

UNITED STATES OF AMERICA  
DEPARTMENT OF THE TREASURY  
COMPTROLLER OF THE CURRENCY

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<b>In the Matter of:</b>	)	
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First Niagara Bank, N.A.	)	AA-EC-2016-64
Buffalo, New York	)	
	)	

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**CONSENT ORDER**

The Comptroller of the Currency of the United States of America (“Comptroller”), through his national bank examiners and other staff of the Office of the Comptroller of the Currency (“OCC”), has conducted an examination of First Niagara Bank, N.A., Buffalo, New York (“Bank”). The OCC has identified deficiencies in the Bank’s practices that resulted in a violation of Section 5 of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 45(a)(1), related to the calculation of overdraft and non-sufficient funds fees (collectively “overdraft fees”).

The Bank, by and through its duly elected and acting Board of Directors (“Board”), has executed a Stipulation and Consent to the Issuance of a Consent Order, dated 9/6/16, that is accepted by the Comptroller (“Stipulation”). By the Stipulation, which is incorporated herein by reference, the Bank has consented to the issuance of this Consent Cease and Desist Order (“Order”) by the Comptroller.

## ARTICLE I

### COMPTROLLER'S FINDINGS

The Comptroller finds, and the Bank neither admits nor denies, the following:

(1) In 2012 and 2013, the Bank issued inaccurate deposit account disclosures (“Disclosures”) related to the calculation of Overdraft Fees (as defined in Article III). The Disclosures remained in effect until February 2015.

(2) The Disclosures were inaccurate because they stated only that the Bank would subtract deposited funds that were not yet available for withdrawal from the ledger balance to obtain the adjusted balance used to determine whether an overdraft fee was charged. However, the Bank’s actual practice was to (i) also subtract funds for must-pay items – items that had been authorized but not yet presented to the Bank (and thus, not yet paid) – from the account’s ledger balance; and (ii) if insufficient funds remained after that additional subtraction to pay the items presented, to then impose Overdraft Fees.

(3) By reason of the foregoing disclosure practices, as described in Paragraphs (1) to (2) of this Article, the Bank engaged in a deceptive practice in violation of Section 5 of the FTC Act, 15 U.S.C. § 45(a)(1).

(4) The Bank’s violation of Section 5 of the FTC Act was likely to mislead consumers, was deceptive from the perspective of a reasonable consumer and was material.

(5) The Bank’s violation of Section 5 of the FTC Act resulted in financial gain to the Bank and the Bank’s unjust enrichment as a result of the fees the Bank retained that were charged due to the inaccurate disclosures.

(6) Pursuant to the authority vested in him by the Federal Deposit Insurance Act, as amended, 12 U.S.C. § 1818(b), the Comptroller hereby ORDERS that:

## ARTICLE II

### COMPLIANCE COMMITTEE

(1) Within thirty (30) days of the date of this Order, a Compliance Committee of at least three (3) members shall be appointed by the Board. The majority of this Compliance Committee will be comprised of outside directors. The Compliance Committee shall be responsible for monitoring and overseeing the Bank's compliance with the provisions of this Order. The Compliance Committee shall maintain minutes of its meetings at which compliance with this Order is discussed.

(2) Within one hundred twenty (120) days of the effective date of this Order, and thereafter within thirty (30) days after the end of each quarter, the Compliance Committee shall submit a written progress report to the Board setting forth in detail the actions taken to comply with each Article of this Order, and the results and status of those actions. The progress report shall include information sufficient to validate compliance with this Order.

(3) Upon receiving the Compliance Committee's report, the Board shall forward a copy of the report, with any additional comments by the Board, to the Associate Deputy Comptroller within ten (10) days of the first Board meeting following receipt of such report, unless additional time is granted by the Associate Deputy Comptroller through a written determination of no supervisory objection. The Associate Deputy Comptroller may, in writing, discontinue the requirement for progress reports or modify the reporting schedule.

## ARTICLE III

### CONSUMER REIMBURSEMENT FOR DECEPTIVE ACCOUNT DISCLOSURES

(1) The Bank shall make full reimbursement, as defined in Paragraph (3) of this Article, in accordance with the Reimbursement Plan required by Article IV of this Order, to all

Eligible Customers as defined in Paragraph (2) of this Article.

(2) For the purposes of this Order, the following definitions shall apply:

(a) “Eligible Customer” includes: any current or former deposit account customer who paid an Overdraft Fee, Continuous Overdraft Fee, and/or Overdraft Protection Transfer Fee as a result of the discrepancy between the Bank’s Disclosures that were in effect between April 1, 2012 and February 16, 2015 and the Bank’s actual practice with regard to overdrafts.

(b) “Overdraft Fee” refers to a fee assessed by the Bank for each item that overdraws an account and is paid by the Bank or returned for non-sufficient funds.

(c) “Continuous Overdraft Fee” refers to a fee assessed by the Bank after the account’s ledger balance remains negative for seven consecutive calendar days.

(d) “Overdraft Protection Transfer Fee” refers to a fee assessed by the Bank for each automated transfer of funds from a linked savings account, line of credit, or credit card to a checking account under the Bank’s overdraft protection programs.

(e) “Reimbursement Start Date” refers to April 1, 2012, the date that the Bank’s Disclosures became effective.

(f) “Reimbursement End Date” refers to February 16, 2015, the date that the Bank’s Disclosures were amended and restated.

(3) The reimbursement amount paid to each Eligible Customer shall include, as applicable to each Eligible Customer:

- (a) The full amount of Overdraft Fees, Continuous Overdraft Fees, and Overdraft Protection Transfer Fees assessed against the customer between the Reimbursement Start Date and the Reimbursement End Date, as calculated in the Reimbursement Plan;
- (b) Less any amount of the fees described above in section (a) of this paragraph that was previously refunded by the Bank, as determined by the methodology in the Reimbursement Plan.

#### ARTICLE IV

##### REIMBURSEMENT PLAN

(1) Within one hundred twenty (120) days of the effective date of this Order, the Bank shall develop an updated Board-approved reimbursement plan (“Reimbursement Plan”) and submit it to the Associate Deputy Comptroller for prior determination of no supervisory objection. The Reimbursement Plan shall include the following:

- (a) A description of the methods used and the time necessary to compile a list of potential Eligible Customers.
- (b) A description of the methods used to calculate the amount of reimbursement to be paid to each Eligible Customer as required by Article III.
- (c) A description of the procedures for the issuance and tracking of reimbursement payments to Eligible Customers.
- (d) A description of the procedures for monitoring compliance with the Reimbursement Plan.

(2) Upon receipt of a determination of no supervisory objection to the

Reimbursement Plan, the Board shall ensure that the Bank implements and adheres to the Reimbursement Plan. Any proposed changes to or deviations from the approved Reimbursement Plan shall be submitted in writing to the Associate Deputy Comptroller for prior supervisory review and non-objection.

## ARTICLE V

### ASSESSMENT OF REIMBURSEMENT

(1) Within ninety (90) days from the completion of reimbursement under the Reimbursement Plan, as detailed in Article IV, the Bank's internal audit department shall review and assess compliance with the terms of the Reimbursement Plan ("Reimbursement Review").

(2) The Reimbursement Review shall include an assessment of the Reimbursement Plan and the methodology used to determine the population of Eligible Customers, the amount of reimbursement for each Eligible Customer, the procedures used to issue and track reimbursement payments, the procedures used for reporting and requesting the reporting of updated balances to the credit reporting agencies, and the work of any independent consultants that the Bank has used to assist and review its implementation of the Reimbursement Plan.

(3) The Reimbursement Review shall be completed and summarized in a written report (the "Reimbursement Review Report"), which shall be completed within sixty (60) days of completion of the Reimbursement Review. Within ten (10) days of its completion, the Reimbursement Review Report shall be submitted to the Associate Deputy Comptroller and the Board.

(4) Any (including all draft and finalized) communications, workpapers, or work product related to the Reimbursement Review shall be made available to the OCC immediately upon request of the Associate Deputy Comptroller.

## ARTICLE VI

### APPROVAL, IMPLEMENTATION, AND REPORTS

(1) The Bank shall submit the written plans, programs, policies, and procedures required by this Order for review and determination of no supervisory objection to the Associate Deputy Comptroller within the applicable time periods set forth in Articles II through V. The Board shall ensure that the Bank submits the plans, programs, policies, and procedures to the Associate Deputy Comptroller for prior written determination of no supervisory objection. In the event the Associate Deputy Comptroller asks the Bank to revise the plans, programs, policies, or procedures, the Bank shall promptly make necessary and appropriate revisions and resubmit the materials to the Associate Deputy Comptroller for review and determination of no supervisory objection. Upon receiving written notice of no supervisory objection from the Associate Deputy Comptroller, the Board shall ensure that the Bank implements and thereafter adheres to the plans, programs, policies, and procedures. Unless otherwise specified, following implementation of the plans, programs, policies, and procedures, the Bank shall not take any action that will cause a significant deviation from, or material change to, the plans, programs, policies, and procedures, unless the Bank has received prior written notice of no supervisory objection from the Associate Deputy Comptroller.

(2) During the term of this Order, the required plans, programs, policies, and procedures shall not be amended or rescinded in any material respect without a prior written determination of no supervisory objection from the Associate Deputy Comptroller.

(3) During the term of this Order, the Bank shall revise the required plans, programs, policies, and procedures as necessary to incorporate new, or changes to, applicable legal requirements and supervisory guidelines.

(4) The Board shall ensure that the Bank has processes, personnel, and control systems to ensure implementation of and adherence to the plans, programs, policies, and procedures required by this Order.

(5) All communication regarding this Order shall be sent to:

- (a) Joel Denkert  
Associate Deputy Comptroller  
Midsize Bank Supervision  
Office of the Comptroller of the Currency  
1 S. Wacker Drive  
Suite 2000  
Chicago, IL 60606
  
- (b) Francis Plonkey  
Examiner-in-Charge  
Midsize Bank Supervision  
Office of the Comptroller of the Currency  
Corporate One Office Park, Bldg. 2  
Monroeville, PA 15146

or such other individuals or addresses as directed by the OCC.

## ARTICLE VII

### OTHER PROVISIONS

(1) Although this Order requires the Bank to submit certain actions, plans, programs, and policies for the review or prior written determination of no supervisory objection by the Associate Deputy Comptroller, the Board has the ultimate responsibility for proper and sound management of the Bank.

(2) If, at any time, the Comptroller deems it appropriate in fulfilling the responsibilities placed upon him by the several laws of the United States to undertake any action affecting the Bank, nothing in this Order shall in any way inhibit, estop, bar, or otherwise prevent the Comptroller from so doing.



(3) This Order constitutes a settlement of the cease and desist proceeding against the Bank contemplated by the Comptroller, based on the practices and violation of law described in the Comptroller's Findings set forth in Article I of this Order. The Comptroller releases and discharges the Bank from all potential liability for a cease and desist order that has been or might have been asserted by the Comptroller based on the practices and violation described in Article I of this Order, to the extent known to the Comptroller as of the effective date of the Order.

Nothing in the Stipulation or the Order, however, shall prevent the Comptroller from:

- (a) instituting enforcement actions, other than a cease and desist order, against the Bank based on the findings set forth in Article I of this Order;
- (b) instituting enforcement actions against the Bank based on any other findings;
- (c) instituting enforcement actions against the Bank's institution-affiliated parties based on the findings set forth in Article I of this Order, or any other findings; or
- (d) utilizing the findings set forth in Article I of this Order in future enforcement actions against the Bank or its institution-affiliated parties to establish a pattern or the continuation of a pattern. Further, nothing in the Stipulation or this Order shall affect any right of the Comptroller to determine and ensure compliance with the terms and provisions of the Stipulation or this Order.

(4) This Order is and shall become effective upon its execution by the Comptroller, through his authorized representative whose hand appears below. The Order shall remain effective and enforceable, except to the extent that, and until such time as, any provision of this

Order shall be amended, suspended, waived, or terminated in writing by the Comptroller or his authorized representative.

(5) Any time limitations imposed by this Order shall begin to run from the effective date of this Order, as shown below, unless the Order specifies otherwise. The time limitations may be extended in writing by the Associate Deputy Comptroller for good cause upon written application by the Board. Any request to extend any time limitation shall include a statement setting forth in detail the special circumstances that prevent the Bank from complying with the time limitation, and shall be accompanied by relevant supporting documentation. The Associate Deputy Comptroller's decision regarding the request is final and not subject to further review.

(6) The terms and provisions of this Order apply to the Bank and its subsidiaries, even though those subsidiaries are not named as parties to this Order. The Bank shall integrate any activities done by a subsidiary into its plans, policies, programs, and processes required by this Order. The Bank shall ensure that its subsidiaries comply with all terms and provisions of this Order.

(7) This Order is intended to be, and shall be construed to be, a final order issued pursuant to 12 U.S.C. § 1818(b), and expressly does not form, and may not be construed to form, a contract binding the Comptroller or the United States. Without limiting the foregoing, nothing in this Order shall affect any action against the Bank or its institution-affiliated parties by a bank regulatory agency, the United States Department of Justice, or any other law enforcement agency.

(8) The terms of this Order, including this paragraph, are not subject to amendment or modification by any extraneous expression, prior agreements, or prior arrangements between the parties, whether oral or written.

IT IS SO ORDERED, this 6<sup>th</sup> day of Sept., 2016.

s/William D. Haas

William D. Haas  
Deputy Comptroller  
Midsize Bank Supervision

**UNITED STATES OF AMERICA  
DEPARTMENT OF THE TREASURY  
COMPTROLLER OF THE CURRENCY**

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<b>In the Matter of:</b>	)	
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First Niagara Bank, N.A.	)	AA-EC-2016-64
Buffalo, New York	)	
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**STIPULATION AND CONSENT TO THE ISSUANCE  
OF A CONSENT ORDER**

**WHEREAS**, the Comptroller of the Currency of the United States of America (“Comptroller”), based upon information derived from the exercise of his regulatory and supervisory responsibilities, intends to issue a cease and desist order to First Niagara Bank, N.A., Buffalo, New York (“Bank”), pursuant to 12 U.S.C. § 1818(b), for the Bank’s violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1), related to the calculation of overdraft and non-sufficient funds fees (collectively “overdraft fees”).

**WHEREAS**, in the interest of cooperation and to avoid additional costs associated with administrative and judicial proceedings with respect to the above matter, the Bank, through its duly elected and acting Board of Directors (“Board”), has agreed to execute this Stipulation and Consent to the Issuance of a Consent Order (“Stipulation”), that is accepted by the Comptroller, through his duly authorized representative;

**NOW, THEREFORE**, in consideration of the above premises, it is stipulated by the Bank that:

## ARTICLE I

### JURISDICTION

(1) The Bank is a national banking association chartered and examined by the Comptroller pursuant to the National Bank Act of 1864, as amended, 12 U.S.C. § 1 *et seq.*

(2) The Comptroller is “the appropriate Federal banking agency” regarding the Bank pursuant to 12 U.S.C. §§ 1813(q) and 1818(b).

(3) The Bank is an “insured depository institution” within the meaning of 12 U.S.C. § 1818(b)(1).

## ARTICLE II

### CONSENT

(1) The Bank, without admitting or denying any wrongdoing, consents and agrees to issuance of the accompanying Consent Order by the Comptroller.

(2) The terms and provisions of the Consent Order apply to the Bank and all of its subsidiaries, even though those subsidiaries are not named as parties to the Consent Order.

(3) The Bank consents and agrees that the Consent Order shall be deemed an “order issued with the consent of the depository institution” pursuant to 12 U.S.C. § 1818(h)(2), and consents and agrees that the Consent Order shall become effective upon its execution by the Comptroller through his authorized representative, and shall be fully enforceable by the Comptroller pursuant to 12 U.S.C. § 1818(i).

(4) Notwithstanding the absence of mutuality of obligation, or of consideration, or of a contract, the Comptroller may enforce any of the commitments or obligations herein undertaken by the Bank under his supervisory powers, including 12 U.S.C. § 1818(b), and not as a matter of contract law. The Bank expressly acknowledges that neither the Bank nor the

Comptroller has any intention to enter into a contract.

(5) The Bank declares that no separate promise or inducement of any kind has been made by the Comptroller, or by his agents or employees, to cause or induce the Bank to consent to the issuance of the Consent Order and/or execute this Stipulation.

(6) The Bank expressly acknowledges that no officer or employee of the Comptroller has statutory or other authority to bind the United States, the United States Treasury Department, the Comptroller, or any other federal bank regulatory agency or entity, or any officer or employee of any of those entities to a contract affecting the Comptroller's exercise of his supervisory responsibilities.

(7) The Consent Order constitutes a settlement of the cease and desist proceeding against the Bank contemplated by the Comptroller, based on the practices and violation of law described in the Comptroller's Findings set forth in Article I of the Consent Order. The Comptroller releases and discharges the Bank from all potential liability for a cease and desist order that has been or might have been asserted by the Comptroller based on the practices and violation described in Article I of the Consent Order, to the extent known to the Comptroller as of the effective date of the Consent Order. Nothing in this Stipulation or the Consent Order, however, shall prevent the Comptroller from:

- (a) instituting enforcement actions, other than a cease and desist order, against the Bank based on the findings set forth in Article I of the Consent Order;
- (b) instituting enforcement actions against the Bank based on any other findings;
- (c) instituting enforcement actions against the Bank's institution-affiliated

parties based on the findings set forth in Article I of the Consent Order, or any other findings; or

- (d) utilizing the findings set forth in Article I of the Consent Order in future enforcement actions against the Bank or its institution-affiliated parties to establish a pattern or the continuation of a pattern.

Further, nothing in this Stipulation or the Consent Order shall affect any right of the Comptroller to determine and ensure compliance with the terms and provisions of this Stipulation or the Consent Order.

### ARTICLE III

#### WAIVERS

- (1) The Bank, by executing this Stipulation and consenting to the Consent Order, waives:
  - (a) Any and all rights to the issuance of a Notice of Charges pursuant to 12 U.S.C. § 1818(b);
  - (b) Any and all procedural rights available in connection with the issuance of the Consent Order;
  - (c) Any and all rights to a hearing and a final agency decision pursuant to 12 U.S.C. § 1818(b) and (h), 12 C.F.R. Part 19;
  - (d) Any and all rights to seek any type of administrative or judicial review of the Consent Order;
  - (e) Any and all claims for fees, costs, or expenses against the Comptroller, or any of his agents or employees, related in any way to this enforcement matter or the Consent Order, whether arising under common law or under

the terms of any statute, including, but not limited to, the Equal Access to Justice Act, 5 U.S.C. § 504 and 28 U.S.C. § 2412;

- (f) Any and all rights to assert this proceeding, this Stipulation, consent to the issuance of the Consent Order, and/or the issuance of the Consent Order, as the basis for a claim of double jeopardy in any pending or future proceeding brought by the United States Department of Justice or any other governmental entity; and
- (g) Any and all rights to challenge or contest the validity of the Consent Order.

#### ARTICLE IV

##### ELIGIBLE BANK – OTHER PROVISIONS

- (1) As a result of the Consent Order:
  - (a) The Bank is an “eligible bank” pursuant to 12 C.F.R. § 5.3(g)(4) for the purposes of 12 C.F.R. Part 5 regarding rules, policies, and procedures for corporate activities, unless otherwise informed in writing by the Office of the Comptroller of the Currency (“OCC”);
  - (b) The Bank is not subject to the limitation of 12 C.F.R. § 5.51(c)(6)(ii) for the purposes of 12 C.F.R. § 5.51 requiring OCC approval of a change in directors and senior executive officers, unless otherwise informed in writing by the OCC;
  - (c) The Bank is not subject to the limitation on golden parachute and indemnification payments provided by 12 C.F.R. § 359.1(f)(1)(ii)(C) and 12 C.F.R. § 5.51(c)(6)(ii), unless otherwise informed in writing by the



OCC;

- (d) The Bank's status as an "eligible bank" remains unchanged pursuant to 12 C.F.R. § 24.2(e)(4) for the purposes of 12 C.F.R. Part 24 regarding community and economic development, unless otherwise informed in writing by the OCC; and
- (e) The Consent Order shall not be construed to be a "written agreement, order, or capital directive" within the meaning of 12 C.F.R. § 6.4, unless the OCC informs the Bank otherwise in writing.

## ARTICLE V

### CLOSING

(1) The provisions of this Stipulation and the Consent Order shall not inhibit, estop, bar, or otherwise prevent the Comptroller from taking any other action affecting the Bank if, at any time, he deems it appropriate to do so to fulfill the responsibilities placed upon him by the several laws of the United States of America.

(2) Nothing in this Stipulation or the Consent Order shall preclude any proceedings brought by the Comptroller to enforce the terms of the Consent Order, and nothing in this Stipulation or the Consent Order constitutes, nor shall the Bank contend that it constitutes, a release, discharge, compromise, settlement, dismissal, or resolution of any actions, or in any way affects any actions that may be or have been brought by any other representative of the United States or an agency thereof, including, without limitation, the United States Department of Justice.

(3) The terms of this Stipulation, including this paragraph, and of the Consent Order are not subject to amendment or modification by any extraneous expression, prior agreements or prior arrangements between the parties, whether oral or written.

IN TESTIMONY WHEREOF, the undersigned, as the duly elected and acting Board of Directors of First Niagara Bank, Buffalo, New York, have hereunto set their hands on behalf of the Bank.

s/Amy G. Brady

8/31/16

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Amy G. Brady

\_\_\_\_\_  
Date

s/Edward J. Burke

8/31/16

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Edward J. Burke

\_\_\_\_\_  
Date

s/Craig A. Buffie

8/31/16

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Craig A. Buffie

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Date

s/Charles P. Cooley

8/31/16

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Charles P. Cooley

\_\_\_\_\_  
Date

s/Dennis A. Devine

8/31/16

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Dennis A. Devine

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Date

s/Christopher M. Gorman

8/31/16

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Christopher M. Gorman

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s/Paul N. Harris

8/31/16

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Paul N. Harris

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s/William L. Hartmann

8/31/16

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William L. Hartmann

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Date

s/Donald R. Kimble

8/31/16

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Donald R. Kimble

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Date

s/David K. Wilson

8/31/16

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David K. Wilson

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Date

Accepted by:

THE COMPTROLLER OF THE CURRENCY  
s/William D. Haas

9/6/16

By: \_\_\_\_\_  
William D. Haas  
Deputy Comptroller  
Midsize Bank Supervision

\_\_\_\_\_  
Date