin customer's sale order. When the borrowers did not return the shares by the close of business T+3, and PFSI did not otherwise have enough shares of the relevant security to meet its CNS delivery obligations, PFSI incurred a CNS failure to deliver.	**Response** Dispute: The Division's statement is redundant of Stipulated FOF 8 previously stipulated to by all parties. There is no basis for a separate or additional finding of fact. **Support** Stipulated FOF 8. When a margin customer sold the hypothecated securities that were out on loan, Penson issued account-level recalls to the borrowers on T+3, i.e., three business days after execution of the margin customer's sale order. When the borrowers did not return the shares by the close of business T+3, and Penson did not otherwise have enough shares of the relevant security to meet its CNS delivery obligations, Penson incurred a CNS failure to deliver.
37	It was Stock Loan's obligation to close-out CNS fails arising from long sales of loaned securities.	**Response** Dispute: Conclusion of Law and unsupported by cited source **Support** Penson's WSPs required Stock Loan to buy-in CNS fails by "forward[ing] the Buy-ins to the customer Buy-in Department." Ex.66 at page 397. The Compliance Department believed that Stock Loan adhered to this procedure when, in fact, it did not. For that reason, the Compliance Department was unaware that its testing of compliance with Rule 204 (3012 testing) did not include buy-ins of long sales of loaned securities and that in a small percentage of cases, Stock Loan was failing to buy in at the open of T+6 as required by Rule 204. **Tr. at 745:15-23—752:1-23[Alaniz]** 15 Q What about, did your test focus primarily on 16 buy-ins -- on the buy-ins function? 17 A I didn't make -- yes, it did, but at the time, 18 I didn't make any distinction between what I was going to 19 focus on. It was just buy-in. The focus was to ensure 20 that the rule was being adhered to. 21 Q Okay. And you constructed the test as best you 22 could to -- to attempt to test that, correct? 23 A Yes. . . . 8 Q Let me ask you, what was your understanding of 9 how buy-ins were accomplished to close out these sales?

		10 A My understanding was that the Securities 11 Lending group would run -- do queries or reports, T+4 and 12 T+6. And at that point, they would look to see if they 13 could borrow securities to settle those positions. If 14 they could not, then they forwarded those reports to 15 buy-ins. And from there, buy-ins would scrub those 16 reports to ensure there were no false positives. 17 From there, once they had their final list, 18 they would forward that list to the trade execution -- or 19 the trading -- trading department and they would execute 20 the trades. 21 Q Okay. Now, that process you just described, 22 was that your understanding of how buy-ins worked for 23 all -- all CNS fails? 24 A Yes. Again, I did not make a distinction. It 25 was what I thought was happening with everyone. 1 Q And did anybody during -- you met with the 2 Stock Loan department. Did they tell you that that 3 wasn't an accurate description of their process? 4 A No. 5 Q And you met with the buy-in department? 6 A Yes. 7 Q And did anybody -- again, that would have been 8 Mr. Gover, Ms. Poldrack -- 9 A And Reilly. 10 Q -- and Reilly? 11 Anybody during that meeting tell you there 12 was -- there was a different process? 13 A No. **Tr. 755:3-25 [Alaniz]** 3 Q In your reading of Rule 204, would there be any 4 basis to make a distinction, as to the close-out 5 requirements, of whether Penson had gone on to loan out a 6 security? 7 A No. 8 Q Let me ask you, what was your understanding of 9 how buy-ins were accomplished to close out these sales? 10 A My understanding was that the Securities 11 Lending group would run -- do queries or

		reports, T+4 and 12 T+6. And at that point, they would look to see if they 13 could borrow securities to settle those positions. If 14 they could not, then they forwarded those reports to 15 buyins. And from there, buy-ins would scrub those 16 reports to ensure there were no false positives. 17 From there, once they had their final list, 18 they would forward that list to the trade execution – or 19 the trading -- trading department and they would execute 20 the trades. 21 Q Okay. Now, that process you just described, 22 was that your understanding of how buy-ins worked for 23 all -- all CNS fails? 24 A Yes. Again, I did not make a distinction. It 25 was what I thought was happening with everyone.
38	By contrast, PFSI's Buy-ins department had the responsibility to close-out CNS fails caused by customers by buying in the shares owed, *e.g.*, customer short sales. The cost of the buy-in, and the attendant market risk, was borne by the customer or broker causing the fail.	**Response** Dispute: Not an independent finding; The Division's statement also constitutes impermissible argument and should be stricken. *See* Post-Hearing Order ¶ 5(c). **Support** **Tr. 87:13 – 90:3 [Gover]** Q Okay. What did buy-ins do at PW- -- PFSI? A Well, we certainly handled the Reg SHO buy-ins, and we can, I imagine, talk about that. We also handled broker-to-broker buy-ins. So if we had trades that were not selling perhaps through CNS, that they were selling just DTC trade for trade, if we were failing to receive from a party, we -- we could issue a -- a buy-in. If we were failing to deliver on a position and another firm issued us a buy-in, we would look at it and either -- retrans is the industry jargon -- we were retransmitting the buy-in to the party that owes you the shares, or, you know, if it was due to a failure on our part, we would -- we would handle those buy-ins. I mean, if we were being bought in, notified we were being bought in, making sure we were ascribing the buy-in costs correctly to the party that caused it. Q Okay. What do you mean by "buy-in"? A You're going to market and you are buying shares at the market. So let's go back to the trade settlement. And you have a contractual agreement or

		your customer has a contractual agreement to sell -- sell 100 shares of IBM and deliver them for X amount of money. If the party that is not -- that is due to receive those 100 shares of IBM doesn't receive them, they -- they have some recourse which -- to prevent them from having undue financial risk and they can -- they can buy it in. They can go and say, hey, the broker was supposed to deliver this to me. He didn't deliver it. I need to have the shares because I have to deliver them to somebody else. I'm notifying you, I'm buying you in at the market. And they go buy the shares that you were supposed to deliver to them. So now they've -- they've fulfilled their obligation that they can -- they had to buy the shares so they can make forward delivery or to give them to your customer who they're owed. The party that should have delivered them to them now has market risk because now they've got shares that they -- they don't need to deliver them anymore. That -- that receiving firm no longer needs them because they bought in. So that's -- that's the core of it. You are -- generally with buy-ins, it's -- you're -- you are -- it's a very risk manage- -- it's a risk-management-centered function. Q And who bears the cost of that buy-in? A In general terms, whoever caused it. Q Okay. Whoever caused what? A The buy-in. So, you know, if -- if you have a customer that caused a buy-in, there's a whole bunch of different kinds of -- you know, different types of trades. But let's say that they have a physical certificate, and they go to deliver the shares to the transfer agent, who is then going to re-register them into the street name for Penson, and they sell the shares. But if you don't have the shares to deliver and they sold them before they were cleared through the agent, and we get bought in, or we get notified that we're going to be bought in, we're going to pass those costs back to the customer. If it's another broker that's failing to deliver to us and -- and Penson is buying in, we're -- we're putting that cost back to that broker who is failing to deliver to us. If it's Penson that is being bought in or should have been bought in, generally Penson is going to have the market risk and the cost on it. So it's whichever party is causing the buy-in is the one that is going to bear the market risk and the cost. **Tr. 361:24 – 364:3 [Wetzig]** Q I want to talk about who, at Penson, had the responsibilities to deal with those various things. So let's start with customer short sales. What was the

		process at Penson for closing out a customer short sale by market open T+4? A So we would get in on T+4 at around 6:00 in the morning, and we would receive a list, the potential 204 customer closeouts, and we would try to go borrow those items before the market opened. Q And when you say "we," who's the we in that sentence? A Rudy would try to borrow the items, initially, and Dawnia would forward the items to me, and I would try it as well. Q So that -- you're talking about people in Stock Lending? A Correct. Q Okay. So on the morning of T+4, after Stock Lending had tried to borrow to cover the customer shorts, were you successful in covering some of the shorts? A We were successful in covering most of the shorts. Q Okay. So if Stock Lending couldn't borrow to cover a customer short, what happened next? A We would send the list back down to the buy-in department. And then they would receive that list and send me instructions, to the trade desk, to close-out the customer short sales. ... Q What did buy-ins then do with the list? A They would send those securities to the trade desk for execution. Q And "execution" means -- means what? A They would buy the customer's short sale. Q So that was handled by the buy-ins group? A Correct. **Tr. 230:21 – 231:18 [DeLaSierra]** Q And let's -- let's talk about those two processes. So on T3, if you queried and determined it was the result of a short sale, what did Stock Lending do? A We would put our list together and start borrowing -- Q Who was the borrower? A There was a lot of those as well. So part of that was what it put -- the Dawnia Robertson reviews is loaded up into LoanNet to try to automate some of these borrows. Q So when there's a fail due to a short sale on T3, Stock Lending tries to borrow to cover that fail? A That is correct. Q What about on T4? Does Stock Lending do anything on T4? A If the customer requested us to borrow it, we would attempt to borrow it in the morning of T4

		before the opening. Q And if Stock Lending couldn't borrow on the morning of T4 before the open, what would Stock Lending do? A We'd notify the buy-ins group. **Proposed Counterstatement** ~~By contrast,~~ PFSI's Buy-ins department had the responsibility to close-out CNS fails caused by customers by buying in the shares owed, *e.g.*, customer short sales. The cost of the buy-in, and the attendant market risk, was borne by the customer or broker causing the fail.
39	PFSI violated Rule 204T/204 at least 1500 times during the time period relevant to this case.	**Response** Dispute: The Division's statement is redundant given Stipulated FOF 49 regarding the number of violations previously stipulated to by all parties. There is no basis for a separate or additional finding of fact. **Support** Stipulated FOF 49. During the relevant time period there were at least 1,500 Rule 204T(a)/204(a) violations by PFSI relating to long sales of loaned securities.
40	PFSI violated Rule 204T/204's requirement to close-out at market-open T+6 approximately 2-10 times each trading day.	**Response** Dispute: The Division's statement is redundant given Stipulated FOF 49 regarding the number of violations previously stipulated to by all parties. There is no basis for a separate or additional finding of fact. **Support** Stipulated FOF 49. During the relevant time period there were at least 1,500 Rule 204T(a)/204(a) violations by PFSI relating to long sales of loaned securities.
41	While many trades naturally settled prior to market-open T+6, when a settlement failure reached market-open T+6, which is the point at which Rule 204 says PFSI must take action to close-out the fail, PFSI Stock Loan took no action to close-out the fail. Thus, 100% of the fails that reached the point where Rule 204 required action were not closed out on time.	**Response** Dispute: Conclusion of law and incomplete citation to the record. Further, the Division's statement is inaccurate and is redundant given existing stipulated findings of fact 11 and 49. **Support** Stipulated FOF 11. At least on some occasions, Stock Loan allowed CNS failures to deliver resulting from long sales of loaned securities to persist beyond market open T+6. At least on some occasions, Stock Loan personnel did not take steps, such as purchasing or borrowing securities, in order to close out Penson's CNS failure-to-deliver position.

		Stipulated FOF 49. During the relevant time period there were at least 1,500 Rule 204T(a)/204(a) violations by PFSI relating to long sales of loaned securities. **Tr. 515:9-15 [Johnson]** Q Sure. Maybe I'll ask you more broadly. From 2008 to 2011, when on T6 did Stock Lending buy in to close out fails to deliver? A I think we bought in in the morning and then throughout the day. Q On T+6? A Yes. **Tr. 306:14-20 [DeLaSierra]** Q Now, I believe there was a time when Stock Loan did begin trying to borrow before the morning of T+6, is that right, to – A I believe – . . . A -- there was a few times where it was attempted. **Tr. 1605:10 – 1606:3 [Sirri]** Q Is it fair to say that persistent failures to deliver can be consistent with Rule 204, compliance with Rule 204? A You can have a situation in a security where there's a persistent fail to deliver and the people who are trading that security absolutely are complying with the requirements of Rule 204. Q And is that when they purchase on at market open? A An example would be someone sells stock on AT short, you reach beginning of market open T+4, they buy shares to cover the short position. Those shares would settle on T+7, so you will show a fail to deliver system -- in the system from T+3 to T+7, and then they establish a new short position on, say, T+5. So you may see a long string of these, or perhaps another short position on T+4 later in the day. You can see a long string of fail to delivers. That doesn't mean someone is not complying with the rule. **Proposed Counterstatement** While many trades naturally settled prior to market-open T+6, when a settlement failure reached market-open T+6, **on some occasions** PFSI Stock Loan took no action to close-out the fail. Thus, **some** of the fails that reached the point where Rule 204 required action were not closed out on time.
42	It is not surprising that only a small percentage of all trades PFSI cleared	**Response** Dispute: The Division's statement consists of

	violated Rule 204, because the vast majority of all trades settle on time, *i.e.*, by T+3. That fact does not excuse or diminish PFSI's Rule 204 violations.	impermissible argument and should be stricken. *See* Post-Hearing Order ¶ 5(c). Additionally, the Division's statement is redundant of Stipulated FOF 49 previously stipulated to by all parties. There is no basis for a separate finding of fact. Further, this is a conclusion of law and is unsupported by record **Support** The Division cites nothing in the record for its proposed conclusion that "that fact does not excuse or diminish PFSI's Rule 204 violations," which in any event is argumentative and a statement of law, not fact. Stipulated FOF 49. **Proposed Counterstatement** During the relevant time period there were at least 1,500 Rule 204T(a)/204(a) violations by PFSI relating to long sales of loaned securities.
43	There would have been substantial costs to PFSI if it had bought shares at market-open T+6, without being able to pass those costs on to customers.	**Response** Dispute: Conclusion of law and incomplete citation to the record **Support** Stipulated FOF 53. During the relevant time period the only specifically quantified benefit PFSI gained from not timely closing out at market open on T+6 is $59,000. Stipulated FOF 80. The total calculated benefit to Penson from the 204(a) violations at issue is only approximately 0.08 percent of Stock Loan's total revenue during the relevant period. **Tr. 539:23 – 540:11 [Johnson]** Q: Are you aware, Mr. Johnson, that the SEC alleges in this lawsuit that the reason Penson was violating Rule 204 was for a profit motive? Have you heard that? A: Yes. Q: What do you think about that? A: I think it's bull crap. Q: In your view, was there material economic benefit to Penson for the conduct they're alleged to have committed with respect to Rule 204? A: I think what you're saying is, was it worth it if we broke the rule. No. We wouldn't -- we didn't do the rule because we didn't understand how to do it. We did not do it for money. **Proposed Counterstatement** During the relevant time period the only specifically

		quantified benefit PFSI gained from not timely closing out at market open on T+6 is $59,000.
44	Stock Loan did not attempt to borrow shares before market open T+6 to close-out fails to deliver caused by long sales of loaned securities.	**Response** Dispute: Accuracy of statement. **Support** **Tr. 515:9-15 [Johnson]** Q Sure. Maybe I'll ask you more broadly. From 2008 to 2011, when on T6 did Stock Lending buy in to close out fails to deliver? A I think we bought in in the morning and then throughout the day. Q On T+6? A Yes. **Tr. 306:14-20 [DeLaSierra]** Q Now, I believe there was a time when Stock Loan did begin trying to borrow before the morning of T+6, is that right, to – A I believe – . . . A -- there was a few times where it was attempted. **Proposed Counterstatement** **On some occasions**, Stock Loan **did attempt** to borrow **or buy in** shares before market open T+6 to close-out fails to deliver caused by long sales of loaned securities.
45	If Stock Loan had decided to close-out fails on the morning of T+6 by buying shares in its own proprietary account, as opposed to buying in the borrowing counterparty, that decision would have had to be approved at a very high level within PFSI because taking a proprietary position could expose the firm to significant losses.	**Response** Dispute: The finding of fact as written is ambiguous and needlessly so. The finding of fact states that "that decision would have had to be approved at a very high level within PFSI," which is ambiguous because it suggests that the very high level might exist in some unidentified portion of PFSI other than Stock Loan. However, both witnesses upon whom the Division relies testified that it would have been approved by Mike Johnson or his supervisors. As a technical matter, neither Johnson nor his supervisors were within PFSI, providing another basis to conclude the finding of fact is unsupported. **Support** **Tr. 228:6 – 229:2 [DeLaSierra]** Q … [I]f Stock Lending had bought in on Penson's own propriety account on the morning of T+6, is that something you think you would have had authority to do? A I would not have, no. Q Why not? A Well, now you're taking proprietary positions in

		illiquid names, and that would have had to have been approved above me, probably above Mike Johnson. Q What's the risk with taking shares in proprietarily? A It's market risk. And, like I said, these are illiquid names, so any small movement -- or I'm sorry -- any trading of these could create large moves in stock price. And now you're proprietary -- I mean, we're not traders. We're Stock Loan. We're just -- we're agents. We're lending securities that are -- are inventory. Q I see. Help me understand. What is the risk, though, that -- if you hold it and the markets moves, so what? A Big -- large losses. **Tr. 307:2-25 [DeLaSierra]** Q -- discussion? Okay. And that discussion was in the context of when you were talking about Rule 204 with Mr. Heinke; isn't that right? A Yes. Q Okay. And why would Penson buy in on their own propriety account? A If they wanted to be long of security. Q Okay. And how -- sorry. How does that fit in with Rule 204? A It doesn't. Q Okay. Would that be a -- a PFSI activity though -- A It would -- Q -- something your group would handle? A It would be PFSI. Q Okay. I think you said that that approval for that activity might have to go above -- above Mike Johnson – A Yes. Q -- I believe is what you said? In fact, Phil would have to approve that activity, right? A You would probably go to Phil. **Tr. 395:3 – 396:14 [Wetzig]** Q Well, why couldn't Stock Loan or Penson just buy those positions in? A That wouldn't have been my decision. Q Pardon? A That would not have been a decision that I could have made. ... A If they would have told me to close-out, I would have closed out. That was not my decision to make.

		Q Whose decision was it? A That would be Mike Johnson, Senior Vice President of Stock Loan. Q So he was in there telling you how to make every decision on your management job? A No. He was not telling me how to make every decision, but taking a large dollar position on proprietary trading would have gone to him. Q So you would have had to clear a 204 buy-in through Mike Johnson? A Yes, that is correct. **Tr. 425:6-22 [Wetzig]** Q And one of the things you said, if I heard you right, is that something about taking a large dollar position on a proprietary trade wasn't something you would have authority to do. Do you recall that? A Yes, sir, I do. Q What did you mean by that? A That wouldn't have been my decision to make, to buy ourselves in on one, on T+6, without any coverage. Q Why not? A Because we would have large market risk exposure if we were to buy ourselves in. It would be long, that security. Q Large market risk and exposure. And if you're long on a security with large market risk and exposure, what -- what does that risk mean in real world terms? A So depending on the change in the stock price, you can essentially lose a lot of money very quickly. **Proposed Counterstatement** If Stock Loan had decided to close-out fails on the morning of T+6 by buying shares in its own proprietary account, as opposed to buying in the borrowing counterparty, that decision would have had to be approved at a very high level within PFSI **by Mike Johnson or Phil Pendergraft** because taking a proprietary position could expose the firm to significant losses.
46	It was not typical for PFSI to buy stock in its proprietary account.	**Response** No dispute.
47	Had PFSI Stock Loan been buying in for PFSI's proprietary account at market-open T+6, that is something that would have been a big deal and a topic of conversation at the firm.	**Response** Dispute: Ambiguous as to "topic of conversation at the firm" The testimony is from Wetzig, who is a lower-level Stock Loan employee who has no basis to know what anyone outside of Stock Loan was discussing. For

		example, although Holly Hasty sat in Stock Loan and Wetzig testified that he did not hide Stock Loan's 204 violations from anyone, Hasty testified that she was not aware of it, suggesting that Wetzig's standards for what would be discussed at the firm are hardly reliable. **Support** **Tr. 1716:21 – 1717:1 [Hasty]** 21 Q During this buzz and running around, did you 22 ever anyone talk about not complying with the rule 23 or -- 24 A No. 25 Q -- how to avoid complying with the rule? 1 A Never, no. **Tr. 426:1-12 [Wetzig]** Q Would it have been, in your view, a -- a big deal if Penson started buying itself in on T+6 in its proprietary account? A I think it would have been a fairly big deal. Q You think you would have had to go -- I think you said this. But you would have had to go up the chain, correct? A Yes, sir, that is correct. Q And it's something, in your view, people at the firm would have been talking about, that's something Penson was doing? A Absolutely. **Proposed Counterstatement** **Wetzig testified that** had PFSI Stock Loan been buying in for PFSI's proprietary account at market-open T+6, that is something that would have been a big deal and a topic of conversation at the firm.
48	Buying in a borrowing counterparty allowed PFSI to pass the risks involved without taking a proprietary position along to the counterparty.	**Response** No dispute.

49	Prior to the implementation of Rule 204T, PFSI issued recalls for stock that it had loaned out, but was now needed to fulfill a settlement obligation, on T+3. Based on PFSI's recall letter, as well as the terms of the MSLA, the borrowing counterparty had until the end of the third business day after receiving the recall (*i.e.*, until the end of the day on T+6) to return the shares. If they did not return the shares by the end of the day on T+6, at that point PFSI would buy the counterparty in.	**Response** No dispute.
50	Stock Loan personnel, including Mike Johnson, understood that Rule 204 required close-outs of fails to deliver related to long sales of loaned securities at market- open T+6.	**Response** Dispute: Redundant. Division's Proposed FOF 50 is duplicative of Stipulated Findings of Fact 41 and 70. There is no basis for a separate finding of fact. **Support** Stipulated Findings of Fact 41 and 70.
51	When 204T was implemented, PFSI Stock Loan initially attempted to close-out fails to deliver related to long sales of loaned securities on the morning of T+6. However, because the recall had not been issued until T+3, the counterparties would not accept the buy-in on the morning of T+6, and instead insisted that they had until the end of the day on T+6 to return the borrowed shares.	**Response** Dispute: The Division's statement is redundant of Stipulated FOF 10 previously stipulated to by all parties. There is no basis for a separate finding of fact. There is no basis for a separate finding of fact. **Support** Stipulated FOF 10.
52	Stock Loan determined that it would not close-out fails to deliver related to securities that had been loaned until the end of the day on T+6, at which time it would buy-in the counterparty.	**Response** Dispute: The Division's statement is redundant of Stipulated FOF 11 previously stipulated to by all parties. Stipulated FOF 11 reflects a more accurate recitation of the testimony and evidence set forth at trial. Alternatively, the statement is inaccurate given testimony from both Johnson and DeLaSierra contradicts the Division's statement. There is no basis for a separate finding of fact. **Support** Stipulated FOF 11. At least on some occasions, Stock Loan allowed CNS failures to deliver resulting from long sales of loaned securities to persist beyond market open T+6. At least on some occasions, Stock Loan personnel did not take steps, such as purchasing or borrowing securities, in order to close out Penson's CNS failure-to-deliver position.

		Tr. 515:9-15 [Johnson] Q Sure. Maybe I'll ask you more broadly. From 2008 to 2011, when on T6 did Stock Lending buy in to close out fails to deliver? A I think we bought in in the morning and then throughout the day. Q On T+6? A Yes. **Tr. 306:14-20 [DeLaSierra]** Q Now, I believe there was a time when Stock Loan did begin trying to borrow before the morning of T+6, is that right, to – A I believe – . . . A -- there was a few times where it was attempted.
53	Mike Johnson knew that Stock Loan was not closing out fails to deliver at market open T+6.	**Response** Dispute: Redundant; to the extent this proposed finding of fact is not entirely duplicative of Stipulated FOF 41 it is not supported by the record. **Support** See Stipulated FOF 41. Division's Proposed FOF 53 is duplicative of Stipulated Findings of Fact 41.
54	As head of PFSI Stock Loan, Mike Johnson ultimately made the decision that Stock Loan would not close-out fails to deliver until the afternoon of T+6.	**Response** No dispute.
55	One of the pressure points in PFSI's relationships with its counterparties was around being bought in, because it could be a cost for the counterparty.	**Response** No dispute.
56	Maintaining relationships with PFSI's counterparties was extremely important to PFSI's business model. Without those relationships, PFSI would likely have gone out of business.	**Response** Dispute: accuracy of statement. The Division's statement mischaracterizes the nature and scope of the testimony. **Support** **Tr. 357:10 – 358:8 [Wetzig]** Q Earlier, when you were discussing the mechanics of Stock Lending and who you would loan or borrow shares from, I thought I heard you say something like there were -- there were big guys like Citigroup. Do you recall that? A I do. Q Help us understand what that means. Where did Penson fit in the world of broker-dealers, and was it a

big guy, small guy?
A So while we were considered big by clearing firm standards, we were kind of an asset size, a lot smaller than, obviously, the Citigroups and Goldman Sachs and the Ameritrades and those types of broker-dealers that we were doing business with.
Q Were the relationships with those broker-dealers important to Penson Stock Lending?
A They were extremely important.
Q Why?
A If we did not have those relationships, we could not go out and borrow. We could not borrow or lend securities to perform stock lending.
Q Why not?
A If we couldn't go out to -- they could essentially quit doing business with us and shut us off.

Tr. 360:13-22 [Wetzig]
Q You may have said this, and I apologize: But if Penson Financial Services didn't have these relationships with the broker-dealer, what -- what would happen?
A We probably would have -- we wouldn't have been able -- we wouldn't have been able to cover trades. We wouldn't have been able to borrow securities. We wouldn't have been able to loan to make revenue. So at some point, I would assume that the firm would have gone out of business.

Stipulated FOF 80.The total calculated benefit to Penson from the 204(a) violations at issue is only approximately 0.08 percent of Stock Loan's total revenue during the relevant period.

Stipulated FOF 49. During the relevant time period there were at least 1,500 Rule 204T(a)/204(a) violations by PFSI relating to long sales of loaned securities.

Stipulated FOF 50. During the relevant time period PFSI cleared at least 1 billion securities transactions.

Stipulated FOF 51. There were a total of 83.6 million long sale transactions by PFSI during the relevant time period that could be potentially associated with loaned shares. Out of these 83.6 million long sale transactions, only 0.12 percent could be potentially associated with a negative CNS position that was a Rule 204(a)/204T(a) violation.

Stipulated FOF 52. The 1,500 Rule 204T(a)/204 negative CNS positions identified as violations represented only approximately 0.68 percent of the total

		number of Penson's CNS net sale settling positions potentially associated with loaned shares. Stipulated FOF 53. During the relevant time period the only specifically quantified benefit PFSI gained from not timely closing out at market open on T+6 is $59,000. **Proposed Counterstatement** **Wetzig testified that** maintaining relationships with PFSI's counterparties was extremely important ~~to PFSI's business model~~. **He testified that** without those relationships, **PFSI would not have been able to cover trades, borrow securities, or loan securities to make revenue, which he assumed would cause** PFSI to go out of business.
57	Nothing in Rule 204T or Rule 204 allowed PFSI to delay its close-out until the end of the day on T+6 based on the terms of PFSI's recall letter or the terms of the MSLA.	**Response** No dispute.
58	The MSLA and PFSI's recall letter were specific to the date the recall was issued, rather than the date the trade was executed, meaning that if a recall was issued on, for example, T+2, the borrower would have three full business days, or until the end of the day on T+5, to return the shares.	**Response** No dispute.
59	In approximately the fall of 2011, Stock Loan became aware of a provision in Rule 204's adopting release that suggested that compliance with Rule 204 could be achieved by issuing recalls of loaned stock on T+2.	**Response** Dispute – accuracy of statement. The Division's statement mischaracterizes the nature and scope of the testimony. The Division's statement regarding Rule 204 compliance is unsupported by testimony of its own expert witness. **Support** **Tr. 247:19-24 [DeLaSierra]** Q … What did Stock Lending do in the fall of 2011? A Once we became aware of the Footnote 55, we started working with Sendero to -- to have some visibility into future settlement. That way we could accurately send recalls out on T2. **Tr. 1115:2-20 [Harris]** Q My question was, it is a violation if you do not recall on T+2; is that a true or false statement? A It is a violation if you do not -- that's a false -- I hate these negatives, the double negative stuff. Let me just --

		Q I'm happy for you to rephrase it in a way that it makes sense. A As I stated before, the rule does not require that you recall on T+2. Accordingly, if you don't recall on T+2, you haven't violated any rule. Q Did you hear testimony during this trial from some witnesses who believed that the rule was you must recall on T+2? A Yes, I did. Q Did that surprise you? A I recognized that it was mistaken. Q It was confused? A No. I recognized that the witness was mistaken. **Proposed Counterstatement** DeLaSierra testified that, in approximately the fall of 2011, Stock Loan became aware of footnote 55 of Rule 204's adopting release.
60	At that time, Stock Loan reprogrammed its Sendero system to issue recalls on T+2, which allowed it to comply with both Rule 204 and the MSLA. By recalling on T+2, Stock Loan could buy-in a counterparty three days after the recall, or at the close of business on T+5, and still close-out the fail to deliver before market-open T+6. The re-programmed system was extremely accurate in allowing Stock Loan to recall shares that were going to be in a fail position.	**Response** Dispute: accuracy of statement. The Division's statement mischaracterizes the nature and scope of the testimony. The Division's statement regarding Rule 204 compliance is unsupported by testimony. Contradicting testimony provided by Harris. **Support** **Tr. 1115:2-20 [Harris]** Q My question was, it is a violation if you do not recall on T+2; is that a true or false statement? A It is a violation if you do not -- that's a false -- I hate these negatives, the double negative stuff. Let me just -- Q I'm happy for you to rephrase it in a way that it makes sense. A As I stated before, the rule does not require that you recall on T+2. Accordingly, if you don't recall on T+2, you haven't violated any rule. Q Did you hear testimony during this trial from some witnesses who believed that the rule was you must recall on T+2? A Yes, I did. Q Did that surprise you? A I recognized that it was mistaken. Q It was confused? A No. I recognized that the witness was mistaken. **Tr. 247:5 – 248:9 [DeLaSierra]** Q At some point in time, did Penson Stock Lending do anything to begin recalling on T+2?

		A Yes, we did. Q Describe that process for us. When did that occur? A It would have been in the fall of 2011. ... Q ... What did Stock Lending do in the fall of 2011? A Once we became aware of the Footnote 55, we started working with Sendero to -- to have some visibility into future settlement. That way we could accurately send recalls out on T2. Q And -- and was Stock Lending able to reprogram Sendero to have visibility into future settlements? A Yes. Q How accurate was it? A It was extremely accurate. From all our testing, most of the -- the fails that occurred from that were -- were not accurate, were not legitimate. They were based on a glitch. But we were recalling our -- for our fails on -- very accurately. **Tr. 333:8-20 [DeLaSierra]** Q ... I think you also said that recalling on T2 enabled Penson to do recalls and handle the tensions with the Master Securities Lending Agreement. Am I summarizing accurately? A That's correct. Q Explain that, just so we understand. A So by recalling on T2, now we were within the timelines of our recall letter. We could close -- we could close-out the security at the afternoon of T5 or, if need be, open it as T6 and -- because our counterparties would accept these buy-ins. **Tr. 372:25 – 373:3 [Wetzig]** Q Did there ever come a point in time where Sendero was reprogrammed to change when that recall was happening? A Yes. **Tr. 373:7-12 [Wetzig]** Q Do you recall how the reprogramming worked? I mean, what happened? What -- what did you do to reprogram Sendero? A So our programmer, Matt Battaini, programmed Sendero so that we could see what we needed to recall on T+2 instead of T+3. Tr. 374:21 – 375:3 [Wetzig] Q Now, once Sendero was reprogrammed to recall on T+2, did you still have issues with your counterparties pushing back and citing the MSLA?

		A Very little. Q And -- and why was that? Why did that resolve that problem? A Now that we were recalling on T2, we could buy-in at the end of the day T5. **Proposed Counterstatement** DeLaSierra and Wetzig testified that in the fall of 2011 Stock Loan reprogrammed its Sendero system to issue recalls on T+2. Stock Loan believed that if they recalled on T+2 it would cure the conflict between Rule 204 and the MLSA. By recalling on T+2, Stock Loan could buy-in a counterparty three days after the recall, or at the close of business on T+5, and still close-out the fail to deliver before market-open T+6.. The re-programmed system was extremely accurate in allowing Stock Loan to recall shares that were going to be in a fail position.
61	The reprogramming of Sendero was done in house, and took approximately one week.	**Response** No dispute.
62	No one from compliance alerted Stock Loan to the provision in Rule 204's adopting release that suggested issuing recalls on T+2.	**Response** Dispute. This proposed finding of fact: (1) contains an implicit misstatement of the law of the case, (2) is irrelevant in any event, and (3) is not supported by the evidence cited in support. **Support** (1) This proposed finding calls for a legal conclusion that a provision of Rule 204's adopting release suggests recalling on T+2. The provision the Division is referring to is Footnote 55 of Rule 204, which states that when there is a recall of a loaned security, that sale can be marked a long sale if the security is recalled on T+2. Footnote 55 in no way "suggests", or requires that recalls be issued on T+2. The Division recognized this when it agreed to Stipulated FOF 59, which provides "[f]or the alleged violations of Rule 204 for long sales of loaned securities in this case, the Division of Enforcement is not alleging that a failure to recall on T+2...is a violation." Upon being shown Footnote 55 when he testified, DeLaSierra agreed that it does not say that you have to recall on T+2 or anything at all about closing out long sales. **Tr. 258:1-15 [DeLaSierra]** 1 Q And it's -- it's a footnote, so it's sort of 2 small there, but let's see. It's right in the middle, 3 dead center of what's blown up there. You happen to see 4 that? If I may, I can make this easier for you, Mr.

		De 5 La Sierra, if you don't mind. 6 A Sure. 7 Q I'll give you a highlighted -- Do you -- do 8 you see that? 9 A Yes. 10 Q It doesn't say anything about you have to 11 recall on T+2, right? 12 A I don't see that here, no. 13 Q And it doesn't say anything about closing out 14 long sales either, does it? 15 A It does not, no. Delaney FOF 74. The Division's expert, Professor Harris, testified that footnote 55, an advisory note to Rule 204, is not at a part of Rule 204(a). **Tr. 1114:19-24 [Harris]** 19 Q Were you -- do you know Footnote 55? 20 A I've been exposed to it, yes. 21 Q True or false: It is a violation of Rule 204 22 if you do not recall a long sale loan security on T+2? 23 A The footnote does not require you -- the rule 24 does not require you to recall on T+2. **Tr. 1115:9-11 [Harris]** 9 A As I stated before, the rule does not require 10 that you recall on T+2. Accordingly, if you don't recall 11 on T+2, you haven't violated any rule. (2) This proposed finding is irrelevant and misleading because Stock Loan employees were well-aware of the close-out requirements of Rule 204T/204. (*See* Delaney's reply brief, p.); Delaney FOFs 30 and 41. **Tr. 264:9-15 [DeLaSierra]** 9 You -- you testified that you understood from 10 the very beginning of 204T, that it required you to buy 11 in at market open on T+6; is that right? 12 A Correct. 13 Q I mean, and you -- you read the rule and -- and 14 came to that conclusion? 15 A Correct. (3) This proposed finding of fact is not supported by the cited reference. DeLaSierra's trial testimony cited by the Division limits his answer that compliance did not tell him about Footnote 55 to the period when Rule 204T came out – late September 2008.

63	Delaney told conflicting stories about his knowledge and conduct in this case.	**Response** Dispute: This proposed finding of fact is conclusory and entirely dependent on its sub-findings in Paragraphs 63a, 63b, and 63c. As identified in the responses to proposed findings of fact 63a, 63b, and 63c, Delaney's testimony over time has been consistent with honest recollection of events informed by increasing preparation, review of contemporaneous documents, and greater understanding of the questions asked of him. Further, the Division proposes a finding of fact about Delaney's testimony without making a single citation to his testimony at the Final Hearing, where the Court was able to observe the testimony and judge Delaney's credibility. To the extent the Division relies on Exhibit 157, this proposed finding of fact is disputed as irrelevant. **Support** See Administrative Law Judge Patil's ORDER AP Release No. 2220/ January 15, 2015.
63a	For instance, Delaney originally testified that he never knew about Stock Loan's practice of Rule 204 violations. Next, he admitted in his Wells submission that he knew Rule 204 close out issues might begin with Stock Loan. Finally, Delaney testified that he did learn of Stock Loan's practice of Rule 204 violations, but only when he saw the March 2011 letter to FINRA disclosing Stock Loans' violations to regulators.	**Response** Dispute: The conclusion that Mr. Delaney made inconsistent responses is not supported by the record cited. The Division cites two instances of Delaney's testimony and one instance of Counsel's advocacy to illustrate a purported inconsistency. To the extent the Division relies on Exhibit 157, this proposed finding of fact is disputed as irrelevant. **Support** See Administrative Law Judge Patil's ORDER AP Release No. 2220/ January 15, 2015 Delaney's first testimony was given with virtually no preparation having reviewed no documents. He did not have a good recollection of the events at issue at that point. **Tr. 1201:2-1202:1 [Delaney]** Q And that -- that lawyer, that was Mr. MacPhail? A MacPhail, yes. Q Okay. Did you prepare with Mr. MacPhail before that first set of testimony? A The evening before. Q And what did you do? A There -- there -- there wasn't a lot of information. Mr. MacPhail had a quarter-inch, maybe -- maybe a

		half-inch binder of some -- some exhibits that we ran through. And I went in the next morning, and – and we went through testimony. Q Okay. Did you feel like you had a good recollection of these events at that point? A No. Q Why not? A I had been, you know, at least a year removed at that point from -- if not longer, from some of the events, as I recall, was in my -- being discussed in testimony related to 204T. So it wasn't just 2011. This was back all the way to the 2008 time frame. So here I am in 2012, a year away from Penson, in a broker-dealer that has a completely different model than Penson. So your years changed completely as you're working – or administering a compliance program between a company like Penson and a company like where I am now. This lack of preparation or recollection of specific events is reflected in numerous sections of Delaney's original investigative testimony with language remarkably similar to the language used in the section the Commission cites: **Tr. 91:19-25 [Delaney 04/04/12 Testimony]** Q Were you aware that guidance relating to -- that Reg SHO required the re-call on T plus 2? A It's been a long time since I have gone through the Reg SHO rules, and I will take your word for it. Q I am asking if you're aware of it. A No, sir. I am not aware of it as I sit. I don't know if that were the case back then. **Tr. 122:23-123:6 [Delaney 04/04/12 Testimony]** Q. Were you aware that in some circumstances the stock loan department allowed extensions on those recalls that prolonged fail to deliver positions? A I may have been aware of specifics and again nothing systemic on them. Q Did you have any discussions with anyone from the stock loan department about the practice of granting extensions on stock loan re-calls? A I don't recall. This lack of recollection is evidenced in Delaney's testimony on the topic of what he knew about Reg SHO violations as well: **Tr. 61:17-62:11 [Delaney 04/04/12 Investigative Testimony]** Q During your tenure with Penson Worldwide or

		Penson Financial Services Inc., did you ever become aware of policies or practices at Penson or PFSI that were not compliant with Reg SHO? A Policies and practices I think to the extent situations, sure. There had always been sort of situations where I would become aware that a buy-in was late or something of that nature. I don't recollect there being necessarily systemic issue that were being brought to my attention in terms of failures, other than what was being identified by Ms. Magyar and her team as part of their -- as part of their ongoing process. Q So to make sure I understand, you were aware of certain ad hoc violations. Is that right? A Ad hoc violations, certain instances, correct. Q But you weren't aware of any policy or procedure that was causing broader categories of violations? A I don't recollect being sort of made aware of any systemic issues. Everything that was being brought to my attention as I recollect was related to specific issues. Delaney's lack of recollection of specific policies was not aided by the questioning attorney for the SEC, who made numerous representations of what the law required that were simply wrong – such as that Reg SHO required recalls on T+2. **Tr. 139:23-140:2 [Delaney 04/04/12 Testimony]** Q Were you aware that guidance relating to -- that Reg SHO required the re-call on T plus 2? A It's been a long time since I have gone through the Reg SHO rules, and I will take your word for it. Q I am asking if you're aware of it. A No, sir. I am not aware of it as I sit. I don't know if that were the case back then. In any event the citations the Division identifies as inconsistent were time limited to when Delaney was CCO of Penson Worldwide or PFSI. Delaney gave his resignation as CCO of PFSI in mid-March, 2011. After giving his notice he did not retain the duties of CCO but transitioned duties to Holly Hasty. Q My question is for the stock loan department. ***During the time that you were the CCO of Penson Worldwide or PFSI***, were you aware that the stock loan department had a policy of closing out Rule 204 close-outs after market? A I was not aware of that. **Tr. 1325:21 -1327:18 [Delaney]** Q. When do you think it is that you gave notice at

		Penson? A. Probably right about the middle of March of 2011. . . . Q And then you left at the end of April? A At the end of April, yes. Q Did you continue having all of the duties of Chief Compliance Officer during that whole period? A No. Q What happened? A At some point, when I -- when I tendered my resignation and had that conversation with -- with Mr. Yancey; Mr. Yancey had asked me to -- that he wasn't ready to communicate that information out to the firm just yet and to -- and to not communicate that, that we would communicate it at the right time. In the meantime, I had asked him if I could tell Holly Hasty so we could begin a transition plan, and Bill thought that that was certainly wise to do that. I did bring Holly Hasty into the -- into the conversation to let her know that I had tendered my resignation, and at some point, we -- we moved her as the Chief Compliance Officer so that I could really begin to work a meaningful transition plan with her while I was getting – during that notice period. Delaney's testimony at his third investigative testimony, which the Division cites as inconsistent with his first investigative testimony, was similar to his testimony at the final hearing, and consistent with his second investigative testimony: that he only became aware of the stock loan practice at issue in this matter in March 2011 during the process of drafting the response to FINRA. **Tr. 1307:9-14 [Delaney]** Q. Prior to you seeing that FINRA exam response that we showed in Exhibit 89 a moment ago, had you ever had a conversation with anyone at Penson that left you with the understanding that Stock Loan wasn't closing out long sales of securities they had out on loan? A No. **Tr. 266:18-267:8 [Delaney 08/29/12 Testimony]** Q Can you read that paragraph [from Exhibit 89] into the record for me please? A "With regards to the timing of loan fail close-outs, the firm does not believe it is industry practice to close out long sales prior to the market open on T plus 6, nor once has the firm ever had a borrow

		closed out by a lender counterparty at the open. Conversely, the firm's borrowing counterparties will not accept a close-out price on a stock loan at the market open. "Thus, the firm executes close-outs versus long sales at the conclusion of DTCC trading window at approximately 3:00 EST daily as is universally practiced. Closing out loans at the market open would put the firm at a competitive disadvantage and ultimately hinder the firm's ability to cover its customers' delivery obligations." Q. Were you aware that it was Penson's policy to close out long sales at the conclusion of the DTCC trading window instead of the open market? A No, sir. **Tr. 266:18-267:8 [Delaney 07/31/13 Testimony]** Q. So was it in the course of drafting this March 2011 letter to FINRA that you first learned that as a matter of practice Stock Loan group was not closing out fails-to-deliver of long sales in accordance with Rule 204A? A. It was in the process of making that response. Drafting the letter may have taken a couple of days. There would have been stuff in front of that. It could have been a couple of days but it was around -- generally around that time that I -- that I recall learning of this. Despite that they had five separate opportunities to take Delaney's testimony under oath, including two at the final hearing (neither of which they cite in this argument), the Division's primary argument of inconsistency on this point comes from Delaney's counsel's advocacy in a Wells submission. To the extent the Wells submission contradicts Delaney's testimony both before and after the Wells submission; its use to attack Delaney's credibility is misplaced and smacks of desperation by the Division. Delaney has not been inconsistent other than that his lack of memory in his first testimony was changed through review of documents and actual preparation for testimony. His testimony at the final hearing was consistent with his testimony during his second and third investigative sessions: that he learned of the stock loan practice in March 2011, at about the time he gave notice of his resignation as PFSI's CCO. At no point has Delaney testified that he had knowledge of the Stock Loan practice prior to roughly mid-March, 2011.
63b	In addition, Delaney told conflicting stories about the March 2011 letter to	**Response** Dispute: The conclusion that Mr. Delaney made

	FINRA (Exhibit 89), which finally disclosed Stock Loan's Rule 204 violations to regulators. In his original testimony he said that he did not recall being concerned about the disclosure. In contrast, he later testified that the disclosure was a big deal, and that the Compliance department was greatly alarmed by the disclosure.	inconsistent responses is not supported by the record cited. The Division cites two instances of testimony that do not actually address the same precise topic. **Support** In his second investigative testimony, Delaney was asked whether he was concerned about the response, not the conduct at issue: **Tr. 268:1-2 [Delaney 08/29/12 Testimony]** Q Do you recall being concerned about this, this response? A I don't recall being concerned. Delaney further explained this position within a few lines of the transcript: **Tr. 268:15-269:14 [Delaney 08/29/12 Testimony]** Q Well, I'm trying to reconcile what you're saying there against what I'm seeing depicted about Penson's policy. How do I reconcile that? A I don't know. That's not my policy. As I read what it's stating here, the firm does not believe -- if there was some catharsis in telling the regulator we don't believe that this is industry practice -- I'm fine with a statement to the regulators saying what you believe or don't believe, but at the end of day, you've to adhere to what the rule says. The rule says you do X, you do X. And if you believe it should be otherwise, you are welcome to complain to your heart's content to the regulator, and there's a process for that. But just because you believe that everybody else does it, to me doesn't excuse the fact that it's not being -- it's not attending to the rule. Q Was that your mind set back in the time when you were the chief compliance -- A That would have been my mind set then -- I apologize. Q Was that your mind set at the time you were chief compliance officer at Penson? A It would have been my mind set then and it's my mind set as I sit here today. As Delaney explained during his testimony at the final hearing, while he was concerned about conduct that violated the rule, he was not concerned about disclosing that conduct to regulators if it was true. **Tr. 1297:2-1298:11 [Delaney]** Q And did you have any discussions with anyone about that language before this letter was sent out? A A couple of folks from my team came to me and

		said -- asked me to read this and say, are you -- is this what we're -- almost verbatim, is this what we're going to actually publish? Q And do you remember who? You said a couple of folks. A I think it was -- it was -- I think it was Kim Miller and -- and it may have been Holly, but I think it was Kim. Q Now, it won't come through in the written record, so the tone that you said there. Was there some question to whether -- A They were clearly concerned about what they had been reading and highlighting it for my attention. Q And when you read this language, did you share their concern? A I did. Q Why? A This was clearly -- this was clearly a – a moment where the firm was self-reporting something that we in the Compliance department had had an understanding – had – that this activity was not occurring. So this was -- this was new information when we were being told that we were in compliance with this rule, and we were now disclosing this to our regulator. Q And did it cause you any concern that you were disclosing it to your regulator? A I don't know if it's concern that you're disclosing it to a regulator. At the end, you -- if this is what you do, and it's responsive to the regulator's query, that's -- that's what you do. You -- you tell the truth. You put it in there, and then you just deal with the consequences after. In any event Delaney's testimony that he learned of this practice for the first time, that he understood it violated the rule, and that he felt he had an obligation to disclose it to regulators regardless of the consequences, was consistent at all times.
63c	Delaney also told conflicting stories about his escalation of Stock Loan's Rule 204 violations to Yancey. He originally testified that he did not escalate the issue to Yancey. Next, in his Wells submission, he claimed that he raised the issue with Yancey "many times – both routinely and extraordinarily." Finally he testified, again, that he did not tell Yancey about Stock Loan's violations, even as he was authorizing disclosure of those violations to be made to regulators.	**Response** Dispute: Irrelevant where the Division relies on Exhibit 157. The conclusion that Mr. Delaney made inconsistent responses is not supported by the record cited. **Support** See Administrative Law Judge Patil's ORDER AP Release No. 2220/ January 15, 2015. Again, despite having taken under-oath testimony from Delaney five separate times, the Division attempts to

		attack his credibility not by citing to Delaney's testimony but by referencing the Wells Submission. Both of the quotes from Delaney's testimony deal with the narrow issue of whether Delaney escalated the specific disclosure made in Exhibit 89 to Yancey. On that point Delaney was consistent: he did not recall escalating that point prior to making the disclosure to FINRA. In the second investigative testimony the Division had asked Delaney to read into the record the specific disclosure in Exhibit 89, the response to FINRA, then asked about whether he escalated that to Yancey. **Tr. 266:18-19; 267:9-12; 270:15-23 [Delaney]** Q Can you read that paragraph [from Exhibit 89] into the record for me please? . . . Q. Were you aware that it was Penson's policy to close out long sales at the conclusion of the DTCC trading window instead of the open market? A No, sir. . . . Q Do you know was Mr. Yancey aware that Penson was executing long sales at the conclusion of the DTCC trading window at approximately 3 Eastern Time instead of the open market? A I don't know what Mr. Yancey knew or didn't know. Q Did you ever escalate that issue to him? A Not specifically. I don't recall specifically escalating this particular issue. His testimony during his third investigative testimony is similar. **Tr. 492:24-493:1; 493:12-15 [Delaney 07/31/13 Testimony]** Q Did you raise with Yancey, look, we're about to tell FINRA that we know what the rule is and we're not following it? A . . . So I don't specifically recall walking up to Bill and saying, Bill, I'm making this disclosure. We certainly circulated out those -- we certainly circulated these responses amongst multiple members of executive management. As it turns out, Yancey explained during his testimony at the Final Hearing why Delaney might not have escalated the issue: he was out of town fulfilling his duties as a

		trustee to the Security Industry Institute at the Wharton School. **Tr. 1898:11-13; 1898:22-1899:4 [Yancey]** Q Looking now on Exhibit 89, please. It is a letter dated March 18, 2011. Do you see this document? A Yes, ma'am. . . . Q Did you review this response before it went out? A Not in this case. Q Why is that? A I was out of the office this entire week. Q Where were you? A I was fulfilling my duties as a Trustee to the Security Industry Institute at the Wharton School.
64	Delaney attempted to repudiate admissions made by him in his Wells submission.	**Response** Dispute: Irrelevant. **Support** See Administrative Law Judge Patil's ORDER AP Release No. 2220/ January 15, 2015.
64a	For instance, after saying that he understood a Wells submission to be, "a response to an invitation by the SEC to -- to respond to a -- their intent to file a lawsuit," he said, "I believe my lawyers crafted a -- a response -- and I don't know what they -- I don't know what their -- what their purpose was at that point in time."	**Response** Dispute: Irrelevant. **Support** See Administrative Law Judge Patil's ORDER AP Release No. 2220/ January 15, 2015.
64b	Delaney admitted that he reviewed his Wells submission before it was sent to the Commission and approved it being sent on his behalf.	**Response** Dispute: Irrelevant. **Support** See Administrative Law Judge Patil's ORDER AP Release No. 2220/ January 15, 2015.
64c	Although Delaney admitted reading his Wells submission and approving its submission, he disclaimed the admissions made therein.	**Response** Dispute: Irrelevant. **Support** See Administrative Law Judge Patil's ORDER AP Release No. 2220/ January 15, 2015.
64d	Delaney even tried to distance himself from admissions in his Wells submission	**Response** Dispute: Irrelevant.

	as to things he, himself, had supposedly said or done, saying, "it was prepared by my attorneys. I read it. I signed it. I counted on my -- relied on my attorneys to do a competent job."	**Support** See Administrative Law Judge Patil's ORDER AP Release No. 2220/ January 15, 2015.
64e	Finally, however, Delaney was forced to admit that he could not repudiate admissions concerning his own actions and words.	**Response** Dispute: Irrelevant. **Support** See Administrative Law Judge Patil's ORDER AP Release No. 2220/ January 15, 2015.
65	Delaney was evasive in his testimony at the hearing in this matter. For instance:	**Response** Dispute: The Division's statement consists violation of the Nov. 13, 2014 Post-Hearing Order ("Post-Hearing Order"), at ¶ 5(c) and should be stricken. In any event it is entirely dependent on the sub-findings in Paragraphs 65a, 65b, and 65c, which are not supported by the record.
65a	Despite the clear language in Ex. 89, and later stipulations by his counsel, Delaney denied that it was the practice of PFSI's Stock Loan department to closeout long sales at market close rather than market open.	**Response** Dispute: The Division's statement consists of impermissible argument and should be stricken. *See* Post-Hearing Order ¶ 5(c). Further, the proposed finding of fact is not supported by the record. **Support** The proposed finding of fact claims that Delaney "denied that it was the practice of PFSI's Stock Loan department to closeout long sales at market close rather than market open." In fact Delaney testified only that he did not know whether that was the practice. **Tr. 572:12-25 [Delaney]** Q And you would agree with me that that was the practice of Penson's Stock Loan department from late 2008 through 2011; isn't that right? A I don't know if I would agree that I know that's the practice. What that was, was a draft that had been presented to me by the subject matter experts -- Q Mr. Delaney? A -- responsible for that. Q You would agree that that is the practice of Stock Loan -- of Penson's Stock Loan department from 2009 through 2011; isn't that correct? A I don't know. Q You don't know whether that was the practice? A ***I do not know whether that was the practice.***

65b	Despite having previously testified that he read the release for Rule 204T, at the hearing Delaney quibbled about whether he had seen the release in the same exact format as that in the exhibit used at the hearing and during his testimony.	**Response** Dispute: The Division's statement consists of impermissible argument and should be stricken. *See* Post-Hearing Order ¶ 5(c). Further, the Division attempts to characterize as Delaney quibbling about format when the apparent confusion was entirely a product of imprecise questioning by the Division. Delaney never disputed that he had seen the adopting release of Rule 204T. **Support** **Tr. 573:16-22; 574:23-575:6: 576:12-18 [Delaney]** Q Let's take a look at Exhibit 67, if you would, please. Are you familiar with Exhibit 67? A It appears to be a copy of a Federal Register. Q Do you recognize it as the adopting release for Rule 204T in October of 2008? A Not specifically, no. . . . Q Would you read the rest of that page to yourself, please. Does that refresh your recollection that you saw the adopting release for Rule 204T? A Not necessarily. I think what I was maybe intending to say is, I don't know if I specifically read it from the Federal Register as an adopting release, but I was certainly familiar with the rule as it was -- as it was coming out at that time. . . . Q So you've seen Exhibit 67. You've seen the adopting release for Rule 204T; is that correct? A I said that here, but I stand my by answer that I think my intention was that I don't know if I specifically saw it off the Federal Register. But I certainly would have seen it in some other context of the rules being released. This is but one instance of Ms. Atkinson confusing the testimony by immediately referencing prior testimony (often on similarly immaterial differences) rather than attempting to communicate clearly with Mr. Delaney as a witness.
65c	Although ultimately admitting that there was only one test of Stock Loan's Rule 204 procedures, Delaney originally denied that fact.	**Response** Dispute: The Division's statement consists of impermissible argument and should be stricken. *See* Post-Hearing Order ¶ 5(c). Further, the proposed finding of fact is not supported by the record. The proposed finding of fact claims that Delaney "ultimately admitting that there was only one

		test of Stock Loan's Rule 204 procedures, Delaney originally denied that fact." Both assertions are false. Delaney did not deny that there was only one test of Stock Loan's compliance with Rule 204, nor did he "admit" that there was only one test. Rather he cited the voluminous record in the case and explained that he did not know whether there was other testing in the quality control function that tested Stock Loan's rule 204 compliance. Given the extent of evidence, basing his testimony in his recollection rather than making a categorical statement was entirely reasonable. **Support** **Tr. 637:3-638:11 [Delaney]** Q In fact, Mr. Delaney, the test in December of 2009 is the only test that tested Stock Loan's compliance with Rule 204; isn't that right? ***A I don't know that.*** Q Do you know of any other testing as you sit here today that tested Stock Loan's compliance with Rule 204? A That was a long time ago. There may have been a lot of testing in the quality control that was going on. Q As you sit here today, do you know of any other testing that showed that stock -- Stock Loan's compliance with Rule 204? It's just yes or no. Yes, you do know, or no, you don't know. A As I -- ***right now in my present recollection, I don't know.*** Q Okay. I think you testified yesterday that you, over the course of preparing for this case, have looked at thousands of documents. Is that what you said? A I don't know if I said thousands, but it may have been hundreds. Q Lots and lots of documents? A Lots of documents. Q Did you see anything in those documents that showed any other testing of Stock Loan's Rule 204 compliance? A I may have. Q Do you remember seeing any documents that showed that? A ***As I sit here today, I don't have a recollection of any other testing.*** Q Okay. Do you think if there was other testing, your counsel would have brought that to your attention? A I don't know what my counsel would do.
66	Delaney is associated with a registered broker-dealer.	**Response** No dispute.

67	PFSI violated Rule 204T/204.	**Response** Dispute: To the extent it is not entirely subsumed by, and duplicative of, the Stipulated Findings of Fact Number 54, this proposed finding is an argumentative legal conclusion, not a finding of fact. **Support** Stipulated FOF 54. Penson violated Rule 204T(a)/204(a) of Regulation SHO.
68	Delaney was Penson's CCO when Rule 204T was implemented in September 2008.	**Response** Dispute: This proposed finding of fact is already included in a Stipulated FOF as Number 12. It is redundant to include it again as a Division FOF.
69	Delaney participated in Penson's efforts to implement procedures in response to Rule 204T in October 2008 and to Rule 204 in July 2009. Delaney knew at all relevant times that Rule 204T/204 required Penson to close-out CNS failures to deliver resulting from long sales by market open T+6.	**Response** Dispute: This proposed finding of fact is already included in a Stipulated FOF as Number 14. It is redundant to include it again as a Division FOF.
70	When a new rule, such as Rule 204T or Rule 204, is adopted, the Chief Compliance Officer is responsible for designing a program for complying with the rule.	**Response** Dispute: The proposed finding of fact is contradicted by evidence in the record that the head of the business units affected by the new rule, such as Stock Loan and Buy-ins, are primarily responsible for designing a program to ensure compliance and for reviewing the WSPs to make sure they reflected actual practice. **Support** **Tr. 1758:2 – 1759:2 [Hasty]** 2 Q Ms. Hasty, I think you talked a little bit 3 with Ms. Mallett about WSPs. Who was it who was 4 responsible for generating the WSPs related to a 5 business unit? 6 A So it was a responsibility of the business 7 unit to convey to compliance what they were doing, how 8 they were supervising their business, what documents 9 they were using to evidence supervision of their 10 business. And from there, they would typically provide 11 us with the information for us to compile a written 12 supervisory procedure. 13 Q Why is it that the business unit originated 14 that?

		15 A Well, they're the experts. They are the 16 people who are doing this day to day. As Compliance 17 Officers, we're not experts in every area of the 18 business. We don't sit at someone's desk and process 19 buy-ins or use the reports or, you know, escalate 20 certain items to our supervisors. We're unfamiliar 21 with the process. We're unfamiliar in general with 22 what they're doing on a day-to-day basis. So it's 23 absolutely is necessary to have the business owners be 24 the original people who are drafting those WSPs and 25 providing the information so that we can make sure it's 1 accurate and that it includes what's really being done 2 day to day. Delaney FOF 65. At Penson, creating WSPs was the responsibility of the business units, as was reviewing those WSPs to be certain they accurately reflected the business practices of the business unit. **Tr. 807:8-16 [Alaniz]** 8 Why is it that the business owner would -- 9 would make changes to a WSP? 10 A I would call them preliminary changes. You 11 would want to have them review it to ensure that if it 12 states that they're doing A, when in actuality, they're 13 doing B, you want that to be adjusted. That's why you 14 would want them to review it; so in the event the 15 regulators would come in and they do ask for WSPs, we are 16 doing what we are saying and not – Exhibit 312 **Proposed Counterstatement** At Penson, creating WSPs was the responsibility of the business units, as was reviewing those WSPs to be certain they accurately reflected the business practices of the business unit.
71	PFSI's Compliance department should have determined whether PFSI's policies and procedures complied with Rule 204.	**Response** Dispute: The Division's statement constitutes impermissible argument and should be stricken. *See* Post-Hearing Order ¶ 5(c).

72	If a rule is complex, it is reasonable for a registered person to consult FINRA, the SEC, or another regulator; consult interpretive guidance; and/or consult with industry groups, such as SIFMA. Then one should identify and manage the related critical control points.	**Response** Dispute: The Division's statement constitutes impermissible argument and should be stricken. *See* Post-Hearing Order ¶ 5(c). It also calls for a legal conclusion, i.e. what is reasonable for a registered person to do under certain circumstances. The support cited by the Division is the opinion of non-expert witness Gover, as to the duties of a registered person, which opinion must be disregarded under these circumstances.
73	Beginning in November 2008, the Commission's Office of Compliance Inspections and Examinations ("OCIE") conducted a review of PFSI's Rule 204T procedures.	**Response** Dispute: This proposed finding of fact is already included in the Stipulated Findings of Fact as Number 28. It is redundant to include it again as a Division FOF.
74	Delaney admits that regulators raised issues about Rule 204 closeouts for long sales. Delaney also admits that he knew, at the time regulators were raising the issue, that Rule 204 closeout issues "might begin" with Stock Loan.	**Response** Dispute: Irrelevant. **Support** See Administrative Law Judge Patil's ORDER AP Release No. 2220/ January 15, 2015.
75	Delaney admits that he knew that stock lending personnel could and did cause delays in buy-ins in that he claims that he raised that issue many times with Yancey.	**Response** Dispute: Irrelevant. **Support** See Administrative Law Judge Patil's ORDER AP Release No. 2220/ January 15, 2015.
76	Delaney admits knowing that there was a "gap" between the requirements set forth in the WSPs and stock lending's practices concerning timely buy-ins that he was "working to close."	**Response** Dispute: Irrelevant. **Support** See Administrative Law Judge Patil's ORDER AP Release No. 2220/ January 15, 2015.
77	Delaney admits knowing that Stock Loan was having issues with compliance with Rule 204T and Rule 204.	**Response** Dispute: Irrelevant. **Support** See Administrative Law Judge Patil's ORDER AP Release No. 2220/ January 15, 2015.
78	Rule 204 was one of the most major rule changes during Delaney's fifteen year career.	**Response** No dispute.
79	Delaney knew Rule 204 was an important Rule.	**Response** No dispute.

80	Because of the push-back Stock Loan got from counterparties when it initially attempted to buy them in at market-open T+6 in order to close-out fails to deliver, Johnson and DeLaSierra had discussions with Tom Delaney about the issues Stock Loan was having with complying with Rule 204.	**Response** Disputed: the language "about the issues Stock Loan was having with complying with Rule 204" is vague, and depending on the interpretation of the language is contradicted by the evidence adduced at the Final Hearing. For example, if the language is interpreted to mean that Delaney was aware that Stock Loan was deliberately and routinely not complying with Rule 204T/204's closeout requirements, it is not supported by the record. **Support** While there is no dispute that Stock Loan got push back from counterparties when it initially attempted to buy them in at T+6 and that Stock Loan discussed this push back with Delaney, he unambiguously told Johnson that the rule was the rule and that any problems with the new rule could only be addressed by Congress through the legislative process: **Tr. 1192:9 – 1193:20 [Delaney]** 9 Q And when Rule 204T came out, did you have 10 conversations with anyone at Penson about them? 11 A I did. 12 Q Okay. We'll talk about some of those 13 conversations in detail. But for present purposes, did 14 you ever have a conversation with Mike Johnson? 15 A I did. 16 Q What do you recall about that conversation, 17 including the time, if you can give us your best 18 estimate? 19 A It was around the time when we were 20 communicating out the 204T requirements. Mike Johnson 21 had expressed some concern that he was getting 22 counter-party pushback, and -- and -- and he was just 23 voicing his -- his concern and frustration with me about 24 that. 25 Q Did you understand what he meant by 1 "counter-party pushback"? 2 A I believe I understood it at the time, yes. 3 Q Okay. Did you give any response? 4 A I did. 5 Q What -- what was your response? 6 A If -- if you know Mike Johnson personally, 7 he's -- he's a pretty interesting character; and I

think
8 I recollect my response being something like, Mike, if
9 you don't like the rule, you need to go to Congress
10 and/or write your congressman.
11 Q Why did you say that?
12 A His complaint about the rule, to me -- I had no
13 ability to change the rule from a compliance standpoint.
14 And so, at that point, I -- I -- he was expressing some
15 frustration, and that really -- the rule is the rule, and
16 this is really what he -- his avenue would be to go
17 through whatever legislative process he could in order to
18 affect a rule change.
19 Q Did he, at that point, ask you for any
20 guidance?
21 A He did not.

Delaney also testified that he believed pushback demonstrated Stock Loan was complying with Rule 204T.

Tr. 1195:5-12 [Delaney]
5 Q Okay. If Mr. De- -- if you had asked Mr. De La
6 Sierra if anything had changed with this counter-party
7 pushback, and he had said, no, would that have concerned
8 you?
9 A No.
10 Q Why not?
11 A Because if you're following the rule, you're
12 getting counter-party pushback.

Delaney FOF 35. Johnson does not know whether Delaney was aware of Stock Loan's practice of not closing out long sales by market open for stocks out on loan as described in Exhibit 89.

Tr. 517:19-23 [Johnson]
19 Q And let me ask you generally, and then we'll
20 talk specifically. Was Mr. Delaney aware that those
21 practices we just saw in Exhibit 89 were how Stock Loan
22 was operated?
23 A I don't know

		Proposed Counterstatement Because of the push-back Stock Loan got from counterparties when it initially attempted to buy them in at market-open T+6 in order to close-out fails to deliver, Johnson and DeLaSierra had discussions with Tom Delaney. Delaney informed them that the rule was the rule and could not be changed absent Congressional action. Delaney did not believe that these discussions indicated Stock Loan was not complying with Rule 204, but instead thought that the pushback demonstrated that Stock Loan was complying with the close out requirements of the Rule.
81	These conversations occurred at approximately the time Rule 204T was implemented.	**Response** Disputed: the finding of fact is ambiguous as written because it does not identify the factual predicate for "These conversations." Assuming that the predicate is the conversations at issue in Division's Proposed FOF 80, no dispute to a similar finding of fact containing this clarification **Proposed Counterstatement** The conversations at issue in the Division's Proposed FOF 80 occurred at approximately the time Rule 204T was implemented.
82	At the time of these conversations, Stock Lending personnel did not believe they could close-out at market-open, as required by Rule 204T, because the terms of the MSLA did not allow PFSI to buy-in the borrowing counterparty until the afternoon of the third day after the recall was issued, which, because PFSI issued recalls on T+3, meant the afternoon of T+6.	**Response** Dispute: Ambiguous and not supported by the record. Presumably the predicate for "these conversations" is the conversations in Division's Proposed FOF 80; otherwise the finding of fact is ambiguous. **Support** This proposed Finding of Fact is not supported by the Division's citations to the record. DeLaSierra testified that Counterparties believed they could not be closed out on long sales of loaned securities until the close of T+6 under the terms of the MSLA, but DeLaSierra did not testify that Stock Loan believed it could not close out at market open T+6. **Tr. 225:11-226:13 [DeLaSierra]** 11 Q Was there any complexity to the time of when 12 the close-out had to happen? 13 A Yes. 14 Q Describe the complexities. 15 A Well, we -- Penson, and probably a majority of 16 the street, before this rule would deal in settlement, so 17 we would deal with T3. To -- to buy in before the -- by

18 the open of T6, you would have to have some view of
19 future settlement.
20 Q So help us understand what that means. If you
21 recall on T+3, what does it mean for three days later,
22 for T+6?
23 A So we would not be in a time line -- a proper
24 time line to be able to buy morning of T6, part of the
25 recall letter. The recall letter when we send it out
1 would say if it's not returned by the close of business
2 T3, then we can close out. By trying to buy in the
3 morning of T6, our counterparties were saying to us that
4 we were in violation of the -- the letter. And also the
5 MSLA of the standard loan agreement also gives that same
6 time line of three days after the recall.
7 Q I see.
8 So if the recall happens on settlement date
9 trade date plus 3, how long does the counterparty have to
10 return the shares to you?
11 A They have three days.
12 Q The beginning of the day, end of the day?
13 A By the close of business of T3.

Specifically, DeLaSierra testified that counterparties would not stop Stock Loan from Buying in to closeout failures to deliver.

Tr. 271:2-18 [DeLaSierra]
Q Okay. And -- and that discussion was about counterparties pushing back on you closing out?
A Yes.
Q And buying them in on morning of T+6?
A Not accepting our recalls -- I mean, buy-ins on the morning of T- -- on the open of T6.
Q And when you say not accepting your buy-ins, that just means they wouldn't pay for the buy-in, right? You could buy in?
A They would not accept it.
Q What do you mean, they wouldn't accept it?
A We wouldn't --
Q They wouldn't accept the bill?
A When we buy in the security, they would not take the price from us.
Q Okay. But it didn't stop you from buying in?
A It would not.

		Similarly, Johnson's testimony cited by the Division about the change in industry practice with Rule 204T and counterparties' complaints that closing out at market open T+6 violated the MSLA, but he did not say he believed stock loan could not close out at market open T+6 and he certainly did not indicate he told Delaney it was not possible to comply with the close-out requirements of Rule 204T.
83	Johnson was a vocal and direct personality; he was not afraid to raise issues and was direct if he needed something.	**Response** No dispute.
84	During his conversations with Delaney, Johnson made it clear to Delaney the problem Stock Loan was having.	**Response** Dispute: Vague and unsupported by the evidence adduced at the final hearing. The finding of fact is vague because it does not identify either the time period when the conversations occurred or the specific nature of "the problem Stock Loan was having." As a result we cannot know whether the proposed finding of fact referred to counterparty pushback as the "problem Stock Loan" was having or failure to closeout in accordance with the rule, or some other unspecified problem because the Division did not ask a sufficiently precise question or clarifying follow-up questions. For the same reason the proposed finding of fact, because of its ambiguity, lacks any value to resolving this dispute. Further, if the problem is the timely close out of long sales of loaned securities, Johnson gave contradictory testimony when he stated, on one hand, that he did not make the problem clear to Delaney and on the other hand, that he did not know if Delaney was aware of Stock's Loans practices with regard to long sales of loaned securities. **Support** **Tr. 525:2-9 [Johnson]** 2 Q And I want to make sure that the record is 3 clear that when you are pressing for answers from Mr. 4 Delaney, was it clear what the problem was -- what the 5 problem Stock Loan was having was? 6 A Yes. 7 Q And was it clear -- did you make it clear to 8 Mr. Delaney what the problem Stock Loan was having was?

		9 A Yes. **(Tr. 517:19-23) (Johnson)** Q And let me ask you generally, and then we'll talk specifically. Was Mr. Delaney aware that those practices we just saw in Exhibit 89 were how Stock Loan was operated? 23 A I don't know Delaney has consistently testified that he was not aware that Stock Loan had been deliberately violating Rule 204 prior to seeing the FINRA exam response in March, 2011. **Tr. 1307:9-14 [Delaney]** 9 Prior to you seeing that FINRA exam response 10 that we showed in Exhibit 89 a moment ago, had you ever 11 had a conversation with anyone at Penson that left you 12 with the understanding that Stock Loan wasn't closing out 13 long sales of securities they had out on loan? 14 A No.
85	During those conversations, Johnson informed Delaney that there was a conflict between the Rule and the historic practice of buying in borrowing counterparties on the afternoon of T+6, three days after a recall was issued on T+3, based on the terms of the MSLA. Johnson further informed Delaney that PFSI's counterparties were not accepting buy-ins at market-open T+6.	**Response** Dispute: Ambiguous and not supported by the record. **Support** See Delaney's Response to the Division's Proposed FOF 82.
86	In his conversations with Delaney, Johnson sought guidance from Delaney on how to comply with Rule 204.	**Response** Dispute: Contradicted by other evidence in the record. **Support** Delaney testified that Johnson did not ask for guidance on how to comply with Rule 204, but rather merely complained about counter-party pushback. He was instead expressing concern and frustration about the Rule changes in what had been industry practice: **Tr. 1192:9 – 1193:20 [Delaney]** 9 Q And when Rule 204T came out, did you have 10 conversations with anyone at Penson about them? 11 A I did. 12 Q Okay. We'll talk about some of those

		13 conversations in detail. But for present purposes, did 14 you ever have a conversation with Mike Johnson? 15 A I did. 16 Q What do you recall about that conversation, 17 including the time, if you can give us your best 18 estimate? 19 A It was around the time when we were 20 communicating out the 204T requirements. Mike Johnson 21 had expressed some concern that he was getting 22 counter-party pushback, and -- and -- and he was just 23 voicing his -- his concern and frustration with me about 24 that. 25 Q Did you understand what he meant by 1 "counter-party pushback"? 2 A I believe I understood it at the time, yes. 3 Q Okay. Did you give any response? 4 A I did. 5 Q What -- what was your response? 6 A If -- if you know Mike Johnson personally, 7 he's -- he's a pretty interesting character; and I think 8 I recollect my response being something like, Mike, if 9 you don't like the rule, you need to go to Congress 10 and/or write your congressman. 11 Q Why did you say that? 12 A His complaint about the rule, to me -- I had no 13 ability to change the rule from a compliance standpoint. 14 And so, at that point, I -- I -- he was expressing some 15 frustration, and that really -- the rule is the rule, and 16 this is really what he -- his avenue would be to go 17 through whatever legislative process he could in order to 18 affect a rule change. 19 Q Did he, at that point, ask you for any 20 guidance? 21 A He did not.
87	Stock Loan sought guidance from Delaney because he was the Chief Compliance Officer and they wanted to make him aware that there was a conflict between the Rule's requirements and	**Response** Dispute: Contradicted by other evidence in the record. **Support** See Delaney's Response to the Division's Proposed FOF

	counterparties stating that Stock Loan could not execute close-outs at market-open based on the terms of PFSI's recall letters.	86 above. In addition, DeLaSierra testified during the Final Hearing that when he first testified in 2012, a time when he remembered events more clearly than during the Final Hearing, he testified that Stock Loan did not consult with anyone from Compliance about Rule 204. DeLaSierra also testified that he never told Compliance that that he understood Rule 204T required buying in sometime other than market open T+6. **Tr. 265:15 – 266:10 [DeLaSierra]** 15 So in the spring of 2012, you testified. 16 And do you recall if you were asked whether Compliance 17 knew about this practice? 18 A Yes. 19 Q Okay. You recall that you were asked that? 20 A I recall that I was asked that, yes. 21 Q And the first thing that you were asked was: 22 At the time that Rule 204T came out, did the Stock Loan 23 department consult with anyone from Compliance? 24 And then I think the question -- maybe the 25 question was going to go on. I think Mr. Warner was the 1 one asking it, and it got cut off. And what did you 2 answer? 3 A I said we did not consult with them. 4 Q Okay. So that was back in 2012. And as we 5 covered earlier, you remembered events a little bit more 6 clearly then? 7 A Yes. 8 Q And you testified that when 204T came out, you 9 didn't consult with anyone from Compliance? 10 A Consult, yes. We did not consult. **Tr. 264:9-19 [DeLaSierra]** 9 You -- you testified that you understood from 10 the very beginning of 204T, that it required you to buy 11 in at market open on T+6; is that right? 12 A Correct. 13 Q I mean, and you -- you read the rule and -- and 14 came to that conclusion? 15 A Correct. 16 Q Did you ever tell anybody in compliance that 17 you had an understanding that the rule required something 18 else?

		19 A No.
88	Part of the role of a compliance officer is to give guidance on rules.	**Response** Dispute: This proposed finding of fact is actually a legal conclusion about the obligations of compliance officers.
89	Poppalardo would have expected a CCO asked for guidance to provide assistance.	**Response** Dispute: This proposed Finding of Fact is either a legal conclusion about the obligations of compliance officers, or not relevant to the resolution of this case. It is also an incomplete recitation of the record. **Support** **Tr. 2029:9 – 2030:7 [Poppalardo]** Q Okay. If a -- if a business line person were to come to a CCO and say, We can't figure out how to comply with this new rule, what would you expect the CCO to do? A Pull together a working group, figure out, you know, what needed to be done, whether it was revising an automated -- reprogramming an automated system or, you know, working within the firm to make sure that you were able to comply. Q Would you expect the CCO to take steps to understand what the problem was? A I think that if the problem is clear on its face and it was something that was programmed into an automated system, you don't need to know all of the details; you just need to know that you have an IT problem and you need to get that fixed. But, you know, it really -- it depends on the situation. Q Okay. But it sounds like you would expect the CCO to take some steps; is that right? A I would expect the CCO, to the extent that it came to his attention, he became aware of it, once you become aware of something, you've got to do something. So to work with the business line and to figure out how to fix -- address the problem. **Proposed Counterstatement** Poppalardo would have expected a CCO, to the extent a problem came to his attention, to work with the business line and figure out how to address the problem.
90	Stock Loan took guidance from compliance seriously, and followed that guidance when it was given.	**Response** Dispute: This Finding of Fact is contradicted by the evidence. Stock loan did not seek guidance from Compliance when Rule 204 was adopted in September 2008. See Delaney's Response to the Division's Proposed FOF 87. Moreover, Stock Loan disregarded Delaney's comment that any problems with 204T close-

		out problems should be taken up with Congress and addressed through the legislative process. *See* Delaney's Responses to the Division's Proposed Findings of Fact 80, 81 and 82.
91	Rather than provide guidance to Stock Loan on how it could comply with Rule 204, Delaney told Johnson to "call your Congressman" if he had problems with the rule.	**Response** Dispute: The Division's statement constitutes impermissible argument and should be stricken. *See* Post-Hearing Order ¶ 5(c). This finding is also unsupported by the record as explained in Delaney's Response to Division's FOFs 80 and 90.
92	At approximately the same time that Johnson and Delaney were discussing Stock Loan's compliance issues, Delaney and Rudy DeLaSierra had a conversation in which Delaney asked whether Stock Loan was still having issues with market-open buy- ins, and DeLaSierra confirmed that Stock Loan had not resolved the issues.	**Response** Dispute: This proposed Finding of Fact is contradicted by the evidence. **Support** First, DeLaSierra's testimony during his first session of investigative testimony was that the first time he made Compliance aware that Stock Loan was not able to buy in at market open was in early 2011. **Tr: 266:11-267:8 [DeLaSierra]** Q Now, you -- you were also asked during that 12 testimony if -- if anyone from Compliance was aware of 13 this practice. Is that right? 14 A Yes. 15 Q All right. And when you were asked about that, 16 you mentioned a meeting. Is that -- 17 A Oh. 18 Q Is that accurate? 19 A Yeah. 20 Q And -- and the meeting you mentioned, you said 21 it was the beginning of last year, which again you were 22 testifying in 2012. Right? 23 A Right. 24 Q So you mentioned a meeting in the beginning of 25 2011. A Yes. 2 Q And -- and that's the meeting that you 3 testified about when you were asked how it was that 4 Compliance was aware, how you knew Compliance was aware 5 of this practice? 6 A Oh, I'm sorry. Is that a question? 7 Q Yeah.

		8 A Yes. See also Delaney's FOF 31. This testimony, given by DeLaSierra before he entered a cooperation agreement in order to reduce his sanction for his admitted conduct, is consistent with Delaney's testimony that he and DeLaSierra did not have a discussion at any breakfast meeting. **Tr. 1193:23-1194:22 [Delaney]** 23 hearing. Did you also hear Rudy DeLaSierra testify? 24 A I did. 25 Q And do you recall him talking about a meeting 1 that he had? 2 A I recalled him testifying to that, yes. 3 Q Do you remember a meeting like that? 4 A I -- I don't remember a meeting. 5 Q Now, if I remember correctly, you talked about 6 perhaps being there with Mike Johnson at one point. Do 7 you recall that? 8 A I recall him mentioning that in his testimony, 9 yes. 10 Q And do you remember whether he was there when 11 you had that conversation you earlier described with Mike 12 Johnson? 13 A He very likely could have been. I -- if I'm 14 remembering right, that meeting had happened outside Mike 15 Johnson's office. 16 Q Okay. What about, you described something 17 about a lunch or breakfast meeting. Do you remember 18 that? 19 A I remember him describing that in his 20 testimony, yes. 21 Q Do you recall a meeting like that? 22 A I don't.
93	In response to DeLaSierra confirming that Stock Loan was still not able to buy-in at the market open on T+6, Delaney simply said "okay." Delaney did not instruct DeLaSierra that Stock Loan had to comply with the market-open requirement of Rule 204 regardless of any counterparty resistance.	**Response** Dispute: This proposed Finding of Fact is contradicted by the evidence. **Support** See Delaney's Response to the Division's Proposed FOF 92.

94	Stock Loan did not hide from Delaney the fact that it was not closing out fails to deliver at market-open T+6.	**Response** Dispute: This proposed Finding of Fact is contracted by the evidence. **Support** Johnson said he did not know whether Delaney was aware of Stock Loans practice: **Tr. 517:19-23 [Johnson]** 19 Q And let me ask you generally, and then we'll 20 talk specifically. Was Mr. Delaney aware that those 21 practices we just saw in Exhibit 89 were how Stock Loan 22 was operated? 23 A I don't know Delaney was not aware that Stock Loan had been deliberately violating Rule 204 prior to seeing the FINRA exam response in March, 2011. **Tr. 1307:9-14 [Delaney]** 9 Prior to you seeing that FINRA exam response 10 that we showed in Exhibit 89 a moment ago, had you ever 11 had a conversation with anyone at Penson that left you 12 with the understanding that Stock Loan wasn't closing out 13 long sales of securities they had out on loan? 14 A No. **Tr. 1307:24 – 1308:2 [Delaney]** 24 Did any conversation you ever had with Mr. De 25 La Sierra leave you with the impression that Stock Loan 1 wasn't complying with Rule 204? 2 A No. Also DeLaSierra was evasive in meetings with Alaniz in advance of Alaniz's Rule 204 testing, never told Alaniz that Stock Loan had a practice of violating Rule 204, and provided misleading responses to Alaniz's inquiries. **Tr. 748:21-749:20 [Alaniz]** 21 Q Okay. You have today's date on there, November 22 13th, 2009. Best of your recollection, would that have 23 been near when you would have begun this testing process? 24 A Yes.

		25 Q All right. Now, I want to go back to this -- 1 to the meetings that you had. What was the purpose of 2 meeting with the Stock Loan department? 3 A The purpose of meeting with any department in 4 this search, under these circumstances with the Stock 5 Loan, was to ensure that I understood the rule 6 completely. Not completely as -- completely as to what I 7 was going to test. 8 Q All right. You've read the rule? 9 A I've read the rule. 10 Q So -- so you said that you met with him to make 11 sure you understood it. How did meeting with him help 12 you understand it? 13 A Well, Reg SHO -- Regulation SHO was new to me. 14 The rule was new at the time. So since they were the 15 business unit that dealt with this rule on a daily basis, 16 I wanted to make sure that I understood it as I read it. 17 As them being the individuals that would be applying this 18 rule, I wanted to make sure we were on the same page so 19 that I wasn't testing one thing when they thought I was 20 testing another. **Tr. 751:10-25 [Alaniz]** 10 Q Okay. Did they -- and I guess you can talk 11 about them individually or as a group. Did either of 12 them mention to you a different interpretation? 13 A No, they did not. Brian Hall was silent. Rudy 14 DeLaSierra indicated that that was not his 15 interpretation of the rule. 16 Q Okay. What did he tell you his interpretation 17 was? 18 A He did not. He just stated that my 19 interpretation was not the correct interpretation. So at 20 that point, so there wouldn't be any, I guess, head 21 butting or trying to, I guess, to avoid any type of 22 confusion, I let them take the rule with them. I told 23 them to read it, sleep on it, and the next day we

		would 24 reconvene and we would decided what -- what they thought 25 the understanding of the rule was. **Tr. 752:11-14 [Alaniz]** 11 Q Okay. At any point during that meeting, did 12 they tell you that they -- that their operations were 13 inconsistent with your interpretation of the rule? 14 A No.
95	Stock Loan told Tom Delaney that Stock Loan's practice was to close-out fails to deliver on long sales on the afternoon of T+6.	**Response** Dispute: Ambiguous as to timing. To the extent the timing is limited to post mid-March 2011, no dispute. To the extent this finding of fact alleges that Stock Loan told Delaney prior to mid-March 2011, the Proposed Finding of Fact is not supported by the evidence. See response to FOF 94. **Support** Additionally, Mike Johnson testified that he did not know if Delaney was aware of this practice, which is inconsistent with Stock Loan having "told" Delaney that its practice was to close-out fails to deliver on the afternoon of T+6. In addition, Delaney testified that he was not aware of the practice prior to mid-March 2011: **Tr: 1307:9-14 [Delaney]** Q. Prior to you seeing that FINRA exam response that we showed in Exhibit 89 a moment ago, had you ever had a conversation with anyone at Penson that left you with the understanding that Stock Loan wasn't closing out long sales of securities they had out on loan? A No.
96	On September 21, 2008, Delaney received and read guidance that the Commission had issued an emergency order requiring close-out at market open T+6 of all fails to deliver due to long sales.	**Response** No dispute.
97	In October 2008 Morgan Lewis issued additional guidance about Rule 204T. It was Delaney's practice to review Morgan Lewis's guidance carefully. This guidance specifically discussed the impact	**Response** No dispute.

	of Rule 204T on securities lending. The guidance also linked to the Rule 204T adopting release.	
98	Delaney also read the adopting release for Rule 204T.	**Response** Dispute: This Finding not supported by cited source to the extent it suggests that Delaney read the release in its entirety. Delaney's testimony which was cited as support for this Proposed Finding states that Delaney saw the adopting release, not that he read the release.
99	Delaney was aware of the tension between the close-out requirements of Rule 204T and securities lending practices.	**Response** Dispute: This Finding is ambiguous insofar as it does not specify that the securities lending practices at issue were general market practices not the practices at PFSI. Delaney's testimony cited by the Division makes it clear that Delaney was aware of an industry discussion but is in no way tied to any understanding of practices at PFSI.
100	On December 13, 2008, Delaney received comments about Rule 204T. The e-mail noted that "Rule 204T applies to long sales, not just short sales. Unfortunately, the timelines set by the rule do not match the timelines in the securities lending markets" and asked PFSI to write a comment letter to the Commission concerning adoption of the rule.	**Response** Disputed: Delaney only to the extent that the proposed Finding of Fact might imply that Delaney was the sole recipient of the email. In fact the original email described in the finding of fact was not sent to Delaney; rather it was forwarded to him by one of the original recipients, Phil Pendergraft. **Support** See Exhibit 160. **Proposed Counterstatement** On December 13, 2008, Delaney, was forwarded an email by Mike Johnson, that was also forwarded to Bill Yancey, Any Koslow (general counsel of PFSI) and Phil Pendergraft, of an email originally sent to Phil Pendergraft and Dan Son, founders of Penson, by a third party. The original e-mail noted that "Rule 204T applies to long sales, not just short sales. Unfortunately, the timelines set by the rule do not match the timelines in the securities lending markets" and asked Pendergraft and Son to write a comment letter to the Commission concerning adoption of the rule.
101	On December 15, 2008, Delaney received a comment letter concerning Rule 204T written by the Securities Industry and Financial Markets Association ("SIFMA"). This letter contained a whole section on the impact of Rule 204T on stock lending. Among other things, the letter discussed the conflict between stock	**Response** No dispute.

	lending practices and Rule 204T.	
102	In July and August, 2009, Delaney reviewed additional guidance from PFSI's legal advisors. This guidance provided a link to the adopting release for Rule 204. Delaney testified that it was his practice to review the links in such guidance.	**Response** No dispute.
103	The adopting release for Rule 204 specifically discussed the "effect of the requirements of temporary Rule 204T on securities lending" and noted the conflict between the "completion of the securities lending cycle" and the requirements of the rule. Nonetheless, in the next paragraph the Commission reiterated that despite the impact on securities lending, the Commission would keep the closeout requirements.	**Response** No dispute.
104	In August 2010, Compliance Officer Eric Alaniz sent Delaney an e-mail attaching guidance concerning Rule 204. The guidance repeated a portion of the August 2009 adopting release, and two of the nine paragraphs in the guidance discussed the conflict between the securities lending practices and Rule 204's requirements.	**Response** Dispute: Incomplete and inaccurate recitation of the Exhibit on which this finding of fact is based. Delaney was only copied on the email, whose primary recipient was Alan Zabloudil. Additionally, the citation on which this finding of fact is taken out of context, as the Division's proposed finding is based only on the portion of the attached language that is not germane to the primary topic of the email. **Support** See Exhibit 328. "The below discussion addresses the same concern(s), buying pressure at the open that may temporarily distort the price of the security, PFSI had today on a buy-in order. As an FYI, Cobra is notified the day before of this buy-in, prior to PFSI taking action, to deliver this position or buy-in their client. Inaction on the part of Cobra requires the Clearing agent, in this case PFSI, to take action as prescribed in the Rule below. Unfortunately per Rule 204 (see below) the trading desk must adhere to the guidance below. Buy- Ins for "fail to deliver" (FTDs) securities must be placed at pre-market or at market open (9:30 EST) either as a market or "VWAP (order type that more effectively manages the buy-in risk)" order to meet the Rule 204 "Close Out"

		requirements. These two options should be adequate to minimize price volatility (see VWAP). If the "close-out" requirement is not met it becomes a violation of Rule 204. Please review the following discussion below. If after reviewing you still have any questions please feel free to contact me at x3446."
105	In December 2009, PFSI's Compliance department did testing pursuant to FINRA Rule 3012 of PFSI's compliance with Rule 204 (the "Rule 204 Test").	**Response** Disputed only insofar as the testing took place in both November and December, 2009 **Support** See Exhibit 301 page 4. "After a review of the T+4 (Securities Lending query/report) and T+6 (EXT816 report) for the dates of November 16th-20th and December 7th-11th the following was observed." **Proposed Counterstatement** In **November and** December 2009, PFSI's Compliance department did testing pursuant to FINRA Rule 3012 of PFSI's compliance with Rule 204 (the "Rule 204 Test").
106	Alaniz discussed the December 2009 testing with Delaney before doing the testing.	**Response** Dispute: Not supported by the evidence cited. The evidence cited by the Division relates only to the process for identifying a list of topics to be tested and for developing what PFSI would test. The passage makes no specific reference to the 2009 test nor does it support the conclusion that Alaniz discussed the December 2009 testing other than as part of the yearly testing schedule. **Support** **Tr. 705:6-19 [Alaniz]** Q Okay. How did this audit come about? What caused this audit to occur? A My basic -- basic way I come up with any audit is that I had a process. I reviewed FINRA sites, SEC sites. I would check in to our regulatory compliance area. I would ask to see what the regulators were asking about. And then from there, I would gather a list of topics. From that point, I would take it to Tom Delaney. We'd create a list. And then from there, we'd go have that list augmented or add to it if there were anything that needed to be added to it from Bill Yancey. And then from there, we'd develop what we would test throughout the year.

107	The December 2009 audit results related only to the Buy-Ins department.	**Response** No dispute.
108	Delaney claimed that his "procedures formed the basis of compliance testing at PFSI that reliably determined whether, and to what extent, PFSI was in compliance with Rule 204T, 203, and 204."	**Response** Dispute: Irrelevant. **Support** See Administrative Law Judge Patil's ORDER AP Release No. 2220/ January 15, 2015.
109	Delaney admits, however, that the December 2009 compliance testing did not test whether Stock Loan was closing out long sales of loaned securities in compliance with Rule 204.	**Response** Dispute: The Division's statement constitutes impermissible argument and should be stricken. *See* Post-Hearing Order ¶ 5(c). The Division asserts that Delaney made an "admission" that was contrary to arguments by counsel (although this proposed finding of fact does not explicitly reference the previous finding of fact, the language "Delaney admits, however," makes no sense without a predicate counter reference to which this language can be contrasting). This characterization as an admission is inappropriate given Delaney's (and Alaniz's corroborating) testimony that at the time of the testing he believed the tests tested Stock Loan's closeouts as well as the Buy-Ins department's closeouts. **Support** **Tr. 614:7-614:23 [Delaney]** Q Okay. You said, There were specific meetings right following the testing. When we do quarterly, we would do the CEO certifications. And Mr. Alaniz and myself were in a -- were in the office with Mr. Yancey briefing him on the specific findings. He, at that point, had made mention of the fact that well, this was something we needed to get Mike Johnson in the office for when he saw those particular findings. We, at that point in time, had explained that we didn't think at this point that there was a Stock Loan issue, that this was really appearing to be a buy-in issue. Did you give that testimony? A I believe I did. **Proposed Counterstatement** Delaney testified that, **contrary to what he understood at the time**, the December 2009 compliance testing **did not end up testing** whether Stock Loan was closing out long sales of loaned securities in compliance with Rule 204.

110	Alaniz wrote a report summarizing the results of the December 2009 testing of Rule 204.	**Response** No dispute.
111	The Rule 204 Test results showed that close-outs of short sales occurred between 30 minutes and 1 hour and 15 minutes after market open, close-outs of long sales occurred between 4 hours from market open to up until 11 minutes of the market close, and, of the 113 securities transactions tested, 112 failed to comply with Rule 204.	**Response** Dispute: Vague as to which test the Division is referring since there were at least three instances in which Rule 204 was tested in some fashion. **Support** See Exhibit 70. **Proposed Counterstatement** The **December 2009** Rule 204 Test results showed that close-outs of short sales occurred between 30 minutes and 1 hour and 15 minutes after market open, close-outs of long sales occurred between 4 hours from market open to up until 11 minutes of the market close, and, of the 113 securities transactions tested, 112 failed to comply with Rule 204.
112	This was one of the most significant occurrence of failures PFSI's compliance department had ever seen in its Rule 204 testing.	**Response** No dispute.
113	Delaney characterized these failures as "massive," "profound," and "anomalous."	**Response** No dispute.
114	No other testing show similar failures.	**Response** No dispute.
115	Gover came to believe that some of the failures were attributable to PFSI's Stock Loan department.	**Response** Dispute: The record on this point is not reliable. Gover's testimony is not credible in this or other regards. For example, Gover also testified that if he had known close-out failures were a Stock Loan problem, he would have mentioned it to his supervisor; however, Gover never told Kenny or anyone else that failures to close out were attributable to Stock Loan during the March 2010 meeting when he was asked about it extensively. **Support** Delaney FOF 22: Gover testified that if he had known close out failures were a Stock Loan problem he would have mentioned that in a meeting with his supervisor. **Tr. 156:13 – 157:1 [Gover]** 12 Q But if someone was calling upon you to fix

		this 13 problem, you would have identified it as a Stock Loan 14 problem, right, assuming you knew about the Stock Loan 15 problem? 16 A Yeah, I don't -- I don't know. It's hard for 17 me to speculate what if on something that -- you know, a 18 conversation that may or may not have happened five years 19 ago. 20 Q Well, let's go here. You wouldn't sit back 21 while the person you reported to probed you at length 22 about this problem and not report that some of it was 23 Stock Loan if you knew some of it was Stock Loan? 24 A No. 25 Q Would you have just sat back silently? 1 A Of course not. **Tr. 790: 9-24 [Alaniz]** Q Okay. What was the interaction that you 10 recall? 11 A The interaction from John Kenny was the basic, 12 simple question of what happened, what were they doing to 13 remediate it, and Brian Gover replied how he was going to 14 remediate it. 15 Q Okay. 16 A What the issues were and what the remediation 17 process was. 18 Q Did that go on for a while, this back and 19 forth? 20 A It was probably about 15, 20 minutes. 21 Q And at any point in that 15 or 20 minutes, did 22 Mr. Gover mention anything about Stock Loan not complying 23 with Rule 204? 24 A Not that I can recall Delaney FOF 23: Gover never told Kenny or anyone else that failures to close out were attributable to Stock Loan. **Tr. 153:25 – 154:21 [Gover]** 24 Q Do you 25 attribute that to any particular part of Penson

		other 15 1 than buy-ins? 2 A Yeah. I mean, at the end of the day Penson is 3 responsible for the close-outs. 4 Q I get that. I'm just trying to figure out 5 if -- if wasn't buy-ins -- 6 A What I think was happening was that Stock Loan 7 was recalling the shares. So they were coming back and 8 saying, hey, so let me take a back -- a step back. It 9 might be helpful to understand the process. 10 Q Well, let me -- instead, let me go here. So 11 you think this relates to that Stock Loan's -- whether 12 they were buying in for market open? 13 A I think it re- -- I think it relates to, when 14 Stock Loan was recalling the shares, as to whether those 15 shares were being recalled in time for the open or if 16 they were getting recalled and they were coming into the 17 close. **Tr. 154:22-25 [Gover]** 22 Q And so is that -- so if that's what you 23 thought, do you recall there being a meeting about this, 24 about this 3012 report? 25 A I don't recall a meeting of it. **Tr. 155:18 – 156:1 [Gover]** 18 you don't remember it, as you're sitting here, if you 19 were asked about that back at the time the 3012 report 20 came out, I take it you would have mentioned the Stock 21 Loan issue if you knew about it, right? 22 A If I were aware of the Stock Loan issue, yeah. 23 Q You for certain would have brought that up? 24 A If I were aware and had a belief that Stock 25 Loan was not doing what they should have been doing, yes, 1 I would have brought it up. Delaney FOF 14: Brian Gover's memory is neither clear nor reliable. **Tr. 140:15-22 [Gover]**

		15 It's been how long since -- since the date of the 16 meetings that you described with Mr. Delaney? 17 A In the range of five years. 18 Q Okay. And how clear would you say your memory 19 is of the dates of those meetings? 20 A You know, I think, you know, I can pretty 21 accurately within nine months, but, you know, I would not 22 be able to reliably say, yeah, at this point.
116	Between March 2010 and June 2010, Gover had a conversation with Delaney and Johnson. In that meeting, they discussed that CNS fails attributable to PFSI's Stock Loan department were not to be closed out. They also discussed the conflict between the buy-ins contemplated by the MSLA and required by Rule 204.	**Response** Dispute: Not factually accurate. Gover testified regarding meetings with Delaney and others where Stock Loan's practice of not closing out under Rule 204 was discussed, but his testimony was contradicted by all of the alleged attendees of the meeting. **Support** Delaney FOF 17: Hasty contradicted Gover's testimony: she did not attend a meeting with Gover at which it was discussed that Stock Loan was choosing not to comply with Rule 204's close out requirements. **Tr. 1756:10-20 [Hasty]** 10 Q Do you recall ever having a meeting with [Gover] 11 where it was discussed that Stock Loan was choosing not 12 to close out in accordance with Rule 204? 13 A No. 14 Q So you don't recall that meeting ever 15 happening? 16 A No. 17 Q Do you recall ever being in -- in a meeting 18 with him and Summer Poldrack related to Rule 204 at 19 all? 20 A No. Delaney FOF 18: Johnson contradicted Gover's testimony: he did not attend a meeting with Gover to discuss the possibility of recalling loans on T+2 to close out 204 fails. **Tr. 568:14-17 [Johnson]** 14 Q Mr. Johnson, did you ever have a meeting with 15 Brian Gover where you discussed the possibility of 16 recalling loans on T+2 to close out to 204 fails?

		17 A Never. Delaney FOF 19: Delaney contradicted Gover's testimony: he did not attend any meeting with Gover at which Stock Loan's intentional non-compliance with Rule 204 was discussed. **Tr. 1308:3 – 1308:11 [Delaney]** 3 Q Do you recall Mr. Gover's testimony that he met 4 with you? 5 A I do. 6 Q Do you remember ever having a meeting with Mr. 7 Gover where he discussed compliance with Rule 204? 8 Probably I asked that too broadly. Discussed a practice 9 by Stock Loan of not -- of deliberately not closing out 10 long sales of securities they had out on loan? 11 A No.
117	Delaney was responsible for ensuring that PFSI's WSPs reflected relevant regulatory guidance in Stock Loan's close-out practices.	**Response** Dispute: Incomplete recitation of the record. Business units were considered subject matter experts, and were relied upon by compliance personnel in many aspects of drafting and reviewing WSPs. **Support** Delaney FOF 65: At Penson, creating WSPs was the responsibility of the business units, as was reviewing those WSPs to be certain they accurately reflected the business practices of the business unit. **Tr. 1758:3-10 [Hasty]** 3 Who was it who was 4 responsible for generating the WSPs related to a 5 business unit? 6 A So it was a responsibility of the business 7 unit to convey to compliance what they were doing, how 8 they were supervising their business, what documents 9 they were using to evidence supervision of their 10 business. **Tr. 1758:13 – 1759:2 [Hasty]** 13 Q Why is it that the business unit originated 14 that? 15 A Well, they're the experts. They are the 16 people who are doing this day to day. As

		Compliance 17 Officers, we're not experts in every area of the 18 business. We don't sit at someone's desk and process 19 buy-ins or use the reports or, you know, escalate 20 certain items to our supervisors. We're unfamiliar 21 with the process. We're unfamiliar in general with 22 what they're doing on a day-to-day basis. So it's 23 absolutely is necessary to have the business owners be 24 the original people who are drafting those WSPs and 25 providing the information so that we can make sure it's 1 accurate and that it includes what's really being done 2 day to day. **Tr. 807:8-16 [Alaniz]** 8 Why is it that the business owner would -- 9 would make changes to a WSP? 10 A I would call them preliminary changes. You 11 would want to have them review it to ensure that if it 12 states that they're doing A, when in actuality, they're 13 doing B, you want that to be adjusted. That's why you 14 would want them to review it; so in the event the 15 regulators would come in and they do ask for WSPs, we are 16 doing what we are saying and not – Delaney FOF 64: The business units, such as Stock Loan, were considered subject matter experts, and compliance personnel relied on the expertise of the business units for an understanding of the compliance issues associated with each business unit. **Tr. 726:15 – 727:3 [Alaniz]** 15 Q And do you rely on those business units for 16 information about what is going on at the firm? 17 A Yes. 18 Q Could you perform your job without kind of an 19 understanding or having information flow from them? 20 A No. They are the product specialist managers 21 of their assigned areas and you do rely on them. 22 Q You said they're the specialists. What do you 23 mean by that? 24 A They're -- they're the owners. They do their

		25 job on a daily basis. I guess I'll -- you would assume 1 that they would know how it would work. 2 Q And who knows their job better, you or them? 3 A I would say them. **Tr. 1220:20 – 1221:10 [Delaney]** 20 Q Who did you rely on? 21 A Various groups. So I had my own staff, of 22 course, that I would rely on, as well as I would rely on 23 the subject matter experts within the -- within the 24 business. 25 Q When you say "subject matter experts," what 1 does that mean to you? 2 A To me, that would be at Penson, lot of moving 3 parts, a lot of -- a lot of departments with specific 4 processes and procedures and things of that nature. And 5 so those -- those leaders in that business group -- these 6 would be generally the registered principals within those 7 business groups -- would have -- would be those -- that 8 key subject matter. I mean, they would know more -- 9 they -- they would forget more about their department and 10 how it operates than -- than I'd ever hope to know. See also response to Proposed FOF 70.
118	On January 25, 2010, Delaney asked Compliance Officer Eric Alaniz to review certain WSPs to see how they reconciled with his testing. Among other things, Alaniz recommended that "as much as they can, I'd recommend to consolidate them and include how Sendero will adjust for T +4's and T+6's close-out requirement "of Rule 204 and to "include close-out requirement procedures in the WSPs."	**Response** Dispute: The Division's statement consists of impermissible argument and should be stricken. *See* Post-Hearing Order ¶ 5(c). To the extent the finding of fact is not argumentative it is entirely duplicative of the Exhibit cited. The Division attempts to summarize the evidence, but the email speaks for itself. **Support** See Exhibit 82.
119	Although Delaney claimed that he was "working to close" "the gap" "between PFSI's WSPs and Stock Loan's practices concerning timely buy-ins," Delaney admits that PFSI's March 31, 2010 WSPs,	**Response** Dispute: The Division's statement consists of impermissible argument and should be stricken. *See* Post-Hearing Order ¶ 5(c). Further, the Division's statement is irrelevant where the Division relies on

	which Delaney specifically reviewed and approved, did not contain procedures for closing-out long sales.	Exhibit 157. Incomplete characterization of the evidence; Unsupported by the cited source. The Division also ignores the language of PFSI's WSPs on Rule 204 procedures. Further, Poppalardo testified that the WSPs were adequate and typical of the industry. **Support** See Administrative Law Judge Patil's ORDER AP Release No. 2220/ January 15, 2015. Exhibit 188 at p. 318 "If Stock Loan does not have a counterparty to pass the Buy-In to, then the Buy-In is forwarded to the customer Buy-In department." Exhibit 188 at p. 317 "Recalls are tracked and based on stock record they can be cancelled at any point, left open or bought in to clean up the purpose of the recall." Delaney FOF 67. Penson's WSPs were adequate and typical of the industry. **Tr. 1993:16 – 1994:13 [Poppalardo]** 16 A Okay. Yes, I did look at PFSI's policies and 17 procedures. And I think what I would say is you start 18 with, you know, as a general matter, you look at all of 19 the key elements of the rule, and you make sure that 20 those are reflected in the policies and procedures and 21 to -- for the Reg SHO, certainly the important things 22 are, you know, that the orders be marked correctly, 23 locate and delivery requirements, close-out 24 requirements and the penalty box restrictions. And I 25 saw all of those elements in the PFSI policies, albeit 1 in not necessarily a single policy because there are 2 separate and distinct responsibilities within different 3 groups in PFSI. 4 Q How did they compare to what you've seen in 5 the industry with respect to policies and procedures? 6 A Relating to Reg SHO, I think their policies 7 and procedures overall were very comprehensive. And

		8 we've seen better, but, you know, they're -- they're 9 perfectly adequate. In connection with Reg SHO, it's a 10 really complicated area. I see a lot of policies and 11 procedures and it took me a really long time to parse 12 through them, but I do think that -- I think they were 13 okay. **Tr. 2039:23 – 2040:6 [Poppalardo]** 23 Q Can you tell me, did anything in the 24 cross-examination questions that Ms. Atkinson asked 25 change your opinion that PFSI policies and procedures 1 were consistent with what you saw in the industry? 2 MS. ATKINSON: I'm going to object to that as 3 leading. 4 JUDGE PATIL: Overruled. 5 A No, I -- I think they're consistent with -- 6 with other policies and procedures that I've seen.

120	Nor did PFSI's December 30, 2010 WSPs contain procedures for closing- out long sales.	**Response** Dispute: Not supported by the evidence. The Division ignores the language of PFSI's WSPs on Rule 204 procedures. Further, Poppalardo testified that the WSPs were adequate and typical of the industry. **Support** Exhibit 211 at p. 4 "If Stock Loan does not have a counterparty to pass the Buy-In to, then the Buy-In is forwarded to the customer Buy-In department." Exhibit 211 at p. 3 "Recalls are tracked and based on stock record they can be cancelled at any point, left open or bought in to clean up the purpose of the recall." Delaney FOF 67. Penson's WSPs were adequate and typical of the industry. **Tr. 1993:16 – 1994:13 [Poppalardo]** 16 A Okay. Yes, I did look at PFSI's policies and 17 procedures. And I think what I would say is you start 18 with, you know, as a general matter, you look at all of 19 the key elements of the rule, and you make sure that 20 those are reflected in the policies and procedures and 21 to -- for the Reg SHO, certainly the important things 22 are, you know, that the orders be marked correctly, 23 locate and delivery requirements, close-out 24 requirements and the penalty box restrictions. And I 25 saw all of those elements in thc PFSI policics, albeit 1 in not necessarily a single policy because there are 2 separate and distinct responsibilities within different 3 groups in PFSI. 4 Q How did they compare to what you've seen in 5 the industry with respect to policies and procedures? 6 A Relating to Reg SHO, I think their policies 7 and procedures overall were very comprehensive. And 8 we've seen better, but, you know, they're -- they're 9 perfectly adequate. In connection with Reg SHO, it's a 10 really complicated area. I see a lot of policies and 11 procedures and it took me a really long time to parse 12 through them. but I do think that -- I think thev

121	In fact, the procedures identified as "PROCEDURES ADOPTED IN ACCORDANCE WITH RULE 204" in the WSPs primarily dealt with Rule 203, not Rule 204.	**Response** Dispute: Incomplete characterization of the evidence. The Division ignores other WSPs that address close outs for Stock Loan. the language of PFSI's WSPs on Rule 204 procedures. Further, Poppalardo testified that the WSPs were adequate and typical of the industry. **Support** See Delaney's Response to the Division's Proposed FOF 120.
122	On May 17, 2010, Delaney received notice that FINRA had detected that PFSI had not closed out long sales in compliance with Rule 204.	**Response** Not disputed.
123	Delaney did nothing to follow-up on the notice in Exhibit 168 that FINRA had detected that PFSI had not closed out long sales in compliance with Rule 204.	**Response** Dispute: Mischaracterization of the testimony; further contains a false premise that the issue was not already being actively addressed by Compliance personnel. The testimony cited by the Division established only that Delaney did not know whether he did anything to follow up on the email, on which he was merely copied. **Support** **Tr. 597:23 – 598:11 [Delaney]** Q Okay. What did you do to follow up on what Ms. Miller told the FINRA person? A I may be missing, but I don't see where I'm being requested to follow up on anything. Q So do I take that to mean you did nothing to follow up on this; is that right? A I don't know if I -- if I'd done anything. I don't see anything here that says that I followed up on it. Q So you -- A Whether I did or didn't, I don't know. Q You don't have any recollection of following up on this? A No. Delaney FOF 48. By the time of the March 2010 meeting, Alaniz believed the problem with the Buy Ins function was in the process of being remediated. **Tr. 793:24 – 794:4 [Alaniz]** 24 Q And so while you had a test that showed a 25 problem with that buy-ins function, I think we saw that 1 you had already been getting preliminary results back

		2 from, say, Summer Poldrack saying that things were 3 getting better; is that about right? 4 A Yes. **Tr. 795:17-21 [Alaniz]** 17 Q Okay. So whether they were -- had been in 18 substantial compliance when you did your testing, you 19 understood they were on the road to substantial 20 compliance when you were in this meeting; is that right? 21 A Yes. Delaney FOF 97. By January, 2010, Compliance personnel were overseeing remediation of known Rule 204 compliance issues uncovered during Rule 204 testing. Exhibit 134 – "Currently the Compliance department has tested, among other areas, SEC Rule 204 and the Transmittal of Funds. These two areas are now the focus of prompt remediation."
124	On July 26, 2010, Delaney received an e-mail indicating that fails attributable to PFSI's Stock Loan department were not to be closed out.	**Response** Dispute: Mischaracterizes the email. While one line authored by a line-level Stock Loan employee said that he understood that Stock Loan was not to be bought in, in fact the email received by Delaney had two Compliance personnel addressing this position and explaining that the closeout must be completed by market open. **Support** Delaney FOF 36. Delaney was not aware that Stock Loan had been deliberately violating Rule 204 prior to seeing the FINRA exam response in March, 2011. **Tr. 1307:9-14 [Delaney]** 9 Prior to you seeing that FINRA exam response 10 that we showed in Exhibit 89 a moment ago, had you ever 11 had a conversation with anyone at Penson that left you 12 with the understanding that Stock Loan wasn't closing out 13 long sales of securities they had out on loan? 14 A No. **1307:24 – 1308:2 [Delaney]** 24 Did any conversation you ever had with Mr. De 25 La Sierra leave you with the impression that

		Stock Loan 1 wasn't complying with Rule 204? 2 A No Exhibit 158 [from Eric Alaniz] Summer, This is correct the Stock Loan account should be flat by the end of the day or have a surplus. Preferably this should be completed prior to or at market open. I will notify Rudy and Brian. Summer would you call me up when you have a second. [from Kim Miller] Eric; Holly requested that I forward this to you since you worked on this issue in one of your reviews. She is of the opinion that the penalty box is not an acceptable solution since there are other controls on the back side that need to be in place to ensure that we do not violate 204T. **Tr. 822:13-823:23 [Alaniz]** 13 Q Now I want to go to the language that follows, 14 "The Stock Loan account should be flat by the end of the 15 day or have a surplus." 16 What day do you think you were referring to 17 there? 18 A T+3. 19 Q T+3 if we're talking about a short sale? 20 A Short sale. 21 Q If we're talking about a long sale? 22 A T+5. 23 Q And given that you were e-mailing this to 24 Summer, based on your conversations with Summer, did you 25 think that was -- that would be clear to her? 1 A Yes. 2 Q Because you had discussed that concept with 3 her? 4 A Correct. 5 Q All right. And then, "Preferably this should 6 be completed prior to or at market open"; do you see 7 that? 8 A Yes. 9 Q Okay. What -- you're the one who wrote this 10 e-mail. Let's start here. First of all, do you think 11 it's optional to close out by market open? 12 A No, it's a requirement. 13 Q Okay. So this word "preferably" seems to have 14 gotten people hung up a few times. You're

		shaking your 15 head with a bit of a grin there? 16 A (Nods head.) 17 Q Tell me what you -- what you were trying to 18 communicate there. 19 A I prefer that they closed out these fails prior 20 to market open versus at market open because, in the 21 past, they had issues that placed it at market open and 22 it was over a minute, 30 seconds, two minutes and they 23 knew that was -- t
125	On October 13, 2010, Brian Gover again elevated the issue of Stock Loan's closeouts of long sales.	**Response** Dispute: Unsupported by the cited source; Mischaracterization of the record. First, the Proposed finding of fact suggests that Gover had previously escalated the "issue of Stock Loan's closeouts of long sales" but there is no evidence of this in the record. Second, the evidence cited by the Division concerns an "elevation" of an issue relating to Ridge Customers, not PFSI Stock Loan shares on loan. Ridge had no stock loan function. **Support** See Exhibit 40.
126	On October 21, 2010, Delaney received a FINRA examination report that informed him that PFSI was violating Rule 204 with respect to closeouts of long sales of loaned securities.	**Response** Dispute: The conclusion is not supported by the evidence. While Delaney received notice that PFSI had failed to closeout with regard to 10 transactions in a two-month period, those transactions included both short sales and long sales and thus could not have been limited to long sales of loaned securities. In any event the email never mentioned "closeouts of long sales of loaned securities" nor in any way could one conclude that any long sales of loaned securities were included in the 10 transactions at issue. Indeed FINRA would have no way of knowing whether the fails had anything to do with long sales of loaned securities. **Support** See evidence cited by the Division
127	Delaney was the compliance person responsible for Rule 204.	**Response** Dispute: Mischaracterization of testimony; Incomplete recitation of the record. Delaney worked with business units to make sure the

		information contained in the adopting release was being properly implemented. By virtue of his position as Chief Compliance Officer, Delaney was primarily responsible for ensuring compliance with Rule 204; however, he relied heavily on the assistance of Compliance staff and the subject matter experts in the business units. **Support** **Tr. 1769:25 – 1770:9 [Hasty]** Q Well, in fact, Mr. Delaney was the person who was responsible for Rule 204; isn't that right? A Yes. Q And he was the one who you expected would have the responsibility to review the adopting release, for instance, that accompanied Rule 204, and work with the business units to make sure that the information contained in the adopting release was being properly implemented; isn't that correct? A Yes. Delaney FOF 38. In preparation for testing in 2009 and 2010, Alaniz met with Stock Loan to learn about their Rule 204 process. **Tr. 749:1-20 [Alaniz]** 1 to the meetings that you had. What was the purpose of 2 meeting with the Stock Loan department? 3 A The purpose of meeting with any department in 4 this search, under these circumstances with the Stock 5 Loan, was to ensure that I understood the rule 6 completely. Not completely as -- completely as to what I 7 was going to test. 8 Q All right. You've read the rule? 9 A I've read the rule. 10 Q So -- so you said that you met with him to make 11 sure you understood it. How did meeting with him help 12 you understand it? 13 A Well, Reg SHO -- Regulation SHO was new to me. 14 The rule was new at the time. So since they were the 15 business unit that dealt with this rule on a daily basis, 16 I wanted to make sure that I understood it as I read it. 17 As them being the individuals that would be

		applying this 18 rule, I wanted to make sure we were on the same page so 19 that I wasn't testing one thing when they thought I was 20 testing another. Delaney FOF 64. The business units, such as Stock Loan, were considered subject matter experts, and compliance personnel relied on the expertise of the business units for an understanding of the compliance issues associated with each business unit. **Tr. 726:15 – 727:3 [Alaniz]** 15 Q And do you rely on those business units for 16 information about what is going on at the firm? 17 A Yes. 18 Q Could you perform your job without kind of an 19 understanding or having information flow from them? 20 A No. They are the product specialist managers 21 of their assigned areas and you do rely on them. 22 Q You said they're the specialists. What do you 23 mean by that? 24 A They're -- they're the owners. They do their 25 job on a daily basis. I guess I'll -- you would assume 1 that they would know how it would work. 2 Q And who knows their job better, you or them? 3 A I would say them. **Tr. 1220:20 – 1221:10 [Delaney]** 20 Q Who did you rely on? 21 A Various groups. So I had my own staff, of 22 course, that I would rely on, as well as I would rely on 23 the subject matter experts within the -- within the 24 business. 25 Q When you say "subject matter experts," what 1 does that mean to you? 2 A To me, that would be at Penson, lot of moving 3 parts, a lot of -- a lot of departments with specific 4 processes and procedures and things of that nature. And 5 so those -- those leaders in that business group -- these 6 would be generally the registered principals within those 7 business groups -- would have -- would be those -- that 8 key subject matter. I mean, they would know more --

		9 they -- they would forget more about their department and 10 how it operates than -- than I'd ever hope to know.
128	Delaney was compliance person responsible for interfacing with Stock Loan.	**Response** Dispute: Incomplete recitation of the record. Delaney was only one of the compliance people who interfaced with Stock Loan. Compliance employees, including Alaniz, Hasty, and Delaney, interfaced with Stock Loan. **Support** Delaney FOF 83. Wetzig did not have any discussions with Delaney pertaining to Rule 204 prior to the phone call with outside counsel. **Tr. 402:21 – 403:2 [Wetzig]** 21 Q Did you have -- did you have discussion -- were 22 the context of your discussions with Mr. Delaney, prior 23 to the phone call with outside counsel, in the context 24 that Stock Loan believed they could opt into the penalty 25 box rather than close out by T+6? 1 A I did not have any discussions with Tom Delaney 2 prior to the phone call. Delaney FOF 38. In preparation for testing in 2009 and 2010, Alaniz met with Stock Loan to learn about their Rule 204 process. **Tr. 749:1-20 [Alaniz]** 1 to the meetings that you had. What was the purpose of 2 meeting with the Stock Loan department? 3 A The purpose of meeting with any department in 4 this search, under these circumstances with the Stock 5 Loan, was to ensure that I understood the rule 6 completely. Not completely as -- completely as to what I 7 was going to test. 8 Q All right. You've read the rule? 9 A I've read the rule. 10 Q So -- so you said that you met with him to make 11 sure you understood it. How did meeting with him help

		12 you understand it? 13 A Well, Reg SHO -- Regulation SHO was new to me. 14 The rule was new at the time. So since they were the 15 business unit that dealt with this rule on a daily basis, 16 I wanted to make sure that I understood it as I read it. 17 As them being the individuals that would be applying this 18 rule, I wanted to make sure we were on the same page so 19 that I wasn't testing one thing when they thought I was 20 testing another.
129	Often when new rules came out PFSI's Compliance department would have meetings, analyze technologies, and develop a road map to ensure compliance.	**Response** No dispute.
130	In contrast, Delaney does not recall any meetings about the implementation of Rule 204.	**Response** Dispute: The Division's statement consists of impermissible argument and should be stricken. *See* Post-Hearing Order ¶ 5(c). Incomplete recitation of the record; Mischaracterization of the record. The phrase "in contrast" necessarily indicates that what follows will be argumentative rather than a recitation of fact. Moreover, Delaney testified that he did have meetings around the time Rule 204T was implemented, which is inconsistent with him not recalling any meetings. **Support** **Tr. 1238:15-21 [Delaney]** Q When 204T was implemented, do you remember if I had any meetings with people up the chain from you at the time that Rule 204T was implemented? A Yes. Q Yes, you did have meetings? A I believe we had meetings, yes.
131	No technology was designed or modified to enable Stock Loan to comply with Rule 204T/204.	**Response** Dispute: Mischaracterization of testimony. Stock Loan used a software system called Sendero, which generated reports for failures to deliver. It was designed, in part, to assist Stock Loan with the timing of

		recalls. **Support** **Tr. 2028:1-15 [Poppalardo]** Q Okay. So your expectation that, if this was embedded in the automated system, would be that the automated system would do these recalls in a timely fashion so that the fail to deliver could be satisfied; is that right? A I would think so. Q Okay. Do you know whether that's true at PFSI? A Well, I know from all of the documentation that I read in connection with the case that they weren't recalling early enough. Q Okay. So you know that the automated system was, in fact, not recalling in sufficient time to close out those fails to deliver? A Right. Delaney FOF 76. Sendero was built for Penson as a front-end software stock loan system, which would generate reports for failures to deliver. **Tr. 229:14-24 [DeLaSierra]** 14 Q What was Sendero? 15 A Sendero started building in 2005. The -- the 16 primary focus of Sendero initially was for locates. 17 We -- we had a large locate volume. 18 Q Did Sendero play any role with respect to the 19 204? 20 A Yes. 21 Q And explain that. 22 A Well, that -- that's what we would query to 23 generate our reports for fails, whether they be versus -- 24 long sales versus CNS for short sales. Delaney FOF 77. Sendero was heavily relied upon by Stock Loan with regard to timing of recalls. **Tr. 372:21-24 [Wetzig]** 21 When you talked about the recall on T+3, was that 22 something, again, that -- that Sendero did? 23 A Correct. On T+3, Sendero would tell us what we 24 needed to recall. **Tr. 364:22 – 365:5 [Wetzig]** 22 How would you know whether 23 an open obligation was due to a customer's short

		sale or 24 a -- a long sale, there -- that there was a stock loan 25 outstanding on? 1 A So our system would tell us what to recall and 2 look to see if there was a CNS obligation versus, say, a 3 loan. 4 Q And was there a name for that system? 5 A That system was called Sendero. **Tr. 365:18-25 [Wetzig]** 18 Q So on T+3, was there some process to look at 19 Sendero to figure out if there was obligations that Stock 20 Lending would have on an -- on an existing fail to 21 settle? 22 A Yes. So Sendero, we essentially had a recall 23 screen, and we -- it was, I guess, query-based, and it 24 would tell us what we need to recall versus our 25 obligations.
132	The Compliance department never gave effective guidance to Stock Loan on how to comply with Rule 204.	**Response** Dispute: This finding of fact contains the false premise that stock loan was responsible to explain to Stock Loan how to structure its business in order to comply with the Rule. In fact multiple people testified that it is a business unit's responsibility – because of the superior subject matter knowledge – was to originate a plan to comply with rules. Further, Delaney provided clear guidance of what was required by the rule, and no Stock Loan personnel had any confusion about what was required. Delaney circulated information about Rule 204 when the Rule came out. He forwarded releases he received from PFSI's counsel. Buy-Ins and Stock Loan understood the Rule 204 close-out requirements. **Support** Delaney's Response to the Division's Proposed FOF 70. Delaney FOF 41. Both Stock Loan and Buy-Ins knew the Rule 204 close-out requirements. **Tr. 101:17-23 [Gover]** 17 Q Who at PFSI knew about Rule 204(a) and the 18 obligations to -- to close out that we just discussed? 19 And I'll just throw it out. Did buy -- did the buy-

		ins 20 department know that? 21 A Yes. 22 Q Did the Stock Loan department know that? 23 A Yes. **Tr. 202:6-14 [DeLaSierra]** 6 Q Mr. DeLaSierra, were you aware of when the 7 rule required close-outs of long sales? 8 A When 204T went into place? 9 Q Yes, sir. 10 A Yes. 11 Q What time did the rule require close-outs? 12 A Market open of T6. 13 Q And that wasn't Stock Lending's practice? 14 A Correct. **Tr. 536:3-6 [Johnson]** 3 Q And -- and your reading of the rule was that it 4 required close-out by market open on T+6? 5 A My reading of the rule as it pertained to long 6 sales and CNS, yes. Delaney FOF 70. The memo Delaney Circulated Related to Rule 204 was copied almost word-for-word from a bulletin issued by Penson's counsel. **Tr. 1256:5-17 [Delaney]** 5 Q Have you had a chance to compare the language 6 in Exhibit 425A with the language in Exhibit 125? 7 A I have. 8 Q Are they at all similar? 9 A They're nearly identical. 10 Q Okay. What does that mean to you? 11 A That this was the -- this was the source 12 information for which I took and made the larger 13 distribution in my communication. 14 Q When you say, "they're largely identical," you 15 mean, like, word-for-word you copied large portions of 16 Exhibit 425A? 17 A I did. Delaney FOF 67. Penson's WSPs were adequate and typical of the industry. **Tr. 1993:16 – 1994:13 [Poppalardo]** 16 A Okay. Yes, I did look at PFSI's policies and 17 procedures. And I think what I would say is you start 18 with, you know, as a general matter, you look at all of

		19 the key elements of the rule, and you make sure that 20 those are reflected in the policies and procedures and 21 to -- for the Reg SHO, certainly the important things 22 are, you know, that the orders be marked correctly, 23 locate and delivery requirements, close-out 24 requirements and the penalty box restrictions. And I 25 saw all of those elements in the PFSI policies, albeit 1 in not necessarily a single policy because there are 2 separate and distinct responsibilities within different 3 groups in PFSI. 4 Q How did they compare to what you've seen in 5 the industry with respect to policies and procedures? 6 A Relating to Reg SHO, I think their policies 7 and procedures overall were very comprehensive. And 8 we've seen better, but, you know, they're -- they're 9 perfectly adequate. In connection with Reg SHO, it's a 10 really complicated area. I see a lot of policies and 11 procedures and it took me a really long time to parse 12 through them, but I do think that -- I think they were 13 okay. **Tr. 2039:23 – 2040:6 [Poppalardo]** 23 Q Can you tell me, did anything in the 24 cross-examination questions that Ms. Atkinson asked 25 change your opinion that PFSI policies and procedures 1 were consistent with what you saw in the industry? 2 MS. ATKINSON: I'm going to object to that as 3 leading. 4 JUDGE PATIL: Overruled. 5 A No, I -- I think they're consistent with -- 6 with other policies and procedures that I've seen. Delaney FOF 65. At Penson, creating WSPs was the responsibility of the business units, as was reviewing those WSPs to be certain they accurately reflected the business practices of the business unit.

		Tr. 1758:3-10 [Hasty] 3 Who was it who was 4 responsible for generating the WSPs related to a 5 business unit? 6 A So it was a responsibility of the business 7 unit to convey to compliance what they were doing, how 8 they were supervising their business, what documents 9 they were using to evidence supervision of their 10 business. **Tr. 1758:13 – 1759:2 [Hasty]** 13 Q Why is it that the business unit originated 14 that? 15 A Well, they're the experts. They are the 16 people who are doing this day to day. As Compliance 17 Officers, we're not experts in every area of the 18 business. We don't sit at someone's desk and process 19 buy-ins or use the reports or, you know, escalate 20 certain items to our supervisors. We're unfamiliar 21 with the process. We're unfamiliar in general with 22 what they're doing on a day-to-day basis. So it's 23 absolutely is necessary to have the business owners be 24 the original people who are drafting those WSPs and 25 providing the information so that we can make sure it's 1 accurate and that it includes what's really being done 2 day to day. **Tr. 807:8-16 [Alaniz]** 8 Why is it that the business owner would -- 9 would make changes to a WSP? 10 A I would call them preliminary changes. You 11 would want to have them review it to ensure that if it 12 states that they're doing A, when in actuality, they're 13 doing B, you want that to be adjusted. That's why you 14 would want them to review it; so in the event the 15 regulators would come in and they do ask for WSPs, we are 16 doing what we are saying and not – **<u>Proposed Counterstatement</u>**

		Compliance acted reasonably by giving effective guidance to Stock Loan with respect to Rule 204, including but not limited to, assisting with drafting sufficient WSPs, and circulating important information pertaining to Rule 204. Accordingly, personnel from the Stock Loan department understood the requirements of Rule 204.
133	In approximately August 2009, Delaney sent an e-mail out regarding Rule 204.	**Response** No dispute.
134	The e-mail (Exhibit 125) simply referenced that close-outs needed to occur on T+6; it did not specify at what point during the day the close-out must occur.	**Response** Dispute: While the finding of fact is an accurate statement, it is misleading because it does not include the important context that the email sent by Delaney was nearly a word-for-word copy of a bulletin sent by PFSI's counsel. Further, to the extent the Finding of Fact suggests that any Stock Loan personnel were unaware of the requirements of Rule 204 – that closeouts occur at or before market open – that is not supported by the record. **Support** Delaney FOF 70. The memo Delaney Circulated Related to Rule 204 was copied almost word-for-word from a bulletin issued by Penson's counsel. **Tr. 1256:5-17 [Delaney]** 5 Q Have you had a chance to compare the language 6 in Exhibit 425A with the language in Exhibit 125? 7 A I have. 8 Q Are they at all similar? 9 A They're nearly identical. 10 Q Okay. What does that mean to you? 11 A That this was the -- this was the source 12 information for which I took and made the larger 13 distribution in my communication. 14 Q When you say, "they're largely identical," you 15 mean, like, word-for-word you copied large portions of 16 Exhibit 425A? 17 A I did. Delaney FOF 41. Both Stock Loan and Buy-Ins knew the Rule 204 close-out requirements. **Tr. 101:17-23 [Gover]** 17 Q Who at PFSI knew about Rule 204(a) and the 18 obligations to -- to close out that we just discussed? 19 And I'll just throw it out. Did buy -- did the buy-

		ins 20 department know that? 21 A Yes. 22 Q Did the Stock Loan department know that? 23 A Yes. **Tr. 202:6-14 [DeLaSierra]** 6 Q Mr. DeLaSierra, were you aware of when the 7 rule required close-outs of long sales? 8 A When 204T went into place? 9 Q Yes, sir. 10 A Yes. 11 Q What time did the rule require close-outs? 12 A Market open of T6. 13 Q And that wasn't Stock Lending's practice? 14 A Correct. **Tr. 536:3-6 [Johnson]** 3 Q And -- and your reading of the rule was that it 4 required close-out by market open on T+6? 5 A My reading of the rule as it pertained to long 6 sales and CNS, yes.
135	The e-mail (Exhibit 125) did not discuss the conflict between the securities lending cycle and the rule. Nor did it provide any guidance on how Stock Loan should comply with the Rule's requirement to close-out at market-open T+6 in the face of counterparty refusal to be bought in at market-open T+6.	**Response** Dispute: See response to Division's Proposed FOF 134.
136	At the time of the August 2009 e-mail, Delaney was aware that Stock Loan was not buying in to close-out fails to deliver until the afternoon of T+6.	**Response** Dispute: Not factually accurate. **Support** Delaney FOF 36. Delaney was not aware that Stock Loan had been deliberately violating Rule 204 prior to seeing the FINRA exam response in March, 2011. **Tr. 1307:9-14 [Delaney]** 9 Prior to you seeing that FINRA exam response 10 that we showed in Exhibit 89 a moment ago, had you ever 11 had a conversation with anyone at Penson that left you 12 with the understanding that Stock Loan wasn't closing out 13 long sales of securities they had out on loan? 14 A No. **Tr. 1307:24 – 1308:2 [Delaney]**

		24 Did any conversation you ever had with Mr. De 25 La Sierra leave you with the impression that Stock Loan 1 wasn't complying with Rule 204? 2 A No Delaney FOF 32. DeLaSierra's memory was better at the time of his first investigative testimony than it was during the final hearing. **Tr. 250:11 – 251:5 [DeLaSierra]** 10 Q Okay. Mr. DeLaSierra, how many times have 11 you now testified about this topic? 12 A In court? I'm sorry. I don't understand. 13 Q In on-the-record testimony or investigative 14 testimony by -- 15 A This is my third time. 16 Q Your third time. And the first time you 17 testified was fall of 2012? 18 A I don't believe so. I think it was in the 19 spring. 20 Q You think it was in the spring of what, 2012? 21 A I believe so, yes. 22 Q Okay. So at some point in 2012. And then you 23 testified again in 2013? 24 A Correct. 25 Q And -- and then you're testifying here today? 1 A Yes. 2 Q And tell me: Your memory, I assume, works sort 3 of like mine; that is, the closer I am to an event, the 4 better I remember it. 5 A Yes.
137	Delaney claimed that he paid close attention to Stock Loan's compliance with Rule 204. He claimed that "We tested. We tested and tested and tested and tested."	**Response** Dispute: Incomplete recitation of the record. **Support** Exhibit 224 **Tr. 448:1-22 [Delaney Testimony 07/31/13]** 1 Q I'm not sure I heard an answer to my question. In 2 light of the unique financial incentives that the Stock Loan 3 group had to violate Regulation SHO, did you pay heightened 4 attention to their Regulation SHO activities as compared to 5 other departments within Penson? 6 A Yes.

		7 Q How so? 8 A We built specific reports to require the buy-ins 9 and compliance with T+6 at that point in time to ensure that 10 and tested for those compliance with those reports. 11 Q Was that specifically focused on the Stock Loan 12 group? 13 A Well, specifically focused on the buy-in. The 14 buy-in was the control for the Stock Loan group, yes. So 15 the buy-in group, while that is an independent group from 16 the Stock Loan group, they were the -- the fact that they 17 were independent was also an inherent control in the 18 process. 19 Had Stock Loan had a buy-in function within their 20 group, that certainly could have presented a different 21 challenge for us in terms of how we would have monitored for 22 that.
138	Delaney admitted that, in fact, the December 2009 testing was the only test testing Stock Loan, that the December 2009 testing did not test Stock Loan's compliance with the close-out requirements of Rule 204, and that the follow-up testing in June 2010 did not test Stock Loan at all.	**Response** Dispute: The Division's statement consists of impermissible argument and should be stricken. *See* Post-Hearing Order ¶ 5(c). To the extent it contains facts and not argument, is entirely duplicative of Proposed FOF 65c. Further, because of the meetings with Stock Loan, where Stock Loan did not disclose their business practices were contrary to the rules, Delaney and Alaniz believed the 204 violations to be an issue within the Buy-In Department. **Support** Delaney FOF 23. Gover never told Kenny or anyone else that failures to close out were attributable to Stock Loan. **Tr. 153:25 – 154:21 [Gover]** 24 Q Do you 25 attribute that to any particular part of Penson other 1 than buy-ins?

		2 A Yeah. I mean, at the end of the day Penson is 3 responsible for the close-outs. 4 Q I get that. I'm just trying to figure out 5 if -- if wasn't buy-ins -- 6 A What I think was happening was that Stock Loan 7 was recalling the shares. So they were coming back and 8 saying, hey, so let me take a back -- a step back. It 9 might be helpful to understand the process. 10 Q Well, let me -- instead, let me go here. So 11 you think this relates to that Stock Loan's -- whether 12 they were buying in for market open? 13 A I think it re- -- I think it relates to, when 14 Stock Loan was recalling the shares, as to whether those 15 shares were being recalled in time for the open or if 16 they were getting recalled and they were coming into the 17 close. **Tr. 154:22-25 [Gover]** 22 Q And so is that -- so if that's what you 23 thought, do you recall there being a meeting about this, 24 about this 3012 report? 25 A I don't recall a meeting of it. **Tr. 155:18 – 156:1 [Gover]** 18 you don't remember it, as you're sitting here, if you 19 were asked about that back at the time the 3012 report 20 came out, I take it you would have mentioned the Stock 21 Loan issue if you knew about it, right? 22 A If I were aware of the Stock Loan issue, yeah. 23 Q You for certain would have brought that up? 24 A If I were aware and had a belief that Stock 25 Loan was not doing what they should have been doing, yes, 1 I would have brought it up. Delaney FOF 40. Stock Loan misled Alaniz by not mentioning their non-compliant procedures with regard to Rule 204. **Tr. 745:15-23 [Alaniz]** 15 Q What about, did your test focus primarily on 16 buy-ins -- on the buy-ins function?

		17 A I didn't make -- yes, it did, but at the time, 18 I didn't make any distinction between what I was going to 19 focus on. It was just buy-in. The focus was to ensure 20 that the rule was being adhered to. 21 Q Okay. And you constructed the test as best you 22 could to -- to attempt to test that, correct? 23 A Yes.
139	At the time of the December 2009 audit of Rule 204 compliance issues, Delaney was aware that Stock Loan was not buying in to close-out fails to deliver until the afternoon of T+6.	**Response** Dispute: Not factually accurate. **Support** Delaney FOF 36. Delaney was not aware that Stock Loan had been deliberately violating Rule 204 prior to seeing the FINRA exam response in March, 2011. **Tr. 1307:9-14 [Delaney]** 9 Prior to you seeing that FINRA exam response 10 that we showed in Exhibit 89 a moment ago, had you ever 11 had a conversation with anyone at Penson that left you 12 with the understanding that Stock Loan wasn't closing out 13 long sales of securities they had out on loan? 14 A No. **Tr. 1307:24 – 1308:2 [Delaney]** 24 Did any conversation you ever had with Mr. De 25 La Sierra leave you with the impression that Stock Loan 1 wasn't complying with Rule 204? 2 A No Delaney FOF 32. DeLaSierra's memory was better at the time of his first investigative testimony than it was during the final hearing. **Tr. 250:11 – 251:5 [DeLaSierra]** 10 Q Okay. Mr. DeLaSierra, how many times have 11 you now testified about this topic? 12 A In court? I'm sorry. I don't understand. 13 Q In on-the-record testimony or investigative 14 testimony by -- 15 A This is my third time. 16 Q Your third time. And the first time you 17 testified was fall of 2012? 18 A I don't believe so. I think it was in the 19 spring. 20 Q You think it was in the spring of what, 2012?

		21 A I believe so, yes. 22 Q Okay. So at some point in 2012. And then you 23 testified again in 2013? 24 A Correct. 25 Q And -- and then you're testifying here today? 1 A Yes. 2 Q And tell me: Your memory, I assume, works sort 3 of like mine; that is, the closer I am to an event, the 4 better I remember it. 5 A Yes.
140	Follow-up Rule 204 testing performed in June 2010 tested only Rule 204 compliance with close-outs of short sales, not long sales.	**Response** No dispute.
141	The follow-up testing should have tested a larger sample and tested the long sales which had the most problematic results.	**Response** Dispute: The Division's statement consists of impermissible argument and should be stricken. *See* Post-Hearing Order ¶ 5(c). This proposed finding is also a legal conclusion. To the extent this "finding of fact" is not mere argument, it is actually an attempt to state a legal standard, not state a fact.
142	Delaney's was responsible to make sure that PFSI had policies and procedures designed to prevent or detect violations of rules.	**Response** Dispute: Legal Conclusion. Delaney relied on business units, who were considered subject matter experts. **Support** Delaney FOF 64. The business units, such as Stock Loan, were considered subject matter experts, and compliance personnel relied on the expertise of the business units for an understanding of the compliance issues associated with each business unit. **Tr. 726:15 – 727:3 [Alaniz]** 15 Q And do you rely on those business units for 16 information about what is going on at the firm? 17 A Yes. 18 Q Could you perform your job without kind of an 19 understanding or having information flow from them? 20 A No. They are the product specialist managers 21 of their assigned areas and you do rely on them. 22 Q You said they're the specialists. What do you

		23 mean by that? 24 A They're -- they're the owners. They do their 25 job on a daily basis. I guess I'll -- you would assume 1 that they would know how it would work. 2 Q And who knows their job better, you or them? 3 A I would say them. **Tr. 1220:20 – 1221:10 [Delaney]** 20 Q Who did you rely on? 21 A Various groups. So I had my own staff, of 22 course, that I would rely on, as well as I would rely on 23 the subject matter experts within the -- within the 24 business. 25 Q When you say "subject matter experts," what 1 does that mean to you? 2 A To me, that would be at Penson, lot of moving 3 parts, a lot of -- a lot of departments with specific 4 processes and procedures and things of that nature. And 5 so those -- those leaders in that business group -- these 6 would be generally the registered principals within those 7 business groups -- would have -- would be those -- that 8 key subject matter. I mean, they would know more -- 9 they -- they would forget more about their department and 10 how it operates than -- than I'd ever hope to know.
143	It was important for Delaney to be honest and forthcoming with Yancey.	**Response** No dispute.
144	If Delaney learned that associated personnel were not following the securities laws, he was required to take reasonable steps to investigate and report his findings to members of senior management where those persons reported.	**Response** Dispute: Redundant. **Support** See Stipulated FOF 13.
145	Delaney had a duty to inform Yancey if Delaney knew that PFSI was following industry practice rather than Rule 204.	**Response** Dispute: The Division's statement consists of impermissible argument and should be stricken. *See* Post-Hearing Order ¶ 5(c). Legal Conclusion; Mischaracterization of testimony.

		Support **Tr. 940:20 – 941:17 [Yancey]** Q And whether PFSI was choosing to follow industry practice instead of the law would have been important to you as a CEO, wouldn't it? A Yes, sir. Q If you had known that Penson was following industry practice instead of the law, you would have taken that seriously, correct? A Yes, sir. Q You would have wanted to follow up on it? A Yes, sir. Q It's something you would try to put a stop to; is that fair? A Certainly try to provide clarity and resources to make sure it was done properly. Q And to make sure that Penson was following the law rather than industry practice, correct? A Yes. That's fair. Q Now, Mr. Yancey, if Tom Delaney knew that Penson was following a perceived industry practice that was contrary to the requirements of Rule 204, that's something you would have expected him to tell you; is that right? A Yes, sir. **Proposed Counterstatement** **Yancey would have expected** Delaney had a duty to inform him if Delaney knew that PFSI was following industry practice rather than Rule 204.
146	Delaney never informed Yancey that PFSI was following a perceived industry practice rather than Rule 204.	**Response** Dispute: Redundant; Delaney could not have told Yancey what he didn't know. **Support** Stipulated FOF 43. Yancey was not aware that Penson's Stock Loan Department was violating Rule 204. Delaney FOF 35. Johnson does not know whether Delaney was aware of Stock Loan's practice of not closing out long sales by market open for stocks out on loan as described in Exhibit 89. **Tr. 517:19-23 [Johnson]** 19 Q And let me ask you generally, and then we'll 20 talk specifically. Was Mr. Delaney aware that those 21 practices we just saw in Exhibit 89 were how Stock Loan 22 was operated? 23 A I don't know

		Delaney FOF 36. Delaney was not aware that Stock Loan had been deliberately violating Rule 204 prior to seeing the FINRA exam response in March, 2011. **Tr. 1307:9-14 [Delaney]** 9 Prior to you seeing that FINRA exam response 10 that we showed in Exhibit 89 a moment ago, had you ever 11 had a conversation with anyone at Penson that left you 12 with the understanding that Stock Loan wasn't closing out 13 long sales of securities they had out on loan? 14 A No. **Tr. 1307:24 – 1308:2 [Delaney]** 24 Did any conversation you ever had with Mr. De 25 La Sierra leave you with the impression that Stock Loan 1 wasn't complying with Rule 204? 2 A No.
147	Delaney claimed that after the December 2009 Rule 204 testing, he "required that representatives from each of the business units involved with closing out short sales were present to discuss the results and create accountability."	**Response** Dispute: Irrelevant. **Support** See Administrative Law Judge Patil's ORDER AP Release No. 2220/ January 15, 2015.
148	In fact, Delaney admitted that he told Yancey that Stock Loan did not need to attend the first meeting discussing the December 2009 Rule 204 testing.	**Response** Dispute: Mischaracterization of testimony; Incomplete recitation of the record; Alaniz testified that it was he who told Yancey that Johnson did not need to be present because Stock Loan and Buy-Ins were being superficially helpful in remediating the issue. He further testified that if he had known that Stock Loan had a policy of not closing out he would have invited Johnson in to the meeting to explain why they were not complying. **Support** **Tr. 614:7-614:23 [Delaney]** Q Okay. You said, There were specific meetings right following the testing. When we do quarterly, we would do the CEO certifications. And Mr. Alaniz and myself were in a -- were in the office with Mr. Yancey briefing him on the specific findings. He, at that point, had made mention of the fact that well, this was something we needed to get Mike Johnson in the office for when he saw those

		particular findings. We, at that point in time, had explained that we didn't think at this point that there was a Stock Loan issue, that this was really appearing to be a buy-in issue. Did you give that testimony? A I believe I did. MS. ATKINSON: That's at Page 329, from Line 14 to Line 24. **Tr. 762:16-763:18 [Alaniz]** 16 Q Okay. And then with Rule 204, I presume we 17 have an idea. That was that testing we were just looking 18 at there, right? 19 A Correct. 20 Q Did you describe kind of the test that you -- 21 that you had done at that point? 22 A Yes. 23 Q And what was the response? 24 A Mr. Yancey's response was that we should bring 25 in Michael Johnson to the conversation. Page 763 1 Q And was there any response to that? 2 A I had a response. 3 Q What did you say? 4 A I had told him that I didn't believe that was 5 necessary. All indications from the security lending 6 department and the buy-ins department was that they were 7 cooperative in remediating those issues. 8 Q Okay. We'll get to remediation here in a 9 minute, but if you had known about this -- that Stock 10 Loan wasn't closing out these -- these long sales by 11 market open when the securities had been loaned out, 12 would that have changed your recommendation as to whether 13 Mr. Johnson should have been in that meeting? 14 A Yes. 15 Q And how would it have changed it? 16 A We would have definitely invited him to speak 17 on behalf of the department as to why they were not 18 compliant or being cooperative **<u>Proposed Counterstatement</u>** In fact, Delaney admitted **testified** that he **and Alaniz** told Yancey that Stock Loan did not need to attend the

		first meeting discussing the December 2009 Rule 204 testing **because, at that point, they did not think there was an issue with Stock Loan, but rather, a Buy-Ins issue.**
149	Delaney met with Yancey again on August 2, 2010 to discuss testing of PFSI's compliance with Rule 204.	**Response** No dispute.
150	It was important for Delaney to be honest and forthcoming with regulators.	**Response** No dispute.
151	On March 31, 2010, Yancey signed an "Annual Certification of Compliance and Supervisory Processes" for PFSI.	**Response** No dispute.
152	The Certification signed by Yancey attached a "NASD Rule 3012 Summary Report" ("Annual Report").	**Response** No dispute.
153	The Annual Report, per Penson's WSPs, was to discuss Penson's "key compliance problems" for the period April 1, 2009 through March 31, 2010.	**Response** Dispute: Redundant; Incomplete restatement of a Stipulated FOF. **Support** Stipulated FOF 21. On March 31, 2010, Delaney met with Yancey to discuss Yancey's annual certification of Penson's compliance testing procedures. As part of that certification, Penson's Compliance Department prepared and presented an Annual Report that, per Penson's WSPs, was to discuss Penson's "key compliance problems" for the period April 1, 2009 through March 31, 2010. At the March 31, 2010 meeting, an item of discussion was the results of the December 2009 audit showing the Rule 204(a) violations resulting from Buy-Ins' procedures -- a compliance failure that Delaney later characterized as "massive," "profound," and "anomalous."
154	The Annual Report was also supposed to summarize the testing that had been conducted and the gaps found by that testing that had been presented to the CEO.	**Response** Dispute: The Division's statement consists of impermissible argument and should be stricken. *See* Post-Hearing Order ¶ 5(c). Legal Conclusion; Document speaks for itself. **Support** See Exhibit 172.
155	Delaney was responsible for the Annual Report.	**Response** Dispute: Document speaks for itself (Ex. 135);

		Incomplete recitation of the record. **Support** **Tr. 1886:17 – 1887:4 [Yancey]** Q Who prepares it? A The Chief Compliance Officer. Q At this time, who was the Chief Compliance Officer? A Tom Delaney. Q And who decides what to include on this Summary Report? A Tom Delaney. Q Is it his judgment alone about what to include? A I believe that Tom takes input from the staff, from the department heads, so ultimately, it is his decision, but I think he take inputs. Delaney FOF 45. Alaniz prepared the initial draft of the 3012 summary report (Exhibit 135). **Tr. 856:22 – 857:5[Alaniz]** 22 Q Okay. You prepared the initial draft of that, 23 right? 24 A Of that, yes. 25 Q Yes. 1 Using the template, as you mentioned? 2 A Correct. 3 Q And there was the section in that template for 4 key Compliance items, right? 5 A I would have to review it. I can't recall Delaney FOF 46. Alaniz included what he thought were key issues on the 3012 summary report. Delaney generally took Alaniz's suggestions on what to include. **Tr. 858:20-25 [Alaniz]** 20 Q So if you had thought it was an important issue 21 and should have been included, you had the ability to 22 tell him to include it? 23 A Yes. 24 Q Or suggest it anyway? 25 A Suggest it, yes. **Proposed Counterstatement** Delaney was **ultimately** responsible for the **contents of the** Annual Report**, and he took input from the staff and department heads to determine what to include in the report.**
156	The Annual Report was a key document in FINRA examinations.	**Response** No dispute.

157	The Rule 3012 Summary Report contained a section describing "[t]he firm's key compliance efforts to date."	**Response** No dispute.
158	The Rule 3012 Summary Report also contained a section noting "[t]he identification of any significant compliance problems."	**Response** No dispute.
159	Alaniz created the template for the Annual Report, and would put in a few items for discussion. Alaniz would then send the Annual Report to Delaney to complete. Delaney determined what would be listed as significant compliance problems.	**Response** Dispute: Incomplete recitation of the record. **Support** Delaney FOF 45. Alaniz prepared the initial draft of the 3012 summary report (Exhibit 135). **Tr. 856:22 – 857:5[Alaniz]** 22 Q Okay. You prepared the initial draft of that, 23 right? 24 A Of that, yes. 25 Q Yes. 1 Using the template, as you mentioned? 2 A Correct. 3 Q And there was the section in that template for 4 key Compliance items, right? 5 A I would have to review it. I can't recall Delaney FOF 46. Alaniz included what he thought were key issues on the 3012 summary report. Delaney generally took Alaniz's suggestions on what to include. **Tr. 858:20-25 [Alaniz]** 20 Q So if you had thought it was an important issue 21 and should have been included, you had the ability to 22 tell him to include it? 23 A Yes. 24 Q Or suggest it anyway? 25 A Suggest it, yes. **Proposed Counterstatement** Alaniz created the template for the Annual Report, and would put in a few items for discussion. Alaniz would then send the Annual Report to Delaney to complete. Delaney determined what would be listed as significant compliance problems **though Alaniz could suggest items to be included in the report.**

160	Delaney's March 31, 2010 Annual Report appended to Yancey's certification did not reference ongoing, willful Rule 204(a) violations relating to long sales of loaned securities by Stock Loan.	**Response** No dispute.
161	Delaney's March 31, 2010 Annual Report appended to Yancey's certification did not reference the Rule 204 testing conducted by Eric Alaniz in December 2009, the results of which Delaney later characterized as "massive," "profound" and "anomalous."	**Response** No dispute.
162	Delaney's March 31, 2010 Annual Report appended to Yancey's certification did not reference Rule 204 at all.	**Response** Dispute: Accuracy of statement; overly broad; unsupported by the cited source. **Support** **Tr. 804:12 – 805:3 [Alaniz]** Q: I mean, did you -- did you shred them as soon as you were done? A: No, I would put all my documentation in folders and keep them there. Q: And why -- why is it that you'd keep them there? A: Well, they were able to be reviewed by the regulators, FINRA specifically. Q: Okay. So FINRA can come in and ask for it and you – A: Exactly. Q: Did that ever happen when you were at Penson? A: Yes. **Proposed Counterstatement** Delaney's March 31, 2010 Annual Summary Report appended to Yancey's CEO certification did not explicitly reference Rule 204, but the Summary Report did mention that all 3012 Audit documentation, which included the Rule 204 audit, was available for review by the regulators.
163	Delaney would have expected some reference to Rule 204 to be in the Annual Report.	**Response** Dispute: Incomplete recitation of the record. While the finding of fact is based on Delaney' investigative testimony it ignores the additional context provided by testimony at the Final Hearing. By the time of the report, Delaney and Alaniz believed the issues with Rule 204 were being remediated. **Support** Delaney FOF 48. By the time of the March 2010

		meeting, Alaniz believed the problem with the Buy Ins function was in the process of being remediated. **Tr. 793:24 – 794:4 [Alaniz]** 24 Q And so while you had a test that showed a 25 problem with that buy-ins function, I think we saw that 1 you had already been getting preliminary results back 2 from, say, Summer Poldrack saying that things were 3 getting better; is that about right? 4 A Yes. Delaney FOF 51. Remediation efforts following the December 2009 3012 testing were underway by the time the April 2010 OCIE response was drafted. **Tr. 1269:12-20 [Delaney]** Q And after the audit, I think you testified 13 earlier there was some remediation? 14 A There was. 15 Q Or maybe you didn't testify earlier. Maybe I'm 16 misremembering. 17 A I think I recall I did. 18 Q Had the remediation begun by the date of this 19 letter? 20 A It absolutely had begun. **Tr. 1275:19 – 1276:9 [Delaney]** 19 A Well, the issue -- we're reporting that the 20 issue had been rectified by advancing the start of the 21 report generation in order to provide the buy-in 22 department and Stock Loan desk earlier access to the 23 data, which ties in here to Summer's e-mail to Eric 24 stating that they've -- that Stock Loan had been going 25 out of their way to either borrow on T+3 or get the 1 report to them earlier on T+4; and that since, they've 2 been able to have the executions to trading by 8:30 in 3 the morning, which is market open. 4 Q Let me ask you the date of this e-mail. And by 5 this e-mail, I mean Exhibit 321.
164	Other topics that were the subject of compliance testing at PFSI were discussed in the Annual Report.	**Response** Dispute: Mischaracterization of testimony; Unsupported by the cited source; Irrelevant.

		The evidence supports that some – but not all – other topics were "disclosed" but never suggests that those topics were "discussed." **Support** **Tr. 1382:12-1383:5 [Delaney]** Q It's Exhibit 135. A I'm at that exhibit. Q Okay. And you said that there was no testing disclosed in this document; is that correct? A No. Q Is that what you said? A I -- I think my testimony was there was no specific results of the testing that had been disclosed in the document. Q Okay. But there were -- the subjects of some of the testing that had been performed at Penson, that was in here; isn't that right? A I think there were some -- some overarching subject matter that was in there, but not the specific results of the testing that had been disclosed on -- in this report based on any of those. Q But the general topic and problems of the testing, that was disclosed? A Some of it, yes. Delaney FOF 97. By January, 2010, Compliance personnel were overseeing remediation of known Rule 204 compliance issues uncovered during Rule 204 testing. Exhibit 134 – "Currently the Compliance department has tested, among other areas, SEC Rule 204 and the Transmittal of Funds. These two areas are now the focus of prompt remediation."
165	All of the items in the Rule 3012 Summary Report's identification of significant compliance problems are items that were being remediated.	**Response** No dispute.
166	The Annual Report referenced "exception and remediation tracking." In May, 2010, FINRA requested the remediation tracking logs related to the CEO certification. The log provided to FINRA did not mention Rule 204T, Rule 204, or Alaniz' testing of Rule 204 compliance.	**Response** Dispute: There is no evidence to support the conclusion that the attached document is the same as the log attached to the CEO certification at issue in this case, March 2010. The Exception and Remediation Tracking Log only appears to track the remediation of exceptions from the 2009 FINRA exam, not the 3012 internal audits. Rule 204 was not an exception in the 2009 FINRA exam.

		Further, to the extent these tracking reports are the same as the ones attached to the he evidence demonstrates that Alaniz provided all of the binders with testing exceptions and remediation to FINRA at the same time as this request. **Support** **Exhibit 194** [From Alaniz] "For bullet point 2 I'll bring over in a few minutes" [bullet point 2] Per CEO certification report, please provide the binders with noted exceptions. **Tr. 804:12-805:3 [Alaniz]** Q Let me ask you one quick question. That binder 13 that we looked at, that 301 in Exhibit 70, those results 14 from your testing, did you keep that around? 15 A How so? 16 Q I mean, did you -- did you shred them as soon 17 as you were done? 18 A No, I would put all my documentation in folders 19 and keep them there. 20 Q And why -- why is it that you'd keep them 21 there? 22 A Well, they were able to be reviewed by the 23 regulators, FINRA specifically. 24 Q Okay. So FINRA can come in and ask for it and 25 you -- Page 805 1 A Exactly. 2 Q Did that ever happen when you were at Penson? 3 A Yes. **Proposed Counterstatement** In May, 2010, FINRA requested the remediation tracking logs related to "the CEO certification." The log provided to FINRA did not mention Rule 204T, Rule 204, or Alaniz' testing of Rule 204 compliance. **Alaniz also provided all responsive binders to FINRA of all testing exceptions.**
167	On March 31, 2010, Delaney met with Yancey to discuss Yancey's annual certification of Penson's compliance testing procedures. As part of that certification, Penson's Compliance department prepared and presented an Annual Report that, per Penson's WSPs, was to discuss Penson's "key compliance	**Response** Dispute: Redundant; Division is repeating language of FOF that has been stipulated to. **Support** See Stipulated FOF 21.

	problems" for the period April 1, 2009 through March 31, 2010. At the March 31, 2010 meeting, an item of discussion was the results of the December 2009 audit showing the Rule 204(a) violation rate resulting from Buy-ins' procedures – a compliance failure that Delaney later characterized as "massive," "profound" and "anomalous."	
168	Beginning in November 2008, OCIE conducted a review of PFSI's Rule 204T procedures. In October 2010, OCIE issued Penson a deficiency letter reporting that OCIE had found Rule 204T(a) violations. The findings reported to Penson in the deficiency letter included findings that Penson had violated Rule 204T in connection with short sales.	**Response** Dispute: Redundant; Division is repeating language of FOF that has been stipulated to. **Support** See Stipulated FOF 28.
169	The OCIE exam concerned close-outs of long sales as well as short sales.	**Response** No dispute.
170	Moreover, PFSI represented to OCIE that there was no report that monitored close-outs of long sales of loaned securities.	**Response** Dispute: Mischaracterization of cited language. **Support** Exhibit 204 at p. 13 **Proposed Counterstatement** Moreover, PFSI represented to OCIE that there was no report that monitored close-outs of long sales of loaned securities **sales marked long in type 2 accounts.**
171	On November 15, 2010, Kim Miller sent Delaney a draft of a response to deficiency letter arising from an OCIE exam.	**Response** Dispute: Incomplete recitation of the record. **Support** **Tr. 147:17 – 148:4 [Gover]** 17 A And that is the section where it says "Penson 18 feels that the processes and proceedings and options" -- 19 Q Yes. 20 A That looks like something I could have written. 21 Q Okay. When you -- when you wrote that, you 22 would have understood that was going to FINRA, right? 23 A Yes. 24 Q And when you wrote that, did you believe it

		was 25 accurate? 1 A Yes. 2 Q And as you sit here today, is there any reason 3 to think that it's not accurate? 4 A No. **Tr. 1738:25 – 1739:10 [Hasty]** 25 Q Okay. And as you sit here today, Ms. Hasty, 1 do you believe that Mr. Gover's statement that 2 "Penson's processes and procedures were effective and 3 performed as designed," do you believe that was 4 truthful and accurate? 5 A Yes. 6 Q Do you have any reason to believe that Mr. 7 Gover's statement was inaccurate? 8 A No. 9 Q Misleading? 10 A No. **Tr. 1739:11-23 [Hasty]** 11 Q Okay. And I believe Michael pulled back up 12 the language from 101. That's the final response. 13 Looking again at the language in the final response, 14 "Penson believes that," do you believe that his -- Mr. 15 Gover's statement that, "Penson believes that the 16 reasonable processes employed to close out positions 17 that were allegedly in violation of Rule 204T were 18 effective and performed as designed." Do you believe 19 that that was truthful and accurate? 20 A Yes. 21 Q Do you have any reason to believe that Mr. 22 Gover's statement was inaccurate or misleading? 23 A No. **Tr. 1739:24 – 1740:7 [Hasty]** 24 Q Do you have any reason to believe anything in 25 this final response was inaccurate or misleading? 1 A No. 2 Q If you did believe anything in that response 3 that you signed was inaccurate or misleading, what 4 would you have done? 5 A I would have said something most likely to 6 Tom or would have -- or to the business unit or would

		7 have called a meeting and said we need to discuss it.
172	On November 19, 2010, Delaney replies to Miller, saying "attached is my redraft...."	**Response** No dispute.
173	Delaney reviewed and edited PFSI's response to Item No. 5.	**Response** No dispute.
174	The language as edited by Delaney appeared in the letter submitted to OCIE on November 24, 2010. The letter did not disclose that PFSI's Stock Loan was not able to comply with Rule 204, nor did it acknowledge the disastrous Rule 204 test results from December 2009 and June 2010. Instead the letter averred that "the processes employed to close-out positions that were allegedly in violation of rule 204T were effective and performed as designed."	**Response** Dispute: The Division's statement consists of impermissible argument and should be stricken. *See* Post-Hearing Order ¶ 5(c). Incomplete recitation of the record. **Support** Stipulated FOF 49. During the relevant time period there were at least 1,500 Rule 204T(a)/204(a) violations by PFSI relating to long sales of loaned securities. Stipulated FOF 50. During the relevant time period PFSI cleared at least 1 billion securities transactions. Stipulated FOF 51. There were a total of 83.6 million long sale transactions by PFSI during the relevant time period that could be potentially associated with loaned shares. Out of these 83.6 million long sale transactions, only 0.12 percent could be potentially associated with a negative CNS position that was a Rule 204(a)/204T(a) violation. Stipulated FOF 52. The 1,500 Rule 204T(a)/204 negative CNS positions identified as violations represented only approximately 0.68 percent of the total number of Penson's CNS net sale settling positions potentially associated with loaned shares. Delaney FOF 58. Every witness who testified on the topic (Gover, Alaniz, and Hasty) stood by the accuracy of the representations made in the OCIE response in November 2010. **Tr. 147:17 – 148:4 [Gover]** 17 A And that is the section where it says "Penson 18 feels that the processes and proceedings and options" -- 19 Q Yes. 20 A That looks like something I could have written.

		21 Q Okay. When you -- when you wrote that, you 22 would have understood that was going to FINRA, right? 23 A Yes. 24 Q And when you wrote that, did you believe it was 25 accurate? 1 A Yes. 2 Q And as you sit here today, is there any reason 3 to think that it's not accurate? 4 A No. **Tr. 828:23 – 829:4 [Alaniz]** 23 Q I'll just represent to you that S+1 is 24 settlement plus one, which is the same as T+4. 25 Based on your remediation plans that you had 1 done, did you believe that by November 2010, the firm's 2 programs were effective and reasonably designed to close 3 out short sales in -- 4 A Yes. **Tr. 1738:25 – 1739:10 [Hasty]** 25 Q Okay. And as you sit here today, Ms. Hasty, 1 do you believe that Mr. Gover's statement that 2 "Penson's processes and procedures were effective and 3 performed as designed," do you believe that was 4 truthful and accurate? 5 A Yes. 6 Q Do you have any reason to believe that Mr. 7 Gover's statement was inaccurate? 8 A No. 9 Q Misleading? 10 A No. **Tr. 1739:11-23 [Hasty]** 11 Q Okay. And I believe Michael pulled back up 12 the language from 101. That's the final response. 13 Looking again at the language in the final response, 14 "Penson believes that," do you believe that his -- Mr. 15 Gover's statement that, "Penson believes that the 16 reasonable processes employed to close out positions 17 that were allegedly in violation of Rule 204T were 18 effective and performed as designed." Do you believe 19 that that was truthful and accurate?

		20 A Yes. 21 Q Do you have any reason to believe that Mr. 22 Gover's statement was inaccurate or misleading? 23 A No. **Tr. 1739:24 – 1740:7 [Hasty]** 24 Q Do you have any reason to believe anything in 25 this final response was inaccurate or misleading? 1 A No. 2 Q If you did believe anything in that response 3 that you signed was inaccurate or misleading, what 4 would you have done? 5 A I would have said something most likely to 6 Tom or would have -- or to the business unit or would 7 have called a meeting and said we need to discuss it. Delaney FOF 59. The November, 2010 OCIE Response (Exhibit 101) was not inconsistent with Alaniz's testing results. **Tr. 1792:1-12 [Hasty]** 1 Q So when was this letter in relation -- and, 2 again, to the best of your knowledge here today, in 3 time relation to when Mr. Alaniz got it? 4 A This was after. 5 Q How much after? 6 A It would have been nearly a year, 11 months. 7 Q And do you -- what would be your expectation 8 as to whether there was any remediation done between 9 the time of testing and the time of this letter? 10 A I would have expected that there would have 11 been significant remediation done during that time 12 frame. **Tr. 1739:3-19 [Hasty]** 3 Q Okay. And What about Rule 204T? When was 4 Rule 204T? When did it go out of -- of effect? 5 A That, I'm not certain. July maybe 2010. 6 Q July 2010 or 2009? 7 A 2009. Sorry. 8 Q No problem. 9 So would Mr. Alaniz' testing in December of 10 2009 tell you anything about what the practices of 11 Penson were related to 204T? 12 A Yes, I would assume they would. 13 I'm sorry. Rephrase your question.

		14 Q Sure. 15 204T went out in July of 2009. Would testing 16 that took place six months later tell you anything 17 about what was going on with regard to 204T? 18 A Oh, likely not. Again, modifications were 19 likely to have been made. Delaney FOF 60. Delaney relied on information from Penson personnel that remediation was underway and that reasonable processes were in place and, as a result, believed the OCIE response was accurate. **Tr. 1285:5-23 [Delaney]** 5 Q Let me do that. Why? Why don't you think this 6 is inconsistent? 7 A Penson -- Eric's testing results were part of a 8 compliance process of testing policies and procedures, 9 and the fact that you find errors in testing -- in 10 testing results is what you expect when you have a good 11 testing regime. I would maybe worry more if he didn't 12 find any errors at that point. 13 And certainly, I had no indicia of any other 14 processes going on beyond what was already being tested 15 and reported back on, and we were remediating and we 16 were -- and there were reports of remediating coming back 17 in. I had business unit leaders telling me, we've got -- 18 we've got this -- these -- sorry -- we've got these 19 reasonable processes in place. 20 So there was just no -- there was nothing in 21 that response, where Brian reports in, that would have 22 somehow triggered to me that there was something 23 inconsistent with what Eric was reporting.

175	Delaney admitted that the language in the OCIE letter was inconsistent with the Rule 204 testing Alaniz conducted in December 2009 and June 2010.	**Response** Dispute: The statement is an incomplete statement of the record and is inconsistent with other testimony. The quote at issue comes from Delaney's first round of investigative testimony, for which he said he did not prepare. The statement is limited by its own terms to Delaney's then-present knowledge ("I can't explain that as I sit here, no, sir."). However, at trial Delaney, Alaniz, and Hasty all explained that the language in the OCIE letter was not inconsistent. **Support** **Tr. 1365:5-21 [Delaney]** 5 Q The sentence that reads, "Penson believes that 6 the reasonable processes employed to close-out positions 7 that were allegedly in violation of Rule 204T were 8 effective and performed as designed;" do you see that? 9 A I do. 10 Q You covered that issue with your counsel, Mr. 11 Washburn, earlier today; did you not? 12 A I did. 13 Q Now, it is that sentence that the Division 14 alleges was your most significant act of concealment. Do 15 you feel like that sentence was false? 16 A No. 17 Q Do you feel like that sentence was misleading? 18 A No. 19 Q Do you feel like that sentence was wrong, 20 confusing or unclear? 21 A No. **Tr. 1284:17-1285:23 [Delaney]** 17 Q Do you recall -- well, do you recall being 18 asked by Ms. Atkinson on cross-examination if you 19 believed that the response that we're seeing here in 20 Exhibit 101 was inconsistent with Mr. Alaniz's 21 examination results? Do you recall being asked that? 22 A I -- I believe I remember that, yes. 23 Q And what did you say about whether you thought 24 it was inconsistent? 25 A That I didn't think it was inconsistent with 1 the results. 2 Q And did she ever ask you why you didn't think 3 it was inconsistent? 4 A She did not. 5 Q Let me do that. Why? Why don't you think this 6 is inconsistent?

176	It is not possible to reconcile the statement concerning Rule 204 in the letter to OCIE with Alaniz' Rule 204 testing.	**Response** Dispute: The Division's statement consists of impermissible argument and should be stricken. *See* Post-Hearing Order ¶ 5(c). During testimony and argument the statements were repeatedly reconciled by Hasty, Alaniz, Delaney, and counsel for Delaney. **Support** See Delaney's Response to Division's Proposed FOF 175. Delaney FOF 59. The November, 2010 OCIE Response (Exhibit 101) was not inconsistent with Alaniz's testing results. **Tr. 1792:1-12 [Hasty]** 1 Q So when was this letter in relation -- and, 2 again, to the best of your knowledge here today, in 3 time relation to when Mr. Alaniz got it? 4 A This was after. 5 Q How much after? 6 A It would have been nearly a year, 11 months. 7 Q And do you -- what would be your expectation 8 as to whether there was any remediation done between 9 the time of testing and the time of this letter? 10 A I would have expected that there would have 11 been significant remediation done during that time 12 frame. **Tr. 1739:3-19 [Hasty]** 3 Q Okay. And What about Rule 204T? When was 4 Rule 204T? When did it go out of -- of effect? 5 A That, I'm not certain. July maybe 2010. 6 Q July 2010 or 2009? 7 A 2009. Sorry. 8 Q No problem. 9 So would Mr. Alaniz' testing in December of 10 2009 tell you anything about what the practices of 11 Penson were related to 204T? 12 A Yes, I would assume they would. 13 I'm sorry. Rephrase your question. 14 Q Sure. 15 204T went out in July of 2009. Would testing 16 that took place six months later tell you anything 17 about what was going on with regard to 204T? 18 A Oh, likely not. Again, modifications were 19 likely to have been made.

		Delaney FOF 58. Every witness who testified on the topic (Gover, Alaniz, and Hasty) stood by the accuracy of the representations made in the OCIE response in November 2010. **Tr. 147:17 – 148:4 [Gover]** 17 A And that is the section where it says "Penson 18 feels that the processes and proceedings and options" -- 19 Q Yes. 20 A That looks like something I could have written. 21 Q Okay. When you -- when you wrote that, you 22 would have understood that was going to FINRA, right? 23 A Yes. 24 Q And when you wrote that, did you believe it was 25 accurate? 1 A Yes. 2 Q And as you sit here today, is there any reason 3 to think that it's not accurate? 4 A No. **Tr. 828:23 – 829:4 [Alaniz]** 23 Q I'll just represent to you that S+1 is 24 settlement plus one, which is the same as T+4. 25 Based on your remediation plans that you had 1 done, did you believe that by November 2010, the firm's 2 programs were effective and reasonably designed to close 3 out short sales in -- 4 A Yes. **Tr. 1738:25 – 1739:10 [Hasty]** 25 Q Okay. And as you sit here today, Ms. Hasty, 1 do you believe that Mr. Gover's statement that 2 "Penson's processes and procedures were effective and 3 performed as designed," do you believe that was 4 truthful and accurate? 5 A Yes. 6 Q Do you have any reason to believe that Mr. 7 Gover's statement was inaccurate? 8 A No. 9 Q Misleading? 10 A No. **Tr. 1739:11-23 [Hasty]** 11 Q Okay. And I believe Michael pulled back up

		12 the language from 101. That's the final response. 13 Looking again at the language in the final response, 14 "Penson believes that," do you believe that his -- Mr. 15 Gover's statement that, "Penson believes that the 16 reasonable processes employed to close out positions 17 that were allegedly in violation of Rule 204T were 18 effective and performed as designed." Do you believe 19 that that was truthful and accurate? 20 A Yes. 21 Q Do you have any reason to believe that Mr. 22 Gover's statement was inaccurate or misleading? 23 A No. **Tr. 1739:24 – 1740:7 [Hasty]** 24 Q Do you have any reason to believe anything in 25 this final response was inaccurate or misleading? 1 A No. 2 Q If you did believe anything in that response 3 that you signed was inaccurate or misleading, what 4 would you have done? 5 A I would have said something most likely to 6 Tom or would have -- or to the business unit or would 7 have called a meeting and said we need to discuss it.
177	Supervision is an important part of a compliance program.	**Response** No dispute.
178	Yancey was hired as CEO because PFSI was growing too large for founders Pendergraft and Son to continue to manage.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
179	Yancey was the CEO of PFSI and was a registered person.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
180	Delaney was a registered person associated with PFSI.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
181	Yancey had supervisory responsibility for	**Response**

	Delaney.	Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
182	Yancey received and reviewed the Rule 204 Test results in December 2009.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
183	Yancey met with the Compliance department quarterly to discuss its Rule 3012 testing, which was part of the process of preparing Yancey to sign and certify Penson's Annual Certification of Compliance, also referred to as the CEO certification.	**Response** No dispute.
184	Issues would be raised at these quarterly meetings only if they were significant enough to warrant Yancey's attention.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
185	On January 28, 2010, Delaney and Alaniz had a quarterly meeting with Yancey. In that meeting, the Rule 204 Test was one of only two items discussed with Yancey. Delaney and Alaniz explained the results of the Rule 204 Test and pointed out that 112 out of 113 items tested failed.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
186	The Rule 204 Test was discussed in the March 31, 2010 quarterly 3012 CEO certification meeting, which was held on the same day that Yancey signed the 2010 Annual CEO Certification. At the meeting, the December 2009 Rule 204 testing was one of ten items discussed.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
187	At the March 31, 2010 meeting Alaniz did not tell Delaney or Yancey that the Stock Loan remediation steps would solve the Rule 204 problem.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein. In addition, Alaniz's 3012 Rule 204 test results contained in Exhibit 70 indicated that issues were, in fact, being remediated. **Support** Exhibit 70. Exhibit 345 (containing an email from Hall to Alaniz and copying DeLaSierra and Summer Poldrack, dated March 11, 2010, indicating "I have updated the

		remediation document with a manual process that should keep us in compliance with Rule 204 until the development work is complete.").
188	Yancey and Delaney met to discuss and review the Annual Report.	**Response** No dispute.
189	As part of the process of signing and certifying the 2010 Annual CEO Certification, Yancey carefully reviewed the Annual Report, which he considered an important document.	**Response** No dispute.
190	Yancey personally signed the Annual CEO Certification; it was an important document.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
191	Yancey was aware that the CEO Certification and Summary Report were sent to regulators.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
192	Yancey does not know why the results of the Rule 204 Test were not included in the Rule 3012 Summary Report.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
193	Yancey did not have any discussion with anyone, including Delaney, about omitting the Rule 204 testing from the Rule 3012 Summary Report.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
194	Yancey knew that it was important to be as accurate as possible in communications with regulators, and that honesty in communications with regulators are the very fabric of a compliance program.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
195	If Delaney were misleading regulators in communications with those regulators, that is something that would have been important to Yancey.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
196	If Yancey saw a red flag that suggested Delaney was not being honest with regulators, he had a duty to follow up on it.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
197	Yancey was the CEO of PFSI and was a registered person.	**Response** Delaney agrees with and joins Yancey's dispute of this

		Proposed Finding of Fact and incorporates the same herein.
198	Johnson is a registered representative associated with PFSI.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
199	Stock loan, as well as the other functional groups within PFSI, reported up to Yancey.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
200	PFSI's Stock Loan department lent shares owned by PFSI customers to earn borrow charges, used that stock as collateral for financing purposes, lent stock for financing purposes, and borrowed stock for PFSI's to cover PFSI customer's short sales.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
201	Stock Loan supported PFSI customers' short selling by providing "locates" on shares – affirmative determinations that the shares would be available – before the customer engaged in the short sale.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
202	Stock Loan also supported PFSI customers' short selling by borrowing securities to satisfy the obligation to settle the short sale trade on T+3.	**Response** No dispute.
203	Stock Loan also lent securities from PFSI customers' margin accounts to its counterparties so they could meet their customers' delivery obligations.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
204	Providing locates, borrowing securities, and lending securities, were functions of PFSI's Stock Loan department rather than Penson Worldwide.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
205	Stock Loan was a significant profit center for PFSI.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
206	Stock Loan generated revenue by lending out securities to counterparties, who generally paid a "rebate" to borrow the securities, and by borrowing securities to	**Response** No dispute.

	assist with customer short selling and charging a mark-up to customers for the cost of the borrow.	
207	Stock Loan also financed PFSI. Financing through Stock Loan was advantageous compared to financing through bank loans because PFSI got more value for the stock pledged as collateral, and because PFSI paid a lower interest rate on the loan.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
208	Stock Loan's firm financing function was important to PFSI.	**Response** No dispute.
209	Stock Loan was a necessary and integral part of PFSI's business model.	**Response** No dispute.
210	PFSI could not have existed without Stock Loan.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
211	Because Stock Loan was a core function of PFSI it is not surprising that the supervisory matrices show Johnson reporting to Yancey, the CEO.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
212	Johnson was initially hired to head the Stock Loan department at PFSI.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
213	Johnson was a very involved supervisor of PFSI's Stock Loan department throughout the time period relevant to this case. He was the "big boss"; the leader of PFSI's Stock Loan group.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
214	Johnson was personally involved in borrowing securities for PFSI customers, locating shares for PFSI customers, and in financing activities for PFSI.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
215	Johnson was involved in substantive issues regarding PFSI Stock Loan, including issues related to Rule 204.	**Response** No dispute.
216	Sometime prior to the implementation of Rule 204T, Johnson became the PWI Senior Vice President for Global Stock Lending, responsible for all of Penson's	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.

	worldwide stock lending operations.	
217	Johnson's interactions with the PFSI Stock Loan department did not significantly change after his promotion. He remained a highly-involved, hands-on manager over PFSI Stock Loan.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
218	After his promotion, Johnson remained associated with PFSI.	**Response** No dispute.
219	After his promotion, Johnson continued to engage in stock lending activity for PFSI.	**Response** No dispute.
220	Pendergraft considered Johnson one of the best technicians on Wall Street.	**Response** No dispute.
221	As President and CEO of PFSI, a broker-dealer, supervision rested with Yancey unless and until he reasonably delegated supervisory responsibility to another qualified individual.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
222	As President and CEO of PFSI, Yancey was responsible for compliance with the securities laws and other requirements imposed on the firm unless and until he reasonably delegated those functions to another qualified individual.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
223	As President and CEO of PFSI, the buck stopped with Yancey.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
224	If there is confusion about who is supervising an individual at a broker-dealer, the president of the broker-dealer retains the supervisory responsibility.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
225	Until Johnson was promoted to PWI Senior Vice President for Global Stock Lending, Yancey was Johnson's supervisor.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
226	Pendergraft or another PWI executive directed Johnson with respect to his global responsibilities, but did not supervise Johnson as to regulatory and compliance issues. Responsibility for supervision as to regulatory and	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.

	compliance issues would have remained at PFSI.	
227	Pendergraft does not believe that Yancey delegated supervision of Johnson to Pendergraft.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
228	It would not be inappropriate to split out regulatory and compliance supervision from operational supervision.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
229	As a practical matter, employees who had responsibilities at both PFSI and PWI could be supervised by a PWI executive for certain matters and a PFSI executive for other matters.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
230	It would not necessarily have been obvious to PFSI employees if there had been a split in Johnson's supervision between Yancey and Pendergraft.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
231	Numerous witnesses had different understandings of Johnson's supervision after Johnson became Senior Vice President of Stock Lending for Penson Worldwide.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
231 (a)	Yancey testified that, in August 2008, Pendergraft wanted to make Stock Loan a global product line and make Johnson the Senior Vice President for Securities Lending for PWI, and that that time Yancey fully delegated all supervisory responsibility for Johnson and for PFSI's Stock Loan department to Pendergraft.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
231 (b)	Pendergraft testified that, while he directed Johnson's activities as Senior Vice President for Global Stock Lending, he did not have supervisory responsibility over Mr. Johnson for regulatory or compliance issues, and that supervisory responsibility for those issues lay with someone at PFSI rather than Penson Worldwide.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
231 (c)	Johnson testified that he reported to Pendergraft, but that PFSI's Stock Loan	**Response** Delaney agrees with and joins Yancey's dispute of this

	department was supervised by Yancey.	Proposed Finding of Fact and incorporates the same herein.
231 (d)	DeLaSierra testified that he believed Johnson reported to Dan Son.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
232	No one other than Yancey and Pendergraft was present for the August 2008 conversation where Yancey purportedly delegated all supervisory responsibility for Johnson and for PFSI's Stock Loan department to Pendergraft.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
233	Pendergraft does not recall the August 2008 conversation.	**Response** No dispute.
234	Pendergraft recalls that stock lending was made a global product unit in approximately 2007.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
235	Pendergraft's interaction with the PFSI Stock Loan department did not materially change after Johnson's promotion from Vice President to Senior Vice President; Pendergraft was always fairly involved in what PFSI Stock Loan was doing.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
236	Pendergraft interacted with Johnson with respect to Reg SHO issues in 2005, which was during the time period that Johnson was Vice President for PFSI Stock Loan and did not report to Pendergraft.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
237	There is no document evidencing that Yancey delegated full supervisory responsibility from Johnson to Pendergraft.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
238	The August 2008 e-mail transferring Johnson's payroll from PFSI to PWI does not mention supervision.	**Response** No dispute.
239	Several witnesses testified that PFSI's organizational charts clearly showed that Johnson was supervised by Pendergraft.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
240	PFSI's organizational charts, which were maintained by the Human Resources department, show Johnson reporting to	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same

	Dan Son.	herein.
241	The organizational charts do not clearly show that Johnson was supervised by Pendergraft.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
242	Even after Yancey became CEO of PFSI, Pendergraft remained very active in PFSI issues and interacted with PFSI employees that he did not supervise.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
243	Pendergraft was involved in the supervision of all aspects of PFSI.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
244	Pendergraft gave final approval for bonuses at all PFSI departments, not just the Stock Loan department.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
245	Pendergraft had personal relationships with PFSI customers and would converse with various PFSI and Penson Worldwide employees, including Mike Johnson, with questions related to those relationships.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
246	Johnson received approximately 300 e-mails per day when he was Senior Vice President for Global Stock Lending.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
247	Pendergraft sent others, including Bart McCain, e-mails on topics including PFSI firm financing, revenue, and regulatory issues.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
248	Pendergraft did not send these e-mails to Bart McCain as McCain's supervisor.	**Response** No dispute.
249	Pendergraft was not Bart McCain's supervisor for purposes of Bart McCain's PFSI responsibilities; Yancey was Bart McCain's supervisor for such purposes.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
250	Johnson communicated with others, including Bart McCain, on topics including Stock Loan revenues, firm financing, travel schedule, and expense approval.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
251	Bart McCain was not Johnson's supervisor, and none of the e-mail	**Response** Delaney agrees with and joins Yancey's dispute of this

	communications on topics including Stock Loan revenues, firm financing, travel schedule, and expense approval made McCain Johnson's supervisor.	Proposed Finding of Fact and incorporates the same herein.
252	If Yancey personally communicated with regulators about information within his knowledge, he was confident that it was accurate.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
253	In March 2011, Yancey personally signed PFSI's 2011 CEO Certification. Attached to that certification was the annual summary report, prepared by the Compliance department. Yancey knew this was an important report that was going to regulators, and he reviewed it before signing the certification.	**Response** No dispute.
254	Bart McCain believed the 2011 annual summary report was accurate.	**Response** No dispute.
255	In the report attached to the 2011 CEO Certification, Johnson is listed as the supervisor of PFSI's Stock Loan department, and is described as being part of the "senior directors team" that meets weekly to report to Yancey.	**Response** No dispute.
256	PFSI's Written Supervisory Procedures ("WSPs") were an important document, and a source of information for PFSI's regulators.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
257	It was important to Yancey that PFSI's WSPs be as accurate as possible.	**Response** No dispute.
258	PFSI's WSPs contained a section designating supervisors. That section was at the very front of the WSPs. The section of the WSPs designating supervisors referenced and incorporated PFSI's supervisory matrix.	**Response** No dispute.
259	PFSI's WSPs did not incorporate any org chart.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
260	The purpose of PFSI's supervisory matrix was to identify the supervisor for each of	**Response** Delaney agrees with and joins Yancey's dispute of this

	PFSI's registered employees.	Proposed Finding of Fact and incorporates the same herein.
261	PFSI's supervisory matrix listed employees under various executives.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
262	For the time period relevant to this case, Johnson was always listed under Yancey in PFSI's supervisory matrix.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
263	For the time period relevant to this case, Johnson was never listed under Pendergraft in PFSI's supervisory matrix.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
264	PFSI's supervisory matrix contained a column for an employee's "Regulatory Supervisor" and his or her "Pi Org Chart Supervisor."	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
265	The "Regulatory Supervisor" was PFSI's assignment of supervisors for purposes of NASD Rule 3010, which requires a firm to provide for the assignment of each registered person to an appropriately registered representative(s) and/or principal(s) who "shall be responsible for supervising that person's activities." (Poppalardo; Miller; Rule 3010(a)(5)).	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
266	The purpose of Rule 3010(a)(5) is to protect investors.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
267	The "Regulatory Supervisor" column identified a person's supervisor from a compliance standpoint.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
268	The "Pi Org Chart Supervisor" designated a person's "boss" from a Human Resources perspective.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
269	For the time period relevant to this case, Yancey was always listed as Johnson's Regulatory Supervisor in PFSI's supervisory matrix.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
270	From May 2010 forward, Yancey was also listed as Johnson's Pi Org Chart	**Response** Delaney agrees with and joins Yancey's dispute of this

	supervisor in PFSI's supervisory matrix.	Proposed Finding of Fact and incorporates the same herein.
271	PFSI's supervisory matrix did not remain static, but rather was updated frequently.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
272	Kim Miller was the compliance department employee charged with maintaining the supervisory matrix.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
273	Miller attempted to make the matrix as accurate as possible, and relied on business unit leaders to advise them if the matrix was incorrect or needed revisions.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
274	If an executive alerted Miller that the supervisory matrix was incorrect, she would correct the document.	**Response** No dispute.
275	At some point, Miller was instructed to move Johnson from underneath Pendergraft to underneath Yancey, and to add Yancey as Johnson's regulatory supervisor.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
276	Miller presumed that Yancey was aware that she had been instructed to list Yancey as Johnson's regulatory supervisor.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
277	Miller provided the matrix to Yancey on more than one occasion.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
278	In February 2009, Yancey received a copy of the supervisory matrix from Miller that specifically updated the Stock Loan supervisory structure. Yancey was asked to review the supervisory matrix to alert Miller to any additional changes needed.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
279	Yancey had a chance to read and review the matrix.	**Response** No dispute.
280	It was Yancey's practice to read e-mails from compliance department employees.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.

281	Delaney expected that Yancey would review documents sent to him by the Compliance department for his review.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
282	Yancey specifically responded to Miller and thanked her for providing the matrix.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
283	The February 2009 supervisory matrix listed Johnson under Yancey, and listed Yancey as Johnson's regulatory supervisor. Johnson was not listed under Pendergraft.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
284	If Yancey had instructed Miller to move Johnson under Pendergraft, she would have done so. Yancey did not do so.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
285	In May 2010, Yancey again received a copy of the supervisory matrix from Miller. Yancey was asked to review the matrix for accuracy.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
286	After a PFSI executive altered Miller that she had attached the prior year's supervisory matrix, Miller re-sent an updated version, again to Yancey.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
287	The May 2010 supervisory matrix listed Johnson under Yancey, and listed Yancey as Johnson's regulatory supervisor. Johnson was not listed under Pendergraft.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
288	The May 2010 supervisory matrix had been updated to amend Johnson's title to Senior Vice President, and his employer to Penson Worldwide. It also continued to designate Yancey as Johnson's regulatory supervisor.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
289	Yancey did not respond to Miller to ask her to make any changes to the supervisory matrix.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
290	In August 2010, Joe Ross, a compliance department employee, e-mailed Eric Alaniz a copy of the supervisory matrix.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same

	Ross noted that he understood Alaniz discussed the supervisory matrix with Yancey quarterly.	herein.
291	The August 2010 supervisory matrix lists Johnson under Yancey, and Yancey was designated as both Johnson's regulatory supervisory and his "Pi Org Chart" supervisor. Johnson was not listed under Pendergraft.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
292	In November 2010, Miller e-mailed a copy of the supervisory matrix to Delaney. That supervisory matrix lists Johnson under Yancey, and Yancey was designated as both Johnson's regulatory supervisory and his "Pi Org Chart" supervisor. Johnson was not listed under Pendergraft.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
293	It is important for a broker-dealer to be accurate in its communications with regulators, including documents provided to regulators.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
294	Regulators typically requested a copy of the PFSI supervisory matrix.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
295	Miller also sent regulators the PFSI supervisory matrix.	**Response** No dispute.
296	In September 2010, PFSI sent a regulatory response to FINRA, which was an important regulator of PFSI. In that response, PFSI instructed FINRA to reference the supervisory matrix for a "description of Penson's supervisory chain identifying each supervisor's direct reports as well as the individual(s) to which each supervisor reports" for the time period May 2010 through August 2010. In the attached supervisory matrix, Johnson was listed under Yancey, and Yancey was designated as both Johnson's regulatory supervisory and his "Pi Org Chart" supervisor. Johnson was not listed under Pendergraft.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
297	Delaney would expect that Kim Miller's submission to FINRA would contain the	**Response** No dispute.

	most accurate, complete and up-to-date information available.	
298	By looking at the September 2010 supervisory matrix, FINRA would conclude that Yancey was Johnson's supervisor.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
299	In September 2010, PFSI sent a copy of the supervisory matrix to an examiner at the National Stock Exchange. In that supervisory matrix, Johnson was listed under Yancey, and Yancey was designated as both Johnson's regulatory supervisory and his "Pi Org Chart" supervisor. Johnson was not listed under Pendergraft.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
300	In October 2010, PFSI sent FINRA a copy of the supervisory matrix. In that supervisory matrix, Johnson was listed under Yancey, and Yancey was designated as both Johnson's regulatory supervisory and his "Pi Org Chart" supervisor. Johnson was not listed under Pendergraft.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
301	In November 2010, PFSI sent the Chicago Board of Options Exchange ("CBOE"), which is one of the primary options exchanges in the United States, a response to a CBOE inquiry which included a copy of the supervisory matrix. In that supervisory matrix, Johnson was listed under Yancey, and Yancey was designated as both Johnson's regulatory supervisory and his "Pi Org Chart" supervisor. Johnson was not listed under Pendergraft.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
302	By looking at the November 2010 supervisory matrix, CBOE would conclude that Yancey was Johnson's supervisor.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
303	In April 2011, PFSI sent a response to a CBOE inquiry. In that response, PFSI instructed FINRA to reference the supervisory matrix for a description of "regulatory supervisors." In the attached supervisory matrix, Johnson was listed	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.

	under Yancey, and Yancey was designated as both Johnson's regulatory supervisory and his "Pi Org Chart" supervisor. Johnson was not listed under Pendergraft.	
304	After August 2008, Yancey did not exercise any supervision over Johnson or PFSI's Stock Loan department.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
305	Yancey asked Johnson not to attend his weekly meetings once Johnson was promoted to Senior Vice President.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
306	Delaney was frustrated that Johnson did not attend the March 31, 2010 meeting with Yancey at which Rule 204 compliance was discussed, because "it was a step that [he] was taking above and beyond [his] role as the Chief Compliance Officer to try and facilitate some supervision discussion around what was happening at that time."	**Response** No dispute.
307	PFSI disclosed to FINRA in March 2011 that it was violating Rule 204 by not closing out until the afternoon of T+6.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
308	Even though PFSI disclosed to FINRA in March 2011 that it was violating Rule 204 by not closing out until the afternoon of T+6, and even though that sort of information was information Yancey expected should have been brought to his attention, Yancey did not learn of that practice until long after March 2011.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
309	Pendergraft's primary interactions with Johnson and PFSI Stock Loan were with respect to financing issues.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
310	In his 12 years working at PFSI and Penson Worldwide, Johnson received only one review, and it was prior to 2008.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
311	Johnson was not generally kept in the	**Response**

	loop on Penson matters.	Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
312	No one at PFSI supervised Johnson or the PFSI Stock Lending department with respect to regulatory or compliance issues.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
313	After Johnson was transitioned to Senior Vice President for Global Securities Lending, PFSI Stock Loan was essentially left alone from an oversight perspective.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
314	PFSI Stock Loan was unsupervised; the department had to "run on the fly and make it."	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
315	Prior to the time that Rule 204T was implemented, Mike Johnson requested a compliance person be assigned to the Stock Loan desk to assist with compliance issues. That individual left before Rule 204T was implemented, and was not replaced. Although several compliance personnel sat near the Stock Loan department, they were there because of space issues and did not provide compliance-related guidance to Stock Loan.	**Response** Dispute: Unsupported by the cited source; Incomplete recitation of the record. Although the compliance personnel were not hired in the same capacity as Nick Russell - strictly for the purpose of handling the naked short rule and monitoring and maintaining spreadsheets to make sure Stock Loan was covering short sales – Stock Loan had access to Compliance personnel for guidance. In fact, Compliance circulated rule releases and updates appropriately. As a result, Stock Loan understood the requirements under Rule 204. Further, Stock Loan helped draft the WSPs, which included adequate Rule 204 procedures. **Support** See Delaney's Response to the Division's FOF 132. **Tr. 222:2 – 224:22 [DeLaSierra]** Q … I want to talk now about interaction with the Compliance department and Stock Lending at PFSI to the extent you observed it. So was there any point in time where compliance was involved and embedded with Penson Financial Stock Lending? A Yes. Q Tell us about that. A We had a -- Nick Russell worked for us in a compliance type role. Q What do you mean "in a compliance type role"? What did Mr. Russell do? A

		Well, Mike wanted -- Mike Johnson wanted a compliance person. He came from compliance. He wanted that person on the desk. This was shortly before the naked short rule, and Nick's role was handling that for us. He monitored the spreadsheets and maintained those for the department to make sure that we were covering short sales that we approved on that day since we now had to pre-borrow for those securities. Q And you said Mr. Russell came on board shortly before the naked short rule. Do you recall approximately when that was? A 2007 possibly, -6 maybe. Q Okay. Do you recall -- well, let me ask it this way: Did Mr. Russell stay on Stock Lending's desk? A He did not. Q Do you recall when he left? A I don't know exactly when. He wasn't there when this -- when 204T went into place, he was no longer with the department -- or with the firm. Q So Mr. Russell left Penson Financial's Stock Lending department before Rule 204T came out; is that right? A Correct. Q Was Mr. Russell replaced? A He was not. Q Was there ever a point where personnel from Compliance sat near Stock Lending at Penson Financial Services? A Yes. Q Describe that for us. A We had -- the room setup? Q Yes, sir. A Okay. So on a -- one side of our room, Mike had his office. He had a sliding window and a door, so that was typically open. I was next to Mike. Next to my left was Brian Hall. We faced Lindsey Wetzig, Terry Ray, Dawnia Robertson, Marc McCain, Logan. Those are the operations. And then behind them was our two programmers, Matt Battaini and Dave Chen, and Dave faced the three compliance people that were in our group or in our area, I should say. Q And who were those three compliance people? A Holly Hasty, Kim Miller and Aaron McInerney. Q Do you know why Ms. Hasty, Ms. Miller and -- is it Ms. McInerney?

		A Mr. Q -- Mr. McInerney sat near Stock Lending? A I was told space. Q Were they there for the same reason that Mr. Russell was there? A No. Q Did you routinely interact with the three people you named in terms of compliance issues? A No. Q Did they routinely provide any sort of guidance on operational issues in Stock Lending? A No. **Proposed Counterstatement** **DeLaSierra testified that** prior to the time that Rule 204T was implemented, Mike Johnson requested a compliance person be assigned to the Stock Loan desk to assist with compliance issues. That individual left before Rule 204T was implemented, and was not replaced. Although several compliance personnel sat near the Stock Loan department, they were there because of space issues and did not **routinely** provide compliance-related guidance to Stock Loan.
316	Yancey currently worked in the broker-dealer industry as the managing director of clearing and execution services. He continues to supervise staff.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
317	PFSI's overall annual revenue was approximately $200 million to $250 million during the relevant time period.	**Response** No dispute.
318	PFSI Stock Loan's annual revenue was approximately in the range of $20 million to $25 million during the relevant time period, or approximately 10% of PFSI's total annual revenues.	**Response** No dispute.
319	Bonuses were calculated based on three components: performance of Penson Worldwide, the overall corporate entity; performance of PFSI; and Yancey's personal goals.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.
320	From 2008 through 2010, Yancey earned bonuses totaling between approximately $300,000 to $1.2 million dollars.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Finding of Fact and incorporates the same herein.

321	From 2008 through 2011, Delaney earned bonuses totaling approximately $40,000 dollars.	**Response** No dispute.
322	While Delaney claimed he was no longer acting as a Chief Compliance Officer, his current employer testified that he is currently serving in that position.	**Response** Dispute: Mischaracterization of the testimony; Not factually accurate. Delaney stepped down as Chief Compliance Officer at the broker-dealer. Simpson testified that Delaney is Chief Compliance Officer at the holding company. **Support** See Form U4. **Tr. 1212:20-1213:15 [Delaney]** Q Okay. Were you at one point the Chief Compliance Officer? A I was. Q When did that change? A In June of this past year. Q And do you have an understanding of why? A I do. Q What's that understanding? A When -- when I received my Wells letter, that becomes a disclosure issue on your -- on your Form U4. And once I had disclosed it, or in advance of the disclosing of that, I had a conversation with the management and leadership team at First Command. And we agreed that in order to -- which it would not just have been a personal disclosure, but as a Chief Compliance Officer, it also would have been a disclosure for First Command. And we -- we decided that it was best that I step down as the Chief Compliance Officer. Q Okay. Who's -- who's your supervisor there at First Command? A Hugh Simpson. **Tr. 1447:9-1447:24 [Simpson]** Q Thank you. In your current position at First Command, as the general counsel, do you lead the legal and compliance group? A Yes, I do. Q Presently how large is that group? A It's 29 persons including myself. It includes the legal team, the compliance team, and also our internal audit team. Q Do you know Tom Delaney, sitting here in the courtroom today? A Yes, I do.

		Q And how do you know Tom? A Tom serves as the chief compliance officer of our holding company. He joined us in early 2011 to assume that role, and of course I've known him through the recruiting process and ever since. **Proposed Counterstatement** Delaney decided to step down from his position as Chief Compliance Officer of the broker-dealer, after a discussion with the management and leadership team at First Command. Delaney's current employer testified that he is currently serving as the Chief Compliance Officer of the holding company.

	DIVISION'S PROPOSED CONCLUSION OF LAW	DELANEY'S RESPONSE
1	Rule 204T/204 require participants of a registered clearing agency to deliver equity securities to a registered clearing agency when delivery is due; that is, by settlement date. As relevant here, settlement date is generally three days after the trade date ("T+3"). For short sales, if the participant does not deliver securities by T+3 and has a failure-to-deliver position at the clearing agency (also referred to as CNS fails/failures to deliver), at market open on the morning of the settlement day following the settlement date ("T+4"), it must take affirmative action to close-out the failure-to-deliver position by purchasing or borrowing securities of like kind and quantity by no later than the beginning of regular trading hours on T +4. For long sales, if the participant has a failure-to-deliver position at the clearing agency (also referred to as CNS fails/failures to deliver) at market open on the morning of the third day following the settlement date ("T+6"), it must take affirmative action to close-out the failure-to-deliver position by purchasing or borrowing securities of like kind and quantity by no later than the beginning of regular trading hours on T+6.	**Response** Dispute: Redundant of Stipulated Conclusion of Law 1, which was previously stipulated to by all parties. A separate or additional conclusion of law is unnecessary. The Division has also attempted to change the language with which the parties previously agreed. **Support** See Stipulated Conclusion of Law 1. **Proposed Counterstatement** Rule 204T/204 requires participants of a registered clearing agency to deliver equity securities to a registered clearing agency when delivery is due; that is, by settlement date. As relevant here, settlement date is generally three days after the trade date ("T+3"). For short sales, if the participant does not deliver securities by T+3 and has a failure-to-deliver position at the clearing agency (also referred to as CNS fails/failures to deliver), at market open on the morning of T+4 it must take affirmative action to close out the failure-to-deliver position by purchasing or borrowing the securities of like kind and quantity by no later than the beginning of regular trading hours on the settlement day following the settlement date ("T+4"). For long sales, if the participant has a failure-to-deliver position at the clearing agency (also referred to as CNS fails/failures to deliver), **at market open on the morning of T+6 it must take affirmative action to close out the failure-to-deliver position by purchasing or borrowing securities of like kind and quantity by no later than the beginning of regular trading hours on the third day following the settlement date ("T+6")."** Tr. 2292:7 – 2293:15.
2	Section 15(b)(6) of the Exchange Act provides that, with respect to any person who is associated with a broker or dealer, the Commission shall sanction such person, if the Commission finds that such sanction is in the public interest and that such person has committed any act enumerated in subparagraph (E) of paragraph (4) of subsection 15(b). *See* 15 U.S.C. §78o(b)(6)(A)(i).	**Response** No dispute.
3	Section 15(b)(4)(E) provides for sanctions against one who has willfully aided, abetted, counseled, commanded, induced, or procured the violation by any other person of any rules or regulations	**Response** No dispute.

	under the Exchange Act. *See* 15 U.S.C. §78o(b)(4)(E).	
4	Section 21C of the Exchange Act provides that, if the Commission finds that any person has violated any rule or regulation under the Exchange Act, the Commission may publish its findings and enter an order requiring any person that was a cause of the violation to cease and desist from causing any future violation of the same provision, rule, or regulation. *See* 15 U.S.C. §78u-3(a).	**Response** No dispute.
5	Rule 204T/204 is a rule under the Exchange Act. 17 C.F.R. §242.204.	**Response** No dispute.
6	With respect to PFSI's violation of Rule 204 and Rule 204T, the Division is not required to show either materiality or scienter. *In the Matter of OptionsXpress, Inc.*, Rel. No. 490, 2013 WL 2471113 at *62 (June 7, 2013) ("Rule 204 and Rule 204T are strict liability provisions and scienter is not required for a violation.").	**Response** Disputed on several grounds. **Ground #1** Dispute: The citation identified by the Division does not support its proposed conclusion of law. **Support** *OptionsXpress* does not stand for the proposition that Rule 204 and Rule 20T do not require a showing of *materiality*. *See In the Matter of OptionsXpress, Inc.*, Rel. No. 490, 2013 WL 2471113 at *62 (June 7, 2013). **Ground #2** Dispute: Accuracy of conclusion. The primary violation charged by the Division in this case requires a showing of scienter. **Support** Delaney does not contest that *In the Matter of OptionsXpress, Inc.* indicated that Rule 204 and Rule 204T are strict liability provisions and scienter is not required for a violation. However, here, the Division did not charge mere technical violations of Rule 204T and Rule 204 as the primary violation. Rather, the alleged primary violation is "Penson's systematic, intentional practice of violating Rule 204(a) on failures to deliver related to long sales of loaned securities." (Division's Opposition to Delaney's Motion for More Definite Statement, June 19, 2014, p. 5 (emphasis added).) The Division confirmed it was charging an "intentional practice" to violate the law in multiple court filings: • Division's Opposition to Delaney's Motion for

		Postponement, p. 7: "While the individual failures to timely close out failures to deliver on long sales of loaned securities in this matter were violations of Rule 204(a), the Division has charged the overarching violation of the intentional practice of consistently violating Rule 204(a).") • Division's Opposition to Delaney's Motion for More Definite Statement, June 19, 2014, p. 6: "The Division has alleged that Penson's Stock Loan department instituted a policy and practice of intentionally and consistently violating Rule 204(a) with respect to a particular type of transactions—long sales of loaned securities." • Division's Opposition to Delaney's Motion for More Definite Statement, p. 5: "In sum, Delany does not need detailed trading information to inform him of the charges against him, which are centered on his aiding and abetting Penson's systematic, intentional practice of violating Rule 204(a) on all failures to deliver related to long sales of loaned securities."(emphasis added)); Where the Division has charged that Penson's Stock Loan Department instituted a policy and practice to intentionally violate the law—in essence, a scheme—it must prove scienter. *See U.S. v. Agnew,* 931 F.2d 1397, 1408 (10th Cir. 1991) ("Scienter its broad sense means knowledge, but has sometimes been used as a word of art connoting willfulness or specific intent to violate a known law."); *cf. SEC v. St. Anselm Exploration Co.,* 936 F.Supp.2d 1281, 1298 (D.Colo.2013) (observing that "scheme liability" requires proof of scienter).
	To prove that Delaney caused PFSI's violations, the Division must show that: 1) PFSI violated Rule 204/204T; 2) an act or omission by Delaney contributed to PFSI's violation; and 3) Delaney knew, or should have known, that his conduct would contribute to PFSI's violation. *In the Matter of Robert M. Fuller*, Rel. No. 34-48406, 2003 WL 22016309 at *4 (Aug. 25, 2003) ("Section 21C of the Exchange Act authorizes the Commission to order a person who was a cause of a violation, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation. To issue such an order, we must find that:	**Response** No dispute.

	(1) a primary violation occurred, (2) there was an act or omission by the respondent that was a cause of the violation, and (3) the respondent knew, or should have known, that his conduct would contribute to the violation."); *see also* 15 U.S.C. §78u-3(a) ("If the Commission finds, after notice and opportunity for hearing, that any person is violating, has violated, or is about to violate any provision of this chapter, or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, and any other person that is, was, or would be a cause of the violation, due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation.").	
8	The Division need only show that Delaney was negligent to prove that he caused PFSI's violation. *See KPMG Peat Marwick LLP*, Rel. No. 34-43862, 2001 WL 47245, at *19 (Jan. 19, 2001) ("We hold today that negligence is sufficient to establish "causing" liability under Exchange Act Section 21C(a), at least in cases in which a person is alleged to "cause" a primary violation that does not require scienter.").	**Response** Dispute: The cited legal principle is not applicable to the allegations in this case because, as indicated in Delaney's Response to the Division's proposed Conclusion of Law 6, the primary violation charged by the Division requires scienter. **Support** *See KPMG Peat Marwick LLP*, Rel. No. 34-43862, 2001 WL 47245, at *19 (Jan. 19, 2001) ("We hold today that negligence is sufficient to establish "causing" liability under Exchange Act Section 21C(a), at least in cases in which a person is alleged to "cause" a primary violation that does not require scienter." (emphasis added)); *see also, e.g.,* In the Matter of Robert W. Armstrong, III , 2004 WL 737067 *12, Release No. 248 (April 6, 2004) ("It is assumed that scienter is required to establish secondary liability for causing a primary violation that requires scienter.")
9	A finding of willfulness does not require an intent to violate the law, but merely an intent to do the act which constitutes a violation. *See, e.g.*, *Wonsover v. SEC*, 205 F.3d 408, 413-15 (D.C. Cir. 2000) ("*In Gearhart & Otis, Inc. v. SEC*, 348 F.2d 798 (D.C.Cir.1965), we rejected the argument 'that specific intent to violate the law is an essential element of the willfulness required to violate Section	**Response** Dispute: Redundant of Stipulated Conclusion of Law 6, which addresses the standard for willfulness. A separate or additional conclusion of law is unnecessary. **Support** Stipulated Conclusion of Law 6. **Proposed Counterstatement** Willfulness is shown where a person intends to commit an

	15(b)' and noted that the argument 'ha[d] been rejected by this court, by the Second Circuit, and by the Commission.' 348 F.2d at 802-03. We further stated that '[i]t has been uniformly held that "willfully" in this context means intentionally committing the act which constitutes the violation' and rejected the contention that 'the actor [must] also be aware that he is violating one of the Rules or Acts.'" Id. at 803.").	act that constitutes a violation.
10	Negligent conduct meets the requirement of willfulness. *See Matter of C. James Padgett*, Rel. No. 34-38423, 1997 WL 126716 at *7 & n. 34 (March 20, 1997) ("Padgett and Graff argue that negligent conduct cannot support a finding of 'willful' conduct. Section 15(b) of the Exchange Act, under which this proceeding was brought, requires a finding of a violation of the securities laws to be 'willful.' The courts have long held that willfulness here means no more than intentionally committing the act that constitutes the violation. *Tager v. SEC*, 344 F.2d 5, 8 (2d Cir. 1965); *Arthur Lipper Corp. v. SEC*, 547 F.2d at 180.")	**Response** Disputed on several grounds. **Ground #1** Dispute: The proposed Conclusion of Law is contrary to Stipulated Conclusion of Law 6. **Support** Stipulated Conclusion of Law 6: "Willfulness is shown where a person **intends** to commit an act that constitutes a violation." (emphasis added). **Ground #2** Dispute: The Division's novel contention is not an accepted or accurate statement of law. **Support** *See, e.g., Allison v. Bank-One Denver,* 1994 WL 637403 *10 (D. Colo., Jan. 7, 1994) ("An act in violation of securities laws is done willfully 'if done intentionally and deliberately and if it is not the result of innocent mistake, negligence or inadvertence.'" (quoting *United States v. Dixon,* 536 F.2d 1388, 1397 (2d Cir.1976)); *Feist v. U.S.,* 607 F.2d 954, 961 (Ct. Cl. 1979) (observing, "'Willfulness' has been almost universally defined as an intentional, voluntary, conscious act or omission," and that "[m]ere negligence is not sufficient proof of willfulness."). **Ground #3** Dispute: The cited source is does not support the proposed Conclusion of Law and is distinguishable from the present case. **Support** *In the Matter of C. James Padgett*, does not state that "negligent conduct meets the requirements of willfulness." *See* Rel. No. 34-38423, 1997 WL 126716 at *7 & n. 34 (March 20, 1997). In addition, the footnote in *Padgett,* upon which the Division relies, concerned claims for direct violations of Section 17(a)(2) and (3) of the Securities Act,

		which do not require a finding of scienter. *See id.* This case is different. *See* Stipulated Conclusion of Law 5 (aiding and abetting requires a showing a scienter); *see also* Delaney's Reponses to the Division's proposed Conclusions of Law 6 and 8. **Proposed Counterstatement** Willfulness is shown where a person intends to commit an act that constitutes a violation.
11	To prove that Delaney aided and abetted PFSI's violations, the Division must show that: 1) PFSI violated Rule 204/204T; 2) Delaney substantially assisted PFSI's violation; and 3) Delaney knew of, or recklessly disregarded, the wrongdoing and his role in furthering it. *In the Matter of Eric J. Brown, et al.*, Rel. No. 34-66469, 2012 WL 625874 (February 27, 2012) ("To establish that a respondent aided and abetted a books and records violation, we must find that (1) a violation of the books and records provisions occurred; (2) the respondent substantially assisted the violation; and (3) the respondent provided that assistance with the requisite scienter. The scienter requirement for aiding-and-abetting liability in administrative proceedings may be satisfied by evidence that the respondent knew of, or recklessly disregarded, the wrongdoing and his or her role in furthering it.").	**Response** Dispute: This standard should not be followed to the extent it is limited to a books and records case and because, as set forth in Delaney's concurrently filed Brief in Response to the Division's Post-Hearing Brief, the Division did not plead or otherwise proceed on a recklessness theory prior to trial, but rather claimed only that Delaney acted knowingly and intentionally to aid and abet Penson to violate Rule 204T(a)/204(a). **Support** *In the Matter of Eric J. Brown, et al.*, Rel. No. 34-66469, 2012 WL 625874 (February 27, 2012) (indicating, "[t]o establish that a respondent aided and abetted a books and records violation . . . ." (emphasis added)). Delaney's Brief in Response to the Division's Post-Trial Brief, pp. 2-5. **Proposed Counterstatement** To prove Delaney aided and abetted PFSI to violate Rule 204T(a)(1)/204(a)(1) of Regulation SHO, the Division must prove each of the following three elements: (1) "a primary or independent securities law violation committed by another party"; (2) "awareness or knowledge by the aider and abettor that his or her role was part of any overall activity that was improper"; and (3) "that the aider and abettor knowingly and substantially assisted the conduct that constitutes the violation." *See Woods v. Barnett Bank of Ft. Lauderdale*, 765 F.2d 1004, 1009 (11th Cir. 1985 ("'[A] person may be held as an aider and abettor only if some other party has committed a securities law violation, if the accused party has general awareness that his role was part of an overall activity that is improper, and if the accused aider-abettor knowingly and substantially assisted the violation.'" (quoting *Woodward v. Metro Bank of Dallas,* 522 F.2d 84, 94-97 (5th Cir. 1975)); *accord Investors Research Corp. v. SEC,* 628 F.2d 168, 178 (D.C.Cir.1980) (identifying the elements of aiding and abetting as "1) another party has committed a securities law

		violation; 2) the accused aider and abetter had a general awareness that his role was part of an overall activity that was improper; and 3) the accused aider and abetter knowingly and substantially assisted the principal violation.").
12	The Division may show that Delaney substantially assisted PFSI's violations by demonstrating that he repeatedly disregarded red flags of suspicious activity and did not report that activity to Yancey. *See In The Matter Of Ronald S. Bloomfield, et al.*, Rel. No. 34-71632, 2014 WL 768828 at *17 (Feb. 27, 2014) ("Bloomfield and Martin substantially assisted Leeb's violations by repeatedly disregarding red flags of suspicious activity in the Uselton and Thimble accounts and not reporting that activity to Leeb.").	**Response** Dispute: Inconsistent with Stipulated Conclusion of Law 7, which was previously stipulated to by all parties, and which addresses the substantial assistance element. A separate or additional conclusion of law is unnecessary. **Support** Stipulated Conclusion of Law 7. **Proposed Counterstatement** To satisfy the substantial assistance element of aiding and abetting, the SEC must show that the defendant in some sort associated himself with the venture, that he participated in it as something that he wished to bring about, and that he sought by his action to make it succeed.
13	Recklessness may be found if Delaney encountered red flags or suspicious events creating reasons for doubt that should have alerted him to the improper conduct of the primary violator. *Howard v. SEC*, 376 F.3d 1136, 1143 (D.C. Cir. 2004) ("'Extreme recklessness' - or as many courts of appeals put it, 'severe recklessness' - may be found if the alleged aider and abettor encountered 'red flags,' or 'suspicious events creating reasons for doubt' that should have alerted him to the improper conduct of the primary violator, *Graham*, 222 F.3d at 1006; *see also Wonsover v. SEC*, 205 F.3d 408, 411 (D.C.Cir.2000), or if there was 'a danger ... so obvious that the actor must have been aware of' the danger. *Steadman*, 967 F.2d at 641-42, *quoting Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1045 (7th Cir.), *cert. denied*, 434 U.S. 875, 98 S.Ct. 225, 54 L.Ed.2d 155 (1977); *see also Wonsover*, 205 F.3d at 414.").	**Response** No dispute with the standard of extreme reckless, only with the applicability to this case, for the reasons stated in Delaney's response to the Division's proposed Conclusions of Law 11-12.
14	A finding that one willfully aids and abets a violation necessarily makes that person a "cause" of those violations. *Matter of Sharon M. Graham*, Rel. No.	**Response** No dispute.

	34-40727, 1998 WL 823072 at n. 35 (Nov. 30, 1998). ("Our finding that Graham willfully aided and abetted Broumas' violations necessarily makes her a "cause" of those violations. *See Dominick & Dominick, Incorporated*, 50 S.E.C. 571, 578 n.11 (1991). As noted above, to conclude that a respondent aided and abetted another's violation, it must be found that the respondent acted with scienter. A respondent is a "cause" of another's violation if the respondent "knew or should have known" that his or her act or omission would contribute to such violation. Exchange Act Section 21C(a).").	
15	Section 15(b)(4)(E) provides for sanctions against one who has failed reasonably to supervise, with a view to preventing violations of the rules and regulations under the Exchange Act, another person who commits such a violation, if such other person is subject to his supervision. *See* 15 U.S.C. §78o(b)(4)(E).	**Response** No dispute.
16	Section 15(b)(4)(E) provides an affirmative defense to a failure to supervise charge: That section provides that no person shall be deemed to have failed reasonably to supervise any other person, if (i) there have been established procedures, and a system for applying such procedures, which would reasonably be expected to prevent and detect, insofar as practicable, any such violation by such other person, and (ii) such person has reasonably discharged the duties and obligations incumbent upon him by reason of such procedures and system without reasonable cause to believe that such procedures and system were not being complied with. *See Matter of Michael Bresner,* Rel. No. 517, 2013 WL 5960690 at * 117 (Nov. 8, 2013) ("Section 15(b)(4)(E) of the Exchange Act and Section 203(e)(6) of the Advisers Act provide an affirmative defense: no person may be deemed to have failed to reasonably supervise if (1) there have been established procedures,	**Response** No dispute.

	and a system for applying such procedures, to prevent and detect any violation; and (2) the person has reasonably satisfied his duties and obligations without reasonable cause to believe that the procedures and system were not being followed."); 15 U.S.C. §78o(b)(4)(E).	
17	The affirmative defense provided by Section 15(b)(4)(E) does not apply where there are no "established procedures, or a system for applying those procedures, which together reasonably could have been expected to detect and prevent the violations." *Michael Bresner,* 2013 WL 5960690 at * 116 ("This affirmative defense does not apply where there are no 'established procedures, or a system for applying those procedures, which together reasonably could have been expected to detect and prevent the violations.'") (*citing John H. Gutfreund*, Rel. No. 34-31554, 1992 WL 362753 at n. 20 (Dec. 3, 1992)).	**Response** No dispute.
18	NASD Rule 3010 provides that a broker-dealer's supervisory system shall provide for the assignment of each registered person to an appropriately registered representative(s) and/or principal(s) who shall be responsible for supervising that person's activities. NASD Rule 3010(a)(5) ("Each member shall establish and maintain a system to supervise the activities of each registered representative, registered principal, and other associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable NASD Rules. Final responsibility for proper supervision shall rest with the member. A member's supervisory system shall provide, at a minimum, for the following: … (5) The assignment of each registered person to an appropriately registered representative(s) and/or principal(s) who shall be responsible for supervising that person's activities.").	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Conclusion of Law and incorporates the same herein.

19	Proper supervision is the touchstone to ensuring that broker-dealer operations comply with the securities laws and NASD rules. It is also a critical component to ensuring investor protection. *Matter of Dennis S. Kaminski*, Rel. No. 34-65347, 2011 WL 4336702 (September 16, 2011) ("Proper supervision is the touchstone to ensuring that broker-dealer operations comply with the securities laws and NASD rules. It is also a critical component to ensuring investor protection.")	**Response** No dispute.
20	To prove that Yancey failed to supervise Delaney, the Division must show that: 1) Yancey was a registered person; 2) Yancey failed to reasonably supervise Delaney with a view to preventing violations of the securities laws; 3) Delaney was a registered person; 4) Delaney was subject to Yancey's supervision; and 5) Delaney committed such violation. *See* 15 U.S.C. §78o(b)(4)(E) ("The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated- - ... has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision.").	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Conclusion of Law and incorporates the same herein.
21	To prove that Yancey failed to supervise Johnson, the Division must show that: 1) Yancey was a registered person; 2) Yancey failed to reasonably supervise Johnson with a view to preventing violations of the securities laws; 3) Johnson was a registered person; 4)	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Conclusion of Law and incorporates the same herein.

	Johnson was subject to Yancey's supervision; and 5) Johnson committed such violation. *See* 15 U.S.C. §78o(b)(4)(E) ("The Commission, by order, shall censure, place limitations on the activities, functions, or operations of, suspend for a period not exceeding twelve months, or revoke the registration of any broker or dealer if it finds, on the record after notice and opportunity for hearing, that such censure, placing of limitations, suspension, or revocation is in the public interest and that such broker or dealer, whether prior or subsequent to becoming such, or any person associated with such broker or dealer, whether prior or subsequent to becoming so associated- - ... has failed reasonably to supervise, with a view to preventing violations of the provisions of such statutes, rules, and regulations, another person who commits such a violation, if such other person is subject to his supervision.")	
22	Neither scienter nor willfulness is an element of a failure to supervise charge. *Matter of Michael Bresner*, Rel. No. 517, 2013 WL 5960690 at * 117 (Nov. 8, 2013) ("Neither scienter nor willfulness is an element of a failure-to-supervise charge, although scienter may be considered in evaluating the reasonableness of supervision.") (*citing Clarence Z. Wurts*, Rel. No. 34-43842, 2001 WL 32844 at * 8 (2001)).	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Conclusion of Law and incorporates the same herein.
23	To prove that Yancey failed to reasonably supervise Delaney, the Division may show that Yancey ignored red flags. *Matter of Banc of America Investment Services, Inc. and Virginia Holliday*, Release No. 34-60870, 2009 WL 3413048 *6 (October 22, 2009) ("Red flags and suggestions of irregularities demand inquiry as well as adequate follow up and review. When indications of impropriety reach the attention of those in authority, they must act decisively to detect and prevent violations of federal securities laws."). Particular vigilance in response to red flags is especially important in large	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Conclusion of Law and incorporates the same herein.

	firms such as PFSI. *See Wedbush Securities, Inc.*, Exch. Act Rel. No. 25504, 48 SEC 963, 967 (Mar. 24, 1988) (Commission opinion reviewing NASD disciplinary action) ("In large organizations it is especially imperative that those in authority exercise particular vigilance when indications of irregularity reach their attention").	
24	The Division may prove that Johnson was subject to Yancey's supervision by showing that Yancey was the CEO, who is ultimately responsible for supervision of all registered employees. *Matter of Johnny Clifton*, Rel. No. 34-69982, 2013 WL 3487076 at *12 & n.81 (July 12, 2013) ("As the president of MPG Financial, and under the firm's WSPs, Clifton was responsible for supervising Registered Representative No. 1.").	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Conclusion of Law and incorporates the same herein.
25	The "facts and circumstances" or "*Gutfruend*" test has never been applied to relieve a CEO of supervisory responsibility. *See John H. Gutfreund*, 1992 WL 362753; *Matter Of James J. Pasztor*, Rel. No. 34-42008, 1999 WL 820621 at n. 27 (October 14, 1999) ("The Commission did not suggest in *Gutfreund* that there are circumstances under which [line supervisors] might be relieved of their responsibility for associated persons subject to their supervision."); *Matter of Angelica Aguilera*, 2013 WL 3936214, *23 (July 31, 2013) (The "facts and circumstances" test ("*Gutfruend*") "related to the Commission's discussion of liability regarding the chief legal counsel of the firm who the Commission stated did not become a supervisor ""solely" because of his position, as opposed to the president of the firm, who the Commission stated "was responsible for compliance with all of the requirements imposed on his firm …").	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Conclusion of Law and incorporates the same herein.
26	The CEO may delegate supervision of registered persons, but such delegation must be clear, reasonable, and effective.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Conclusion of Law and incorporates the same

	See Application of Midas Securities, LLC, Rel. No. 34-66200, 2012 WL 169138 at * 13 (Jan. 20, 2012) (effective delegation of supervision requires clear vesting of supervisory responsibility; "Lee's cited evidence does not refute his failure to effectively delegate supervision by clearly vesting supervisory responsibility in Cantrell for Centeno's and Santohigashi's sales."); *Application of Kirk A. Knapp*, Rel. No. 34-30391, 1992 WL 40436 at * 4 Feb. 21, 1992) (President who failed to make an effective delegation of authority retained his responsibility for supervision; "The president of a brokerage firm is responsible for the firm's compliance with all applicable requirements unless and until he reasonably delegates a particular function to another person in the firm, and neither knows nor has reason to know that such person is not properly performing his duties. We think it clear that Seshadri never made a reasonable or effective delegation of authority to Skalski. Seshadri therefore retained his responsibility for supervising sales, a responsibility he failed to shoulder.").	herein.
27	It is the burden of the CEO to prove that there has been clear, reasonable, and effective delegation. *SEC v. Yu*, 231 F. Supp. 2d 16, 21 (D. D.C. 2002) (Defendant must submit "reliable evidence" of delegation to another individual).	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Conclusion of Law and incorporates the same herein.
28	The "facts and circumstances" or "*Gutfruend*" test has never been applied to prove a delegation.	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Conclusion of Law and incorporates the same herein.
29	If there is confusion concerning delegation, the delegation is not clear, reasonable, and effective, and the CEO of the broker dealer retains responsibility. *See Matter Of Koch Capital, Inc.*, Rel. No. 34-31652, 1992 WL 394580 at *5 (December 23, 1992) ("Applicants contend that Wolford was responsible for	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Conclusion of Law and incorporates the same herein.

	Koch capital's compliance with Rule 15c2--6. However, as President, Koch had the ultimate individual responsibility for assuring that the firm's compliance procedures were adequate. *Far from discharging this obligation, the record shows that Koch took no responsibility for compliance with Rule 15c2–6, but rather created confusion as to who was responsible.* Koch testified that he was not responsible for compliance, and he was not sure whether Wolford or Jones was responsible for compliance during the relevant period of time. While Koch assertedly delegated to Wolford the duty to write the compliance procedures, he knew that Wolford was inexperienced, and that the transition of day-to-day compliance responsibilities from Wolford to Jones resulted in a state of confusion in which no one assumed responsibility for compliance. In any event, Koch did nothing to ensure that Wolford wrote the procedures, that the procedures that she wrote were adequate, or that the firm implemented the procedures. To the contrary, as developed in the hearing before the Board of Governors, Koch ignored Wolford's insistence that Koch capital adopt more extensive procedures to secure compliance, and refused even to review her written drafts of such procedures.") (emphasis added).	
30	The Division may prove that Yancey failed to reasonably supervise Johnson by showing that there was a supervisory vacuum resulting in violations of Rule 204T/204. *See Matter Of The Application Of Bradford John Titus*, Rel. No. 34-38029, 1996 WL 705335 (December 9, 1996) ("Titus contends that he should not be held responsible for Dickinson's failure to fill the supervisory vacuum created by the departure of Broker/Dealer Services. As discussed above, however, Titus failed to fulfill his responsibilities as SROP and compliance director. We have previously rejected the assertion that a firm's change in corporate structure or supervisory systems provides	**Response** Delaney agrees with and joins Yancey's dispute of this Proposed Conclusion of Law and incorporates the same herein.

	a defense for abdicating obligations. As compliance officer, Titus was responsible for enforcing adequate supervisory procedures. Yet, after Viggers left the Firm and Broker/Dealer Services was disbanded, Titus did not approach senior management to provide replacement supervision.").	
31	Section 21C of the Exchange Act provides that, if the Commission finds that any person has violated any rule or regulation under the Exchange Act, the Commission may publish its findings and enter an order requiring any person that was a cause of the violation to cease and desist from causing any future violation of the same provision, rule, or regulation. *See* 15 U.S.C. §78u-3(a).	**Response** Dispute: The conclusion of law omits material language from the cited source. **Support** *See* 15 U.S.C. § 78u-3(a) (stating, in pertinent part: "If the Commission finds, **after notice and opportunity for hearing**, that any person is violating, has violated, or is about to violate any provision of this chapter, or any rule or regulation thereunder, the Commission may publish its findings and enter an order requiring such person, and any other person that is, was, or would be a cause of the violation, **due to an act or omission the person knew or should have known would contribute to such violation**, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation." (emphasis added)). **Proposed Counterstatement** Section 21C of the Exchange Act provides, in pertinent part, that if the Commission finds, after notice and opportunity for hearing, that any person has violated any rule or regulation under the Exchange Act, the Commission may publish its findings and enter an order requiring any person that was a cause of the violation due to an act or omission the person knew or should have known would contribute to such violation, to cease and desist from committing or causing such violation and any future violation of the same provision, rule, or regulation.
32	In deciding whether to issue a cease-and-desist order, the court must consider whether there is a reasonable likelihood of future securities violations. *KPMG Peat Marwick LLP*, Rel. No. 34-43862, 2001 WL 47245 at *26 (Jan. 19, 2001). In the ordinary course, a past violation suffices to establish a risk of future violations. *Id.* The showing necessary to demonstrate the likelihood of future violations is "significantly less than that	**Response** Dispute: Delaney disputes that statement "[i]n the ordinary course, a past violation suffices to establish a risk of future violations." The Division fails to inform the Court that, in a subsequent order in the *KPMG Peat Marwick* case, the Commission reconsidered and backed-off the statement. **Support** *KPMG Peat Marwick LLP* Rel. No. 44050 (Mar. 8, 2001) (although upholding the cease-and-desist order, the Commission found the mere existence of a past violation

	required for an injunction." *Id.*	was not enough to support a finding of a risk of future violations: "This does not mean, however, that even in the ordinary case issuance of a cease-and-desist order is "automatic" on a finding of past violation. Instead, as we made clear in our opinion, "[a]long with the risk of future violations, we will continue to consider our traditional factors in determining whether a cease-and-desist order is an appropriate sanction…") *WHX Corp. v. SEC*, 362 F. 3d 854, 859 (DC Cir. 2004) ("Under [the SEC's] view, apparently the 'risk of future violation' is satisfied if (1) a party has committed a violation of a rule, and (2) that party has not exited the market or in some other way disabled itself from recommission of the offense. Given that the first condition is satisfied in every case where the Commission seeks a cease-and-desist order on the basis of past conduct, and the second condition is satisfied in almost every such case, this can hardly be a significant factor in determining whether a cease-and-desist order is warranted. The Commission itself has disclaimed any notion that a cease-and-desist is 'automatic' on the basis of such an almost inevitably inferred risk of future violation.").

33	In deciding whether to issue a cease-and-desist order, the court may consider several factors including the seriousness of the violation, the isolated or recurrent nature of the violation, the respondent's state of mind, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, the respondent's opportunity to commit future violations, whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings. *KPMG Peat Marwick LLP*, Rel. No. 34-43862, 2001 WL 47245 at *26 (Jan. 19, 2001). This inquiry is a flexible one and no one factor is dispositive. *Id.* It is undertaken not to determine whether there is a "reasonable likelihood" of future violations but to guide the court's discretion. *Id.*	**Response** Dispute: This conclusion of law is not supported by the cited source, insomuch as the Division's use of "may"—particularly in contrast to its use of "must" in its proposed Conclusion of Law 32—inaccurately suggests that consideration of these additional factors is optional. In addition, this conclusion ignores other guidance that supports limiting the reliance on "assurances against future violations," and "opportunity to commit future violations." **Support** *KPMG Peat Marwick LLP*, Rel. No. 34-43862, 2001 WL 47245 at *26 (Jan. 19, 2001) (stating: "**Along with the risk of future violations, we will continue to consider our traditional factors in determining whether a cease-and-desist order is an appropriate sanction based on the entire record**. Many of these factors are akin to those used by courts in determining whether injunctions are appropriate, including the seriousness of the violation, the isolated or recurrent nature of the violation, the respondent's state of mind, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, and the respondent's opportunity to commit future violations. In addition, we consider whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the context of any other sanctions being sought in the same proceedings." (emphasis added)). *KPMG, LLP v. S.E.C.,* 289 F.3d 109, 127 (D.C. Cir. 2002) (*dissent*) (observing,"[t]he reconsideration order criticizes KPMG for its 'consistent failure to recognize the seriousness' of its violations. True, KPMG mounted a vigorous defense to the SEC's case, but those charged with misconduct have a right to defend themselves.") *KPMG Peat Marwick LLP* Rel. No. 44050 (Mar. 8, 2001), *supra* *WHX Corp. v. SEC*, 362 F. 3d 854, 859 (DC Cir. 2004), *supra* **Proposed Counterstatement** Along with the risk of future violations, the court may consider the isolated or recurrent nature of the violation, the respondent's state of mind, the sincerity of the respondent's assurances against future violations, and to a lesser degree—both the respondent's recognition of the wrongful nature of his or her conduct and the respondent's opportunity to commit future violations. In addition, we consider whether the violation is recent, the degree of harm to investors or the marketplace resulting from the violation, and the remedial function to be served by the cease-and-desist order in the

34	Section 15(b)(6) of the Exchange Act provides that the Commission shall censure, limit, suspend, or bar any associated person from being associated with a broker, dealer, investment adviser, municipal securities dealer, municipal advisor, transfer agent, or nationally recognized statistical rating organization, or from participating in an offering of penny stock, if the Commission finds that such censure, limitation, suspension, or bar is in the public interest. *See* 15 U.S.C. §78o(b)(6)(A)(i).	**Response** No dispute.
35	The Dodd-Frank Wall Street Reform and Consumer Protection Act, enacted on July 21, 2010, provided additional collateral bar sanctions to Exchange Act Section 15(b). Pub. L. No. 111-203, 124 Stat. 1376 (2010). In addition, the collateral bars added by the Dodd-Frank Act may be imposed even if some of the violative conduct pre-dated the Dodd-Frank Act because the bars are prospective remedies "whose purpose is to protect the investing public from future harm." *Matter of John W Lawton,* Rel. No. 3513, 2012 WL 6208750 at *7 - 10 (Dec. 13, 2012).	**Response** No dispute.
36	In determining the public interest the Commission has considered the following factors: the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, the likelihood that the respondent's occupation will present opportunities for future violations, the age of the violation, the degree of harm to investors and the marketplace resulting from the violation, and, in conjunction with other factors, the extent to which the sanction will have a deterrent effect. *See Matter of Gary M. Kornman*, Rel. No. 34-59403, 2009 WL 367635 at * 6 (Feb. 13, 2009) (*citing Steadman v. SEC,* 603 F.2d 1126, 1140 (5th Cir. 1979), *aff'd on*	**Response** Dispute: accuracy of statement. Deterrence is not one of the *Steadman* factors, but rather a consideration weighed against punishment when determining the severity of sanctions. **Proposed Counterstatement and Support** In determining the public interest the Commission has considered the following factors: the egregiousness of the respondent's actions, the isolated or recurrent nature of the infraction, the degree of scienter involved, the sincerity of the respondent's assurances against future violations, the respondent's recognition of the wrongful nature of his or her conduct, the likelihood that the respondent's occupation will present opportunities for future violations, the age of the violation, the degree of harm to investors and the marketplace resulting from the violation and, in conjunction with other factors, the extent to which the sanction will have a deterrent effect. The purpose of imposing sanctions is deterrence, not to punish the Respondent. In the Matter of Stephen J. Horning, Exchange Act Release No. 56886, 2007 SEC LEXIS 2796, at *24 (Dec. 3, 2007).

	other grounds, 450 U.S. 91 (1981)); *Matter of Ralph W. LeBlanc*, Rel. No. 34-48254, 2003 WL 21755845 at * 6 (July 30, 2003); *Matter of Peter Siris*, Rel. No. 34-71068, 2013 WL 6528874 at n.72 (Dec. 12, 2013).	
37	The "'inquiry into the appropriate sanction to protect the public interest is a flexible one and no one factor is dispositive.'" *See Kornman*, 2009 WL 367635 at * 6 (quoting *Matter of David Henry Disraeli*, Rel. No. 34-57027, 2007 WL 4481515 at * 15 (Dec. 21, 2007)).	**Response** No dispute.
38	The determination of what is in the public interest "extends ... to the public-at-large," "the welfare of investors as a class," and "standards of conduct in the securities business generally." *See Matter of Christopher A. Lowry*, Rel. No. IA-2052, 2002 WL 1997959 at * 6 (Aug. 30, 2002), *aff'd*, 340 F.3d 501 (8th Cir. 2003); *Matter of Arthur Lipper Corp.*, Rel. No. 34-11773, 1975 WL 163472 at * 15 (Oct. 24, 1975).	**Response** No dispute.
39	Section 21B(a)(2) of the Exchange Act provides that, in any proceeding instituted under Section 21C, the Commission may impose a civil penalty if the Commission finds that person is or was a cause of the violation of any rule or regulation issued under the Exchange Act. 15 U.S.C. §78u-2(a)(2)(B).	**Response** No dispute.
40	Section 21B(a)(1) of the Exchange Act further provides that, in any proceeding instituted under Section 15(b), the Commission may impose a civil penalty if it finds that such penalty is in the public interest and that such person has willfully aided and abetted a violation of the securities laws. 15 U.S.C. §78u-2(a)(1)(B).	**Response** No dispute.
41	Section 21B(a)(1) of the Exchange Act also provides that the Commission may impose a civil penalty if it finds that such penalty is in the public interest and that such person has failed reasonably to	**Response** No dispute.

	supervise, within the meaning of section 15(b)(4)(E), with a view to preventing violations of rules and regulations, another person who commits such a violation, if such other person is subject to his supervision. 15 U.S.C. §78u-2(a)(1)(D).	
42	In making the public interest determination required by Section 21B(a)(1) of the Exchange Act, the Commission may consider (1) whether the act or omission for which such penalty is assessed involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement; (2) the harm to other persons resulting either directly or indirectly from such act or omission; (3) the extent to which any person was unjustly enriched, taking into account any restitution made to persons injured by such behavior; (4) whether such person previously has been found by the Commission, another appropriate regulatory agency, or a self-regulatory organization to have violated the Federal securities laws, State securities laws, or the rules of a self-regulatory organization, has been enjoined by a court of competent jurisdiction from violations of such laws or rules, or has been convicted by a court of competent jurisdiction of violations of such laws or of any felony or misdemeanor described in section 15(b)(4)(B) of this title; (5) the need to deter such person and other persons from committing such acts or omissions; and (6) such other matters as justice may require. 15 U.S.C. §78u-2(c).	**Response** No dispute.
43	Section 21B(b) establishes a three-tier penalty structure and provides that a third-tier penalty is appropriate where (A) the act or omission involved a deliberate or reckless disregard of a regulatory requirement; and (B) such act or omission directly or indirectly created a significant risk of substantial losses to other persons. 15 U.S.C. §78u-2(b)(3).	**Response** No dispute.

44	Section 21B(e) of the Exchange Act provides that, in any proceeding in which the a penalty may be imposed, disgorgement may also be ordered. 15 U.S.C. §78u-2(e).	**Response** No dispute.
45	Disgorgement is an equitable remedy that requires a violator to give up wrongfully obtained profits causally related to the proven wrongdoing. *See SEC v. First City Fin. Corp.,* 890 F.2d 1215, 1230-32 (D.C. Cir. 1989).	**Response** No dispute.

DATED this 20th day of January 2015.

CLYDE SNOW & SESSIONS

BRENT R. BAKER
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