No. _____

IN THE

Supreme Court of the United States

LAURA AKAHOSHI, Former Chief Compliance Officer,

Petitioner,

—v.—

OFFICE OF THE COMPTROLLER OF THE CURRENCY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The question presented is:

Does the target of an enforcement action brought by the Office of the Comptroller of the Currency have standing to petition for meaningful federal court review of the agency's orders and proceedings, where the final decision condemned her alleged conduct and tacitly rejected her constitutional and legal objections to the forum and proceedings but dismissed the action without imposing a monetary sanction or formal prohibition order?

PARTIES TO THE PROCEEDING

The caption of the case contains the names of all parties.

LIST OF RELATED PROCEEDINGS

Laura Akahoshi, Former Chief Compliance Officer v. Office of the Comptroller of the Currency, No. 23-938, U.S. Court of Appeals for the Ninth Circuit. Entered October 21, 2024.

In the Matter of Laura Akahoshi, Equal Access to Justice Applicant, OCC-AA-EC-2018-20, Department of the Treasury, denied by the administrative law judge and stayed by the Acting Comptroller by order entered July 13, 2023, prior to issuing a final agency decision.

In the Matter of Laura Akahoshi, Former Chief Compliance Officer, Rabobank, N.A., Roseville, California, OCC-AA-EC-2018-20, Department of the Treasury, Final Decision. Entered April 5, 2023.

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INTRODUCTION

Laura Akahoshi respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit, which dismissed—for lack of standing—her petition for review of an administrative enforcement proceeding brought against her by the Office of the Comptroller of the Currency ("OCC"). The Ninth Circuit reasoned that (1) being subjected to a five-year administrative enforcement proceeding that Ms. Akahoshi argued was unconstitutional, untimely, unlawful, and meritless does "not qualify as injur[y] in fact," and therefore, cannot be remedied by such review, and (2) she would not suffer a redressable future injury as a result of the OCC Final Decision. A.3a.[1]

Ms. Akahoshi's petition to the Ninth Circuit sought review of the OCC's Final Decision as well as prior orders and proceedings that became reviewable upon the issuance of a final decision. 5 U.S.C. § 704; 12 U.S.C. § 1818(h). In the twenty-page Final Decision, the Acting Comptroller "reluctant[ly]" dismissed the action and ignored Ms. Akahoshi's constitutional and legal challenges to the proceedings that rendered them void *ab initio* and time-barred. At the same time, the Final Decision took pains to condemn her, confirm the righteousness of the enforcement action, and

[1] The Appendix is cited as "A."

announce "in the strongest possible terms" new legal duties for bankers. A.50-51a.

The Ninth Circuit's no-standing dismissal decided an important federal question—Ms. Akahoshi's legal standing to obtain meaningful judicial review of the agency actions taken against her that both adversely affected or aggrieved her and caused her legal injury—in a way that directly conflicts with statutes and the precedents of this Court. Worse, the Ninth Circuit's dismissal authorizes the OCC to exercise unilateral control over whether its actions are subject to judicial review, even when review is sought by the very persons the OCC subjected to enforcement actions, and regardless of whether the agency's actions are unconstitutional, unlawful, time-barred, or meritless. If the Ninth Circuit's dismissal order stands, history shows that the OCC will use this unilateral control not only to avoid judicial review, but to perpetuate its decades-long practice of regulation-by-dismissal. The petition should be granted.

OPINIONS AND ORDERS

The Ninth Circuit's decision dismissing the petition for review of administrative proceedings is unreported as *Laura Akahoshi v. Office of the Comptroller of the Currency* at 2024 WL 4532895 (9th Cir. Oct. 21, 2024) and is reproduced at A.1a.

The Ninth Circuit's decision denying, without prejudice, the OCC's motion to dismiss the petition for

review of administrative proceedings is unreported as *Laura Akahoshi v. Office of the Comptroller of the Currency* at (9th Cir. Sep. 29, 2023). ECF 16.1[2]

The OCC's Final Decision is *In the Matter of Laura Akahoshi, Former Chief Compliance Officer*, Rabobank, N.A., Roseville, California, OCC-AA-EC-2018-20, Department of the Treasury, Final Decision (April 5, 2023) and is reproduced at A.28a.

The OCC's initial decision denying Ms. Akahoshi's application for attorneys' fees and costs is unreported as *In the Matter of Laura Akahoshi, Equal Access to Justice Applicant*, OCC-AA-EC-2018-20, 2023 WL 4233919, Department of the Treasury, Order Denying Respondent's Application for An Award of Attorney's Fees and Costs Pursuant to The Equal Access to Justice Act (June 14, 2023) and is reproduced at A.6a.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on October 21, 2024. Pursuant to this Court's Rule 13, the deadline for filing this petition is 90 days from the challenged order. Pursuant to this Court's Rule 30, since the 90th day falls on a Saturday, and Monday, January 20, 2025, is a legal holiday, *see* 5 U.S.C. § 6103(a), the time for filing this petition extends to

[2] Citations to "ECF" refer to docketed entries in the Ninth Circuit appeal. Cited page numbers of such docketed entries is to the pdf page number—i.e., the page number in the court-imprinted ECF header.

the end of January 21, 2025, which is the next day after the 90th day that is not a weekend or federal holiday. This Court has jurisdiction pursuant to Title 28, United States Code, Section 1254(1). As explained herein, Ms. Akahoshi has standing, and the Court has Article III jurisdiction.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The following pertinent provisions are reported at A.163a.

5 U.S.C. § 702

5 U.S.C. § 704

5 U.S.C. § 706

12 U.S.C. § 481

12 U.S.C. § 1818(e), (h), (i)

18 U.S.C. § 1001

12 C.F.R. § 19.5(a)

STATEMENT OF THE CASE

Ms. Akahoshi's saga through the OCC's enforcement proceeding began on April 16, 2018, when Michael R. Brickman—who was never properly appointed as an officer in accordance with the Constitution or statute—issued a Notice of Charges ("Notice") against Ms. Akahoshi on behalf of the OCC, which was served on April 17, 2018. ECF 14.2. The Notice sought

a $50,000 civil money penalty and a prohibition order barring Ms. Akahoshi from the banking industry for life, under 12 U.S.C. §§ 1818(e) and (i). *Id.* The Notice alleged three misconduct predicates based on three 2013 email communications that Ms. Akahoshi sent on behalf of the bank, each of which was reviewed and approved by the general counsel and chief executive officer: a federal felony violation of 18 U.S.C. § 1001 for making false statements; unsafe or unsound banking practices under Section 1818; and a direct violation of 12 U.S.C. § 481. *Id.*

In her Answer, Ms. Akahoshi raised constitutional objections to the forum, including that the OCC did not properly appoint Brickman or the administrative law judge ("ALJ"), that both Brickman and the ALJ are unconstitutionally insulated from presidential control by two layers of tenure protection, and that the forum improperly denied Ms. Akahoshi due process, the right to a jury trial, and was otherwise unlawful. ECF 14.4. Ms. Akahoshi also asserted that the Notice was barred by the applicable statute of limitations and was meritless because the statements she made were true and the documents allegedly concealed from the OCC were produced by Ms. Akahoshi (on behalf of the bank) on the date the OCC agreed, and in any event, those documents and statements were not material as a matter of law. *Id.*

The OCC stayed the proceedings for the next eighteen months. Approximately three months of this

delay was a stay pending the Department of Justice's ("DOJ") criminal investigation, which ended in September 2018 when the DOJ made the considered decision to decline to prosecute. The remaining *fifteen-month* delay resulted from an ALJ's failure to decide fully briefed motions (three months) and the OCC's failure to replace that ALJ upon his retirement (twelve months). ECF 14.1 at 9.[3]

On January 6, 2020, the Acting Comptroller reassigned Ms. Akahoshi's matter to a new ALJ. The OCC and Ms. Akahoshi litigated the case for two years—including extensive motion practice, document discovery, and depositions. *Id.*

Both Ms. Akahoshi and the OCC moved for summary disposition before the ALJ. Ms. Akahoshi argued that there was no falsehood, no concealment, no evidence of guilty *mens rea*, and that the documents at issue were, as a matter of law, immaterial. She requested that the ALJ grant summary disposition in her favor, exonerating her. In addition, she reiterated her constitutional challenges that render the proceedings and forum void *ab initio*, raised due process and statute of limitations objections and requested, in the alternative, that the proceeding be declared void, untimely from inception, or meritless because all claims

[3] The Final Decision inaccurately describes the agency's failure to replace a retiring ALJ, which resulted in a one-year delay, as a "*Lucia*-related" delay. A.40a.

predicated on an individual Section 481 violation were illegal, as was the OCC's only proffered evidence of bank loss causation.

On August 5, 2021, the ALJ issued an order on the parties' cross-motions for summary disposition, which granted summary disposition to the OCC on liability and reserved the issue of penalties for further briefing. A.155a. On February 10, 2022, the ALJ issued a final recommended decision ("Recommended Decision"), that sought to impose a lifetime prohibition order and a $30,000 civil monetary penalty on Ms. Akahoshi. A.55a. The ALJ noted that Ms. Akahoshi's arguments were preserved for appeal. A98-99a. Specifically, the ALJ preserved Ms. Akahoshi's constitutional and other challenges to the tribunal for appeal to the Acting Comptroller, including her due process arguments that the OCC prejudged Ms. Akahoshi's matter, unlawfully charged her with a Section 481 violation, improperly blocked disclosure of exculpatory and impeachment material, and improperly sought to punish Ms. Akahoshi based on the results of a separate proceeding to which she was not a party. *Id.*

On April 18, 2022, Ms. Akahoshi filed her Exceptions to the ALJ's Recommended Decision with the Acting Comptroller, A.16-17a, reiterating her arguments that she was entitled to a judgment in her favor and that the proceedings were void from inception as unconstitutional, unlawful, and untimely, and that

they deprived her of an Article III adjudication with a jury and due process.

On July 1, 2022, the Acting Comptroller issued an order directing supplemental briefing addressing three questions—directly related to Ms. Akahoshi's constitutional arguments on appeal to the Acting Comptroller—in light of recent decisions in the Courts of Appeals for the Fifth and Sixth Circuits, in *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022), and *Calcutt v. FDIC*, 37 F.4th 293 (6th Cir. 2022). A53a.

On April 5, 2023—nearly five years to the day from when the OCC commenced the enforcement action—the Acting Comptroller issued the Final Decision. The Acting Comptroller ignored the constitutional challenges presented by Ms. Akahoshi (including those for which the Acting Comptroller specifically requested supplemental briefing), as well as the statute of limitations and other statutory objections to the proceedings, attempting to write them out of existence. Instead, the Acting Comptroller found the ALJ misapplied the summary disposition standard *but* dismissed the action against Ms. Akahoshi—citing "substantial delays"—in a twenty-page decision excoriating her and her conduct, declaring the righteousness of the case against her, and declaring new legal duties, pursuant to Section 481, that she purportedly violated that are nowhere found in the statute. By declaring the righteousness of the enforcement action, the Acting Comptroller tacitly rejected Ms. Akahoshi's legal

challenges to it, including its constitutional defects, the multiple due process violations tainting the proceedings, its untimeliness, and its lack of legal and factual merit.

On May 5, 2023, Ms. Akahoshi timely filed a petition for review of the agency's actions. ECF 1.1. Ms. Akahoshi was entitled to bring this petition for review before the Ninth Circuit pursuant to 12 U.S.C. § 1818(h) and 5 U.S.C. §§ 704, 706. Section 1818(h) permits "any party" to an OCC enforcement proceeding to obtain judicial review in the Circuit Court responsible for the area in which the home office of the depository institution (Rabobank, N.A.) is located (California), and cross-references the Administrative Procedure Act ("APA"). The APA provides that "preliminary, procedural, or intermediate agency action," is subject to review as part of any review of a final agency order or action, and it directs the reviewing court to "decide all relevant questions of law [and] interpret constitutional and statutory provisions" relevant to Ms. Akahoshi's matter. 12 U.S.C. § 1818(h)(2); 5 U.S.C. §§ 704, 706. In a motion to dismiss the appeal, the OCC argued that Ms. Akahoshi prevailed before the agency due to the dismissal, and therefore, lacked standing to appeal. The Ninth Circuit denied the motion to dismiss without prejudice to renewal of those arguments before the merits panel. ECF 16.1.

After merits briefing and oral argument, on October 21, 2024, the Ninth Circuit issued a decision

dismissing the appeal based on its view that Ms. Akahoshi lacked standing because her "injuries either do not qualify as injuries in fact or would not be redressed by declaratory relief." A.3a. The Ninth Circuit relied on this Court's decision in *Axon Enter., Inc. v. FTC*, 598 U.S. 175, 191 (2023), interpreting it as *limiting* federal courts' review of constitutional objections to agency action to collateral attacks. In other words, under the Ninth Circuit's erroneous reading of *Axon*, *potential* constitutional injury is cognizable, but already suffered injury—even when it relates not only to the structure but also to the substance of the proceedings—is not. The Ninth Circuit did not analyze Congress's directions to federal courts to conduct judicial review of agency actions, as set forth in the APA and Section 1818(h).

REASONS FOR GRANTING CERTIORARI

The Ninth Circuit's dismissal based on lack of standing squarely conflicts with binding precedent of this Court, turns *Axon* on its head, and defies the Constitution and statutes that establish Ms. Akahoshi's right to meaningful judicial review of agency action that aggrieves her and causes her legal injury. By refusing jurisdiction except where a respondent is sanctioned by the OCC's final decision (contrary to the dictates of the relevant statutes, which do not so limit the judicial review sought here), the Ninth Circuit abdicated its duty to exercise jurisdiction mandated by Congress. Its dismissal also directly conflicts with this

Court's decision in *Axon*, which *expanded* federal court review of certain SEC and FTC actions to include not only post-proceeding review in a Circuit Court, but also collateral district court review of not-yet-conducted or ongoing proceedings where the challenge to the proceedings is unrelated to the substance and instead focuses on a structural defect. In addition, the Ninth Circuit's dismissal conflicts with this Court's other precedents holding that constitutional harm is an injury in fact, that courts have the power to remedy injuries suffered as a result of defective agency proceedings, and that a person raising a meritorious Appointments Clause challenge is entitled to relief.

The federal question decided by the Ninth Circuit's dismissal is particularly important because it permits the OCC—an executive agency that acts as judge, prosecutor, and appellate tribunal in enforcement actions—to control whether its enforcement proceedings are *ever* subject to judicial review. The OCC's punishment-by-process and regulation-by-dismissal ploy in Ms. Akahoshi's matter is part of the OCC's playbook, not a one-off situation. The OCC has, in multiple instances, relentlessly litigated against an administrative respondent only to abruptly drop the charges or to issue a final decision chock-full of adverse factual findings and legal interpretations that dismisses to avoid judicial review. Significantly, the OCC's efforts succeed—by the undersigned's count, only four OCC enforcement actions have been subject

to direct judicial review in nearly a quarter century, and in three of them, the court of appeals *reversed* the agency in whole or in part.

Such "speaking" dismissals are significant for individuals who, like Ms. Akahoshi, are ushered into the OCC's in-house proceedings. According to the Acting Comptroller, the applicable statute bars federal courts from *any* review until *after* the administrative proceedings have concluded,[4] and after they conclude, the OCC believes it can dismiss and thereby strip courts of jurisdiction to conduct post-proceeding review. The OCC then treats its "dismissal" decisions as authoritative precedent, binding not only on ALJs in related

[4] Michael Hsu, the Acting Comptroller of the Currency, in his capacity as a board member of the FDIC, and ALJ Whang (the ALJ who issued the Recommended Decision against Ms. Akahoshi as well as the decision denying Ms. Akahoshi's Equal Access to Justice Act ("EAJA") application) have taken the position that Section 1818(i) distinguishes enforcement actions under that statute from SEC and FTC enforcement actions, and thus, regardless of *Axon*, in matters relating to Section 1818 (such as the OCC's enforcement action against Ms. Akahoshi), district courts are without jurisdiction to consider even structural constitutional challenges to in-house adjudications by banking regulators. Supplemental Principal Brief of Appellants/Cross-Appellees, *Burgess v. Whang*, Dkt. No. 22-11172 (5th Cir.), 2024 WL 4837003, at *10-15 (Nov. 14, 2024). In other words, according to the Acting Comptroller, other than post-proceeding petitions for review in Circuit Courts, where sanctions have been imposed, no federal court has jurisdiction to hear any challenge to OCC enforcement proceedings.

or future enforcement actions, but also on all regulated banks and bankers, despite never having been subjected to judicial review or being properly promulgated as a regulation.

I. THE NINTH CIRCUIT'S DECISION IS FUNDAMENTALLY INCOMPATIBLE WITH THE RELEVANT STATUTES, *AXON*, AND THIS COURT'S OTHER PRECEDENTS

The Ninth Circuit's no-standing dismissal of Ms. Akahoshi's appeal—the individual target who personally endured a multi-year OCC enforcement action directed at her, and who challenged the action's unconstitutionality, unlawfulness, untimeliness, and lack of merit—conflicts with this Court's precedents and the pertinent statutes directing judicial review. This Court has cautioned that "[l]egal lapses and violations occur" in administrative proceedings, "and especially so when they have no consequence." *Weyerhaeuser Co. v. U.S. Fish and Wildlife Serv.*, 586 U.S. 9, 22-23 (2018) (quoting *Mach Mining v. EEOC*, 575 U.S. 480, 489 (2015)). "That is why" this Court "has so long applied a strong presumption favoring judicial review of administrative action." *Id.* "The presumption may be rebutted only if the relevant statute[s] preclude[] review." *Id.*;[5] *Bowen v. Michigan Acad. of Fam.*

[5] The presumption favoring judicial review may also be rebutted if the action is "committed to agency discretion by law," 5 U.S.C. § 701(a)(2), but that exception is inapplicable here.

Physicians, 476 U.S. 667, 670 (1986) (recognizing "the strong presumption that Congress intends judicial review of administrative action."). The relevant statutes here provide for review, and thus this Court should grant the petition.

A. The Relevant Statutory Scheme Guarantees Ms. Akahoshi's Right to Meaningful Judicial Review of the OCC's Proceedings

The Ninth Circuit centered its analysis of Ms. Akahoshi's standing to appeal on "Article III's case-or-controversy requirement" of "injury in fact, causation, and redressability," A.2a—but failed to analyze (or even mention) the relevant statutory framework that lays the foundation for—and provides the right to—Ms. Akahoshi's appeal of the OCC's Final Decision. The relevant statutes confer jurisdiction on courts of appeals to review all agency proceedings, not just the final agency order, and instruct courts of appeals to review those proceedings for an enumerated set of diverse harms. Under these laws, Ms. Akahoshi has standing to appeal the OCC's proceedings.

Section 1818, the applicable statute under which Ms. Akahoshi was administratively prosecuted, could hardly be more broadly worded. It permits "*any* party to *any* proceeding under paragraph (1)," i.e., a proceeding in which a final decision has been rendered, to obtain "review of *any* order issued" by filing "a written petition praying that the order of the agency be

modified, terminated, or set aside." 12 U.S.C. § 1818(h)(2) (emphasis added). Once filed, Section 1818 explicitly provides jurisdiction to a Court of Appeals, and "[r]eview of such *proceedings* shall be had as provided in chapter 7 of title 5"—the APA. *Id*. (emphasis added). Thus, by its terms, Section 1818 explicitly provides jurisdiction to the Circuit Court to review the entire administrative "proceedings" (i.e., "any order" issued) and the harm contained in them, once the triggering event—a final decision—has occurred and a petition is filed. *Id*.

The incorporated chapter of the APA is similarly emphatic in directing judicial review. It provides that "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. And that "Agency action made reviewable by statute and final agency action *for which there is no other adequate remedy in a court are subject to judicial review*. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704 (emphasis added). The APA further directs that a Court of Appeals' review must be made on "the whole record or those parts of it cited by a party." 5 U.S.C. § 706.

Nothing in Section 1818 or the APA limits federal court review to respondents who have been penalized

through a civil money penalty or a lifetime ban. On the contrary, the APA provides that "the reviewing court *shall decide all* relevant questions of law, *interpret constitutional* and statutory provisions, *and determine* the meaning or applicability of the terms of an agency action," and:

> shall— . . . hold unlawful and set aside agency action, findings, and conclusions found to be—(A) . . . not in accordance with law; (B) contrary to constitutional right, power, privilege . . . ; (C) in excess of statutory jurisdiction, authority, or limitations . . .; (D) without observance of procedure required by law; (E) unsupported by substantial evidence . . .; or (F) unwarranted by the facts. . . .

5 U.S.C. § 706 (emphasis added). The nature of the review called for by Section 706, coupled with the diverse set of grounds upon which relief must be granted, reveal that the Ninth Circuit is wrong, and that Congress intended, through Section 1818 and the APA, to address diverse harms beyond penalties and lifetime bans. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J. concurring in part and concurring in judgment) ("Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before."). Indeed, by the Ninth Circuit's reasoning, unless a formal, forward-looking prohibition order or monetary penalty is imposed, none of the actions mandated by the APA are within the scope of

Article III's judicial power, since none of them can "unring the bell" of a prior legal, constitutional, or factual defect.

Congress, of course, knows how to limit the right to judicial review of agency action to those actions resulting in a particular kind of final order, such as one that imposes sanctions, but it did no such thing here. For example, the statute establishing judicial review for targets of agency action by the FTC, 15 U.S.C. § 45(c), limits judicial review to parties whose enforcement actions result in a final "order of the Commission to cease and desist from using any method of competition or act or practice." *Id.* No such limitation applies to Ms. Akahoshi—indeed, the language chosen in the judicial review provision of Section 1818(h)(2) is all-embracing, applying to "any party" to "any proceeding" under Section 1818(h)(1) and permitting review of "any [final] order." 12 U.S.C. § 1818(h)(2). The Ninth Circuit's no-standing dismissal thus violates the principle that "[f]ederal courts 'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" *Axon*, 598 U.S. at 207 (Gorsuch, J., concurring in the judgment) (quoting *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404, 5 L. Ed. 257 (1821) (Marshall, C. J., for the Court)).

Nor can it be claimed that Ms. Akahoshi's right to judicial review based on the statutes founders because her appeal arguments are of general application. Ms. Akahoshi—the target of the OCC's enforcement

proceeding that involved reams of administrative orders and years of litigation—comfortably fits within the parties entitled to judicial review under Section 1818(h)(2) and the APA. Ms. Akahoshi suffered both a legal wrong and was adversely affected or aggrieved by the OCC's unlawful actions. *See Barker v. Carr*, 369 U.S. 186, 204 (1962) ("the gist of the question of standing" is whether "appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination"). This is particularly so because the review provisions of the APA are "generous," and this Court construes them "not grudgingly but as serving a broadly remedial purpose." *Assoc. of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 156 (1970).

This generous review structure makes sense in the OCC administrative context where respondents are prosecuted—outside the protections of Article III courts—in matters that seek to deprive them of their life and liberty. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571-72 (1972) ("'Liberty' and 'property' are . . . among the great constitutional concepts . . . They relate to the whole domain of social and economic fact . . . [and are] privileges long recognized . . . as essential to the orderly pursuit of happiness by free men." (internal punctuation and citations omitted)). In every real-world way, Ms. Akahoshi has had her rights to liberty and property revoked by being

subjected to (and choosing to fight) the agency proceeding. She is effectively, if not formally, blacklisted from banking and has been engaged in ruinous litigation since 2018.

For these reasons, the Ninth Circuit contravened statutes—and abdicated its duty—when it declined to conduct the judicial review directed by Congress based on an asserted lack of standing.

B. This Court's Precedents Entitle Ms. Akahoshi to Meaningful Federal Court Review of the OCC's Proceedings

1. Under this Court's Precedents, Ms. Akahoshi Was Adversely Affected or Aggrieved

This Court has held that a respondent is "adversely affected or aggrieved" where the injury complained of "falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990) (quoting *Clarke v. Securities Industry Assn.,* 479 U.S. 388, 396–397 (1987)). This Court went on to explain that "the failure of an agency to comply with a statutory provision" that was "enacted to protect the interests of the parties to the proceedings," would result in those parties being "'adversely affected within the meaning' of the statute." *Id.*

Ms. Akahoshi has been adversely affected within the meaning of the statute. *First,* here, the stakes are all related to Ms. Akahoshi's personal interests. *See Defenders of Wildlife*, 504 U.S. at 561-62 (stating that where a person "is himself an object of the action (or forgone action) at issue" "there is ordinarily little question that the action or inaction has caused him injury, and that a judgment preventing or requiring the action will redress it.").

Second, Ms. Akahoshi's Appointments Clause and Due Process Clause challenges relate to constitutional provisions designed to protect the rights of persons subjected to significant executive power or whose liberty and property interests are at stake. *See Lucia v. SEC*, 585 U.S. 237, 251 (2018) ("This Court has held that 'one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case' is entitled to relief." (quoting *Ryder v. United States*, 515 U.S. 177, 182-83 (1995)); *id.* at 252 n.5 ("But our Appointments Clause remedies are designed . . . also to create '[]incentive[s] to raise Appointments Clause challenges.'" (quoting *Ryder*, 515 U.S. at 183)). The OCC is required to "conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay." 12 C.F.R. § 19.5(a) (emphasis added) (implementing regulation of Section 1818). Ms. Akahoshi claims that she is aggrieved by the OCC's proceeding because it was unfair, unconstitutional, unlawful, and meritless. The OCC's Final Decision tacitly found against her on all these issues. The

Acting Comptroller found her conduct to be "deeply troubling" and involving a "possible lack of candor," and he announced "in the strongest possible terms" that bankers are expected not to act as Ms. Akahoshi was alleged to have acted. Thus, the OCC Final Decision did nothing to remedy or mitigate the constitutional, legal, and procedural injuries she suffered from the invalid and meritless action but, rather, cemented its allegations against her in a permanent, public censure that attempts to eliminate any meaningful review by dismissing.[6]

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[6] The Acting Comptroller's decision to opine at length on Ms. Akahoshi's alleged conduct and the requirements of 12 U.S.C. § 481 belies the OCC's claim (adopted by the Ninth Circuit) that the Final Decision "did not make any factual findings on disputed issues or legal conclusions against her." A.3a. The OCC's claim is also belied by the OCC's embrace of the Final Decision, in its opposition to Ms. Akahoshi's application for fees and costs under the EAJA, as establishing—definitively—that Ms. Akahoshi is not a prevailing party and that the OCC's actions against her were substantially justified. A.20a. Indeed, the OCC's subterfuge is particularly stark, given that the metadata of the Final Decision lists as "author" an OCC lawyer who also is listed on the cover of the OCC's Ninth Circuit brief—Special Counsel Gabriel Hindin. ECF 2.1, PDF properties (listing "author" as Gabriel.Hindin); ECF 42.1, cover (listing Special Counsel Gabriel Hindin as one of the "Attorneys for Respondent Office of the Comptroller of the Currency"); *see* 21B Charles Alan Wright and Arthur R.

Permitting meaningful federal court review of the OCC Final Decision could undo the impact of the proceeding on Ms. Akahoshi in a real way—either by vacating and declaring that the Notice is void *ab initio*, or by finding that it was unconstitutional or otherwise unlawful. *See Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his every injury"). And, of course, Ms. Akahoshi's defense would be *vindicated* by a judicial decision finding that, under the undisputed facts, she engaged in no misleading conduct, concealed nothing, the documents at issue were not material, and that she violated no law. Those findings would mean that Ms. Akahoshi is entitled to a judgment exonerating her from any wrongdoing as a matter of law.

Miller, *Federal Practice and Procedure* § 5106.4 (2d Ed. June 2024 update) (courts can take judicial notice of filings in federal court). It is duplicitous for the same agency—let alone the same lawyer—to author lengthy comments on Ms. Akahoshi's conduct in the Final Decision, and then to argue to the Ninth Circuit that those comments should be ignored because the Final Decision purportedly only found that the ALJ misapplied the summary judgment standard.

2. Under This Court's Precedents, Ms. Akahoshi Suffered a Legal Injury

Certiorari is also warranted because the Ninth Circuit's claim that Ms. Akahoshi had not suffered a legal injury, and thus, lacked standing to appeal the OCC's Final Decision, conflicts with this Court's precedents. The Ninth Circuit upended *Axon* when it relied on it to shut the courthouse doors to hear Ms. Akahoshi's actualized constitutional injury. *Axon* recognized that after-the-fact review of an unlawful proceeding cannot provide *full* relief, but that does not mean that the Circuit Court is stripped of jurisdiction to provide *some* relief by finding the Final Decision, proceedings, and Notice void *ab initio*, unconstitutional, unlawful, or some combination. The fact that there is no *full* remedy for Ms. Akahoshi's legal harm does not mean there is *no* remedy at all, or that her already-suffered legal injury does not give her standing.[7]

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[7] The Ninth Circuit's view that Ms. Akahoshi's injuries failed the constitutional redressability test is wrong for the reasons discussed in the text. But also, because Ms. Akahoshi suffered concrete injury and her appeal seeks to vindicate her statutory procedural rights, this Court has recognized that normal standards of redressability do not apply. *Defenders of Wildlife*, 504 U.S. at 560, 573 n.7 ("[t]here is this much truth to the assertion that 'procedural rights' are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

This Court in *Axon* found that "[s]ubjection" to an unconstitutional process is a legal injury "irrespective of [the process's] outcome, or of other decisions made within it." *Axon*, 598 U.S. at 192. There, in contrast to Ms. Akahoshi's petition for review, which challenges not only the structure but also the agency proceedings and several specific orders, the petitioners' identified harm was *not* about the agency process or any order, but the generalized harm of "subjection to an illegitimate proceeding, led by an illegitimate decisionmaker." *Id.* ("The claims, in sum, have nothing to do with the enforcement-related matters the Commissions 'regularly adjudicate[ ]'—and nothing to do with those they would adjudicate in assessing the charges against Axon and Cochran."). For this reason, the Court acknowledged that "a statutory review scheme . . . does not necessarily extend to every claim concerning agency action." *Id.* at 185. It explained, "Axon's separation-of-powers claim is not about that order." *Id.* at 191. And in that context, the Court "recognized that [petitioners'] rights are 'effectively lost' if review is deferred until after trial. . . . Axon and Cochran will lose their rights not to undergo the complained-of agency proceedings if they cannot assert those rights until the proceedings are over." *Id.* at 192.

This, however, does not foreclose meaningful federal court review of constitutional claims that are tied to the final order and agency proceedings; the *results of* having been subjected to the process. Throughout the *Axon* majority opinion, this Court tracked the

multiple paths to meaningful federal court review—"One way of framing the question we must decide is whether the cases before us are more like *Thunder Basin* and *Elgin* or more like *Free Enterprise Fund*."—but at its core, the Court maintained that:

> *Thunder Basin* and *Elgin* both make clear that adequate judicial review does not usually demand a district court's involvement. *Review of agency action in a court of appeals can alone "meaningfully address[ ]" a party's claims*. *Thunder Basin*, 510 U.S. at 215, . . . ; *see Elgin*, 567 U.S. at 21, . . . (holding that Congress provided "meaningful review" in authorizing the Federal Circuit "to consider and decide petitioners' constitutional claims").

Axon, 598 U.S. at 190 (emphasis added). For this reason, this Court stated that "[u]nder those statutes, Axon and Cochran can (eventually) obtain review of their constitutional claims through an appeal from an adverse agency action to a court of appeals." *Id.* at 190-91. *Axon* supports the notion that constitutional harm—whether complete or anticipated—guarantees meaningful federal court review. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) ("It is a settled and invariable principle that every right, when withheld, must have a remedy, and every injury its proper redress."). Indeed, the Court recognized that, even after-the-fact, a reviewing court retains the remedial power inherent in vacating a void order. *Axon*, 598 U.S. at

191 (stating that if a reviewing court of appeals found that the FTC's ALJ proceedings violate the separation of powers, it "could *of course* vacate the FTC's order." (emphasis added)). The Court nowhere stated that this after-the-fact review was reserved only for enforcement targets who were sanctioned by the agency or that vacating reaches beyond the limits of Article III.

The Ninth Circuit's no-standing dismissal also contravenes this Court's decision in *Seila Law LLC v. CFPB*, 591 U.S. 197, 211 (2020). There, this Court held that "[i]n the specific context of the President's removal power, we have found it sufficient that the challenger 'sustains injury' from an executive act that allegedly exceeds the official's authority." *Id.* (quoting *Bowsher v. Synar*, 478 U.S. 714, 721 (1986)). The Court "explained that a lower court order that presents real-world consequences for the Government and its adversary suffices to support Article III jurisdiction." *Id.* at 212.

Here, the OCC's final order presents "real-world consequences" for both the OCC and Ms. Akahoshi, and it warrants review. Invalidation of the OCC's Notice, or some or all the proceedings initiated by that Notice, would result in the cancellation of the Final Decision that publicly proclaims that Ms. Akahoshi's behavior was "deeply troubling," questions her "lack of candor," and, as a practical matter, perpetuates the blacklisting of her from the banking industry dating

back to the Notice. The OCC would also be impacted—it would be forced to restructure its enforcement apparatus in a lawful manner by complying with the Constitution, not depriving respondents of due process, and enforcing law and precedent—*e.g.*, statutes and this Court's decisions relating to the statute of limitations—consistent with this Court's and other Article III courts' decisions. *Id.*

The Ninth Circuit's dismissal similarly conflicts with this Court's decision in *Lucia v. SEC*. In *Lucia*, the Court found SEC ALJs to be unconstitutionally appointed—even though Lucia had already lived through his agency proceeding—and found that the record produced by the unconstitutional use of ALJs could not be perfected but instead had to be invalidated. As a result, this Court vacated. *Id.*; *cf. Env't Prot. Info. Ctr., Inc v. Pac. Lumber Co.*, 257 F.3d 1071 (9th Cir. 2001) (finding that the appellant was an "aggrieved party" entitled to vacatur where the district court "render[ed] an opinion in spite of knowing the cause was moot" because the parties had settled the dispute before the opinion was issued). To be sure, the Court in *Lucia* also remanded and stated that Lucia was entitled to a new hearing before a properly appointed ALJ, but that does not mean that invalidating the prior proceedings and vacating the final order were legal nullities or no remedies at all. On the contrary, the Court relied on *Ryder v. United States* for the twin propositions that a person who timely asserts a meritorious Appointments Clause challenge is

"entitled to relief," and that this rule is necessary to incentivize individual litigants in specific matters to police Appointments Clause violations, presumably because eliminating those incentives would mean that Appointment Clause violations would go unchecked. *Ryder*, 515 U.S. at 182-83; *Lucia*, 585 U.S. at 251 & n.5.

Ms. Akahoshi suffered a legal injury under this Court's precedents and has standing to access meaningful federal court review.

II. THIS COURT SHOULD GRANT CERTIORARI TO PREVENT THE OCC FROM INSULATING ITSELF FROM FEDERAL COURT REVIEW

The OCC's last-minute dismissal in Ms. Akahoshi's case was part of the agency's long-held strategy of regulation-by-dismissal. Through this practice, the OCC seeks to avoid judicial review while creating agency-specific law without complying with the notice-and-comment requirements of the APA, *see* 5 U.S.C. § 553, and using the enforcement process itself to inflict career-ending and financial ruin on individuals facing the OCC's ire. The OCC has a track record of relentlessly litigating against administrative respondents only to abruptly drop the charges or issue a final decision chock-full of adverse factual findings and legal interpretations that dismisses the charges in an attempt to avoid judicial review. *See, e.g.*, *In re Usher*, OCC-AA-EC-2017-3, and *In re Ramchandani*, OCC AA-EC-2017-2, Department of the Treasury,

Termination Orders (July 8, 2021) (OCC unilaterally dismissed after respondents spent four years defending against a meritless action (alleging conduct for which they had already been acquitted in a criminal trial) and challenging the OCC's unlawful practices); *In re Adams*, OCC-AA-EC-11-50, Department of the Treasury, Final Decision Terminating Enforcement Action, 2014 WL 8735096, at *1 (Sept. 30, 2014) (OCC dismissed at Comptroller-review level, after three years of litigating, where ALJ found *in favor of* respondent; OCC issued a forty-nine-page dismissal opinion rejecting the ALJ's and certain Circuit Courts' legal standards, adopting agency-friendly standards, and—while disclaiming any factual findings—exhaustively cataloguing the evidence purportedly demonstrating respondent's culpability); *In re Loumiet*, OCC-AA-EC-06-102, Department of the Treasury, Final Decision and Order, 2009 WL 10761542 (July 27, 2009) (OCC dismissed enforcement action after litigating for three years, and, in a fifteen-page opinion, "largely reject[ed]" the ALJ's recommended decision, which exonerated the respondent).

The OCC has succeeded in its efforts to avoid judicial review while creating OCC-specific law—by the undersigned's count, only four OCC enforcement actions have been subject to direct judicial review in a quarter century, and in three of them, the court of appeals reversed the agency in whole or in part. *See Blanton v. OCC*, 909 F.3d 1162 (D.C. Cir. 2018)

(reversing in part and remanding; limiting the OCC's overly permissive interpretation of the statute of limitations and requiring additional fact finding); *DeNaples v. OCC*, 706 F.3d 481 (D.C. Cir. 2013) (reversing and remanding; finding OCC applied incorrect legal standard and "failed to adequately justify their positions on [respondent's] expunction," and stating "the agencies' scattergun approach is too unpredictable"); *Grant Thornton, LLP v. OCC*, 514 F.3d 1328 (D.C. Cir. 2008) (vacating and dismissing; rejecting OCC's attempt to "shoehorn[]" conduct related to an audit into the controlling statutory language for unsafe or unsound practice); *Ulrich v. OCC*, 129 F. App'x 386 (9th Cir. 2005) (affirming; finding substantial evidence supported OCC finding of unsafe or unsound practices related to approving a loan).

The OCC's last-minute dismissals do more than simply create a system of punishment-by-process—they are the OCC's method of regulation-by-dismissal. This is because the OCC treats its "dismissal" decisions as authoritative precedent. For example, in *In re Adams*, the OCC offered the same excuse it used here (delay) to dismiss an enforcement action, but used the dismissal order to establish a more agency-friendly interpretation of "unsafe or unsound practice" under Section 1818 that rejected multiple circuit court decisions, including the Fifth Circuit's decision in *Gulf Federal Savings & Loan Ass'n v. Federal Home Loan Bank Board*, 651 F.2d 259 (5th Cir. 1981), which found that an unsafe or unsound practice must cause

"abnormal risk of loss or damage to the financial stability of the bank." *In re Adams*, 2014 WL 8735096, at *3-11. The Comptroller decided that the Fifth Circuit's "restrictive gloss, which requires that a practice produce specific effects that threaten an institution's financial stability, conflicts with the text and structure of the statute;" and that instead—an unsafe or unsound practice "warrant[s] sanction and remediation*, even if it does not threaten the continued viability of the institution*." *Id*. (emphasis added). Moreover, in *In re Adams*, the Comptroller found that ALJs *must* give deference to the opinions of OCC examiners—i.e., enforcement counsel's chosen witnesses in enforcement proceedings—on ultimate issues, such as whether an enforcement target's conduct constitutes an unsafe or unsound practice. *Id*. at *6.

The OCC now cites *In re Adams* as authoritative precedent even though it was issued in a dismissal order and never reviewed by a court. In the action against Ms. Akahoshi, both enforcement counsel and the ALJ liberally cited *In re Adams*. *See, e.g.*, A.63a, 66a, 127a. And based on *In re Adams*, the ALJ gave deference to the OCC's witnesses against Ms. Akahoshi on the ultimate issues of whether a violation of law occurred and whether Ms. Akahoshi committed an unsafe or unsound banking practice. A.160-61a. None of the OCC's witnesses were lawyers or had any familiarity with violations of law, and all were personally involved—as fact witnesses—in the underlying events. Practically speaking, this deference renders

the OCC's purported in-house "adjudication" little more than a compulsory reiteration of the OCC's prosecutorial stance, based on enforcement counsel's selective presentation of OCC examiner opinions.

Similarly, in Ms. Akahoshi's case, in the Recommended Decision, the ALJ cited her own decision in the then-dismissed *Usher* matter for facts and law rejecting Ms. Akahoshi's Appointments Clause challenge to the proceedings, finding that "Senior Deputy Comptroller" Michael Brickman was not a "Deputy Comptroller of the Currency," and was instead a "mere employee," who was nevertheless permitted to wield the executive power to commence a ruinous enforcement action. A.152-53a. And the OCC and the ALJ have relied on the Final Decision as conclusively establishing that Ms. Akahoshi is barred from obtaining fees and costs under the EAJA, assertedly because she is not a "prevailing" party and because the OCC's actions against her were "substantially justified." A.26a. The ALJ concluded:

> Both the undersigned and the [Acting] Comptroller, on the strength of the administrative record as a whole, also find it plausible, at minimum, that Enforcement Counsel's interpretation of the events at issue, and its legal theories regarding those events, would have prevailed had the matter proceeded to hearing. In other words, as Enforcement

> Counsel puts it, 'there is ample evidence that [Respondent] violated laws and engaged in unsafe and unsound practices, and that Enforcement Counsel satisfied the requisite elements of 12 U.S.C. §§ 1818(e) and (i),' *even if in this instance the matter has been terminated for reasons unrelated to the merits of the underlying case*.

Id. (emphasis added). In this way, the OCC adds a double layer of insulation from judicial review.[8]

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[8] The Ninth Circuit erroneously disregarded the ongoing adverse effects to Ms. Akahoshi of the Final Decision's statements and found that Ms. Akahoshi's interest in pursuing her fee application was insufficient to establish standing because a statutory entitlement to attorneys' fees for a prevailing *plaintiff* does not permit a person to bootstrap standing by bringing suit under such a statute. A.4a. While this rule may make sense in other contexts, it is entirely inapposite to Ms. Akahoshi's appeal. Ms. Akahoshi brought no suit; the OCC chose to bring an enforcement action *against her*. Having endured that unjustified enforcement action that ended in dismissal by the agency, Ms. Akahoshi is entitled to an award of fees and costs under the EAJA. There is no bootstrapping in this context. Rather, the EAJA action is emblematic of how the ALJ, the OCC, and any reasonable observer has and will read the Final Decision—as an unmistakable condemnation of Ms. Akahoshi's honesty and integrity, and not, as the Ninth Circuit erroneously stated, as making no findings against her. It blinks reality to suggest that the Final Decision does no cognizable future harm to Ms. Akahoshi or her reputation, or that proof of that harm was somehow

No doubt the OCC will also rely on the Final Decision as having established a purportedly pre-existing (but nowhere in law or regulation articulated) duty on individual bankers under Section 481 (which says nothing about any such duty). Not only that, but the OCC will expect regulated banks to treat the Final Decision's legal pronouncements as binding legal authority although they are not reflected either in statute or in a duly promulgated regulation. *See* Nicholas R. Parrillo, *Federal Agency Guidance and the Power to Bind: An Empirical Study of Agencies and Industries*, 36 YALE J. ON REG. 165, 174 (2019) (empirical study concluding that "[r]egulated parties often face overwhelming practical pressure to follow what a guidance document 'suggests,' at least absent an individual dispensation from the agency").

The Ninth Circuit's dismissal condones the OCC's transparent practice of creating binding legal rules without properly promulgating them as regulations, and seeking to insulate those rules from any judicial review. It likewise permits the OCC to use the enforcement process itself to punish those subject to its power, and to insulate from judicial review any wrongful practices it wields against enforcement targets

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lacking in the record. Indeed, attacks on a person's honesty are the types of statements that constitute libel *per se*. *See* Restatement (Second) of Torts § 569, comment g (1977) ("it is actionable *per se* to impute to another in libelous form conduct that tends to lower the other's reputation for veracity or honesty").

(like Ms. Akahoshi) by the simple expedient of dismissing the case after years of ruinous litigation. This Court should reject the OCC's attempt to sweep its unconstitutional, unlawful, and unfair conduct against Ms. Akahoshi under the rug, and should ensure that Ms. Akahoshi's fortitude is rewarded with the meaningful judicial review she has expected for years because it is guaranteed to her by statute and this Court's precedents.

CONCLUSION

For the reasons stated above, the Court should grant the petition, and upon *certiorari* review, reverse the Ninth Circuit's no-standing dismissal and remand to that court with a direction to review Ms. Akahoshi's challenge to the OCC's administrative proceedings on the merits.

Dated: January 21, 2025

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APPENDIX

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[STAMP]

FILED

OCT 21 2024

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

No. 23-938

AA-EC-2018-20

MEMORANDUM*

LAURA AKAHOSHI,
Former Chief Compliance Officer,

Petitioner,

—v.—

OFFICE OF THE COMPTROLLER
OF THE CURRENCY,

Respondent.

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

On Petition for Review of an Order of the
Office of the Comptroller of the Currency

Argued and Submitted October 7, 2024
Las Vegas, Nevada

Before: BEA, CHRISTEN, and BENNETT, Circuit Judges.

This case arises from an administrative enforcement action by the Office of the Comptroller of the Currency ("OCC") against Laura Akahoshi, a former banking officer. Akahoshi petitions for review of the Comptroller of the Currency's ("Comptroller") final decision, which dismissed all charges and terminated the enforcement action against her ("Final Decision"). Because Akahoshi fails to establish Article III standing, we dismiss the petition.

"The 'irreducible constitutional minimum of standing' contains three requirements." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 102 (1998) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). "First and foremost, there must be alleged (and ultimately proved) an 'injury in fact'—a harm suffered by the plaintiff that is 'concrete' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 103 (quotation marks omitted) (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990)). "Second, there must be causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." *Id.* "And third, there must be redressability—a likelihood that the requested relief will redress the alleged injury." *Id.* "This triad of injury in fact, causation, and redressability constitutes the core of Article III's case-

or-controversy requirement, and the party invoking federal jurisdiction bears the burden of establishing its existence." *Id.* at 103–04 (footnote omitted).

Akahoshi alleges the administrative action, including the Final Decision, injured her by: (1) making legal and factual determinations against her; (2) causing her to suffer reputational harm; (3) impairing her ability to pursue her application for attorneys' fees under the Equal Access to Justice Act ("EAJA"), *see* 5 U.S.C. § 504; and (4) subjecting her to an unconstitutional and invalid agency proceeding.

To remedy these alleged injuries, she asks us to set aside the Final Decision, charges, and agency proceedings as void ab initio, unlawful, time-barred, and meritless. At bottom, this is a request for declaratory relief. Akahoshi cannot establish standing because her alleged injuries either do not qualify as injuries in fact or would not be redressed by declaratory relief.

Contrary to Akahoshi's claim, the Final Decision did not make any factual findings on disputed issues or legal conclusions against her. Rather, the Final Decision rejected the administrative law judge's recommended decision in its entirety, stated that the Comptroller would "not reach final findings of fact," dismissed all the charges against Akahoshi, terminated the enforcement action, and based on mootness, declined to address any other issues. While Akahoshi objects to some of the Comptroller's phrasing, this does not establish an injury in fact, because the Final Decision makes clear that the Comptroller made no definitive findings or legal conclusions against Akahoshi.

As to Akahoshi's alleged past reputational harm, such injury would not be redressed by declaratory relief. *See Leu v. Int'l Boundary Comm'n*, 605 F.3d 693, 694 (9th Cir. 2010) (holding that declaratory relief for

only past injuries cannot satisfy the redressability requirement for standing, as such relief amounts to mere 'psychic satisfaction'" (quoting *Steel Co.*, 523 U.S. at 107)). And her allegation of future reputational harm is too speculative to constitute an injury in fact, as it is based on only cursory assertions with no supporting details. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) ("It is a long-settled principle that standing cannot be 'inferred argumentatively from averments in the pleadings,' but rather 'must affirmatively appear in the record.'" (citations omitted)).

Akahoshi's interest in pursuing her application for attorneys' fees is insufficient by itself to establish standing. *See Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 480 (1990) (holding that an "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim"); *see also Steel Co.*, 523 U.S. at 108 ("[R]eimbursement of the costs of litigation cannot alone support standing.").[1]

Finally, while having been subjected to an alleged unconstitutional and invalid agency proceeding is a concrete injury, such a past injury cannot be redressed by declaratory relief.[2] *See Axon Enter., Inc.*

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[1] The Comptroller stayed Akahoshi's EAJA application for attorneys' fees pending a decision in this appeal. According to the stay order, the proceeding on her EAJA application will go forward "30 days after [this] appeal results in a final judgment." If Akahoshi is dissatisfied with the fee determination, she presumably could then seek review of the final agency decision. *See* 31 C.F.R. § 6.16; 5 U.S.C. § 504(c)(2).

[2] Akahoshi makes no claim that the OCC will subject her to an unconstitutional and invalid proceeding in the future. Indeed, the Comptroller has conceded that, under 12 U.S.C. § 1818, the OCC is barred from bringing a new enforcement action against Akahoshi based on her tenure at the bank.

v. FTC, 598 U.S. 175, 191 (2023) (holding that being subjected to unconstitutional agency authority is an injury, but explaining that "it is impossible to remedy [such an injury] once the proceeding is over" because the injury "is about subjection to an illegitimate proceeding, led by an illegitimate decisionmaker" and "as to that grievance, the court of appeals can do nothing: A proceeding that has already happened cannot be undone"); *see also Leu*, 605 F.3d at 694.

PETITION DISMISSED.[3]

[3] We deny as moot the OCC's motion to supplement the record. Dkt. No. 39.

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

Docket No.: AA-EC-2018-20

In the Matter of

LAURA AKAHOSHI,
Equal Access to Justice Applicant

ORDER DENYING RESPONDENT'S APPLICATION FOR AN AWARD OF ATTORNEY'S FEES AND COSTS PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT

The Office of the Comptroller of the Currency ("OCC") commenced this action against Respondent Laura Akahoshi ("Respondent"), a former OCC examiner, on April 17, 2018, seeking an order of prohibition and the imposition of a $50,000 civil money penalty under 12 U.S.C. § 1818 for alleged violations of 12 U.S.C. § 481 and 18 U.S.C. § 1001 as well as allegedly unsafe or unsound practices in managing the affairs of Rabobank, N.A. ("the Bank"). Specifically, the Notice of Charges (or "Notice") alleged that Respondent, in her capacity as the Bank's Chief Compliance Officer, had "continuously concealed" from OCC examiners the existence of a third-party auditor's draft report ("the Crowe Report")

regarding deficiencies in the Bank's Bank Secrecy Act and Anti-Money Laundering ("BSA/AML") compliance program, despite the agency's "unambiguous, repeated, and direct requests" for that document, which was in Respondent's possession at the time. The Notice also alleged that Respondent demonstrated an actionably culpable state of mind and that her misconduct ultimately resulted in the Bank suffering financial loss and "significant reputational harm" as the result, *inter alia*, of its February 2018 entry of a guilty plea to conspiracy to obstruct an OCC examination.

On February 10, 2022, the undersigned issued a Recommended Decision concluding that Enforcement Counsel for the OCC ("Enforcement Counsel") had established all elements of its case by at least a preponderance of the evidence and recommending that a prohibition order and a $30,000 civil money penalty be assessed against Respondent. The Acting Comptroller of the Currency ("Comptroller") then issued a Final Decision on April 5, 2023, declining to adopt the undersigned's recommendations and terminating all charges against Respondent for reasons discussed further below.

On the heels of that Final Decision, Respondent has filed an application for a monetary award pursuant to the Equal Access to Justice Act ("EAJA"), 5 U.S.C. § 504, contending that she is entitled to approximately $4.2 million in attorney's fees and costs expended defending herself against the OCC's "defective and unfounded" enforcement action.[1] EAJA Application at 1.

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[1] Respondent concedes that it was the Bank's insurance company, rather than she herself, who paid for her defense in this action, although she nevertheless insists that she is entitled to the fees and costs that she did not pay. *See* EAJA Application at 40 (arguing that Respondent "is eligible for an EAJA reward

Following a joint motion for clarification by Respondent and Enforcement Counsel ("the Parties") regarding the proper forum for Respondent's Application, the Comptroller referred the Application to the undersigned for her determination as the presiding officer in the underlying adjudication.[2] Now, upon consideration of this May 5, 2023 Application, Enforcement Counsel's June 5, 2023 Response in opposition, the Comptroller's Final Decision, and the administrative record as a whole, the undersigned finds that the agency's position in this matter was (more than) substantially justified, and Respondent's Application is therefore DENIED.

Procedural Background

The history of this case has been recounted at various points in prior orders,[3] but the pertinent details follow. On August 21, 2018, in the wake of the Supreme Court's *Lucia* decision,[4] Administrative Law Judge ("ALJ") C. Richard Miserendino replaced ALJ

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even though insurance advanced the costs she incurred in defending herself"), 41 (contending that because insurance was part of her compensation package, "she effectively pre-paid for those fees and costs with the service she provided" as an officer of the Bank). Because the undersigned finds that Respondent does not meet the statutory standard for an EAJA award on other grounds, she does not need to address the merits of this argument.

[2] *See* May 26, 2023 Comptroller's Order on Joint Motion for Clarification at 1.

[3] *See* April 24, 2020 Order Reviewing Prior Administrative Law Judges' Prehearing Actions at 1-2; August 5, 2021 Order Regarding the Parties' Cross Motions for Summary Disposition ("SD Order"), *available at* 2021 WL 7906097, at 25-27; February 10, 2022 Recommended Decision, *available at* 2022 WL 1032840, at 27-28.

[4] *Lucia v. SEC*, 138 S. Ct. 2044 (2018).

Christopher B. McNeil as presiding judge in this matter. ALJ Miserendino then retired, and the matter was reassigned to the undersigned on January 6, 2020 by Order of the Comptroller.

On January 8, 2020, the undersigned issued a Notice of Reassignment pursuant to the Comptroller's Order, directing the Parties to file whatever objections they wished to raise to the undersigned's appointment and to any previous actions taken by the prior ALJs by a certain date, to which the undersigned would then issue a decision on reconsideration of the objected-to actions. On March 6, 2020, Respondent filed objections to, among other things, the purported unconstitutionality of the undersigned's appointment and the appointment of the previous ALJs, the validity of the OCC signatory to the Notice of Charges, and the general structure of the Office of Financial Institution Adjudication ("OFIA") itself. On April 24, 2020, the undersigned issued an Order Reviewing Prior Administrative Law Judges' Prehearing Actions that considered and rejected Respondent's arguments on these issues in their entirety.

On May 28, 2020, Respondent filed an Initial Dispositive Motion in which she argued variously that (1) this action was untimely under the applicable statute of limitations; (2) the 12 U.S.C. § 481 and 18 U.S.C. § 1001 claims set forth in the Notice of Charges were legally deficient and should be dismissed; and (3) the Notice failed to state a claim for unsafe and unsound practices even if all of its allegations were taken as true. In orders issued on October 16, 2020 and March 1, 2021, the undersigned again rejected all of Respondent's arguments, concluding that the action was timely brought; that the Notice properly alleged violations of Sections 481

and 1001; and that "the Notice's allegations that Respondent knowingly and repeatedly lied to the OCC over a prolonged period and concealed a document central to the agency's examination of the Bank for which she acted as Chief Compliance Officer easily [met the] threshold" for a claim of unsafe or unsound practices.[5] In separate orders, the undersigned also granted in part Enforcement Counsel's June 25, 2020 Motion to Strike Respondent's Affirmative Defenses and declined to grant Respondent relief on her February 17, 2021 Motion to Prohibit Reliance on Secret Law.[6]

On June 1, 2021, following extensive discovery, the Parties filed cross-motions for summary disposition on all issues. In a 70-page order issued on August 5, 2021, the undersigned denied Respondent's motion in full and concluded that the undisputed material facts supported the grant of Enforcement Counsel's motion as to "certain aspects of the statutory elements of misconduct, culpability, and effect."[7] In so doing, the undersigned was guided (and, indeed, bound) by the Comptroller's articulation of the applicable standard in his 2017 *Blanton* decision:

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[5] October 16, 2020 Order Recommending the Grant in Part and Denial in Part of Respondent's Initial Dispositive Motion, *available at* 2020 WL 13157348, at 51; *see also* March 1, 2021 Order Modifying Sections A2, B2, and B3 of this Tribunal's October 16, 2020 Order, *available at* 2021 WL 7906090.

[6] *See* October 27, 2020 Order Granting in Part and Denying in Part Enforcement Counsel's Motion to Strike Affirmative Defenses, *available at* 2020 WL 13157350; March 8, 2021 Order Regarding Respondent's Motion to Prohibit Reliance on Secret Law, *available at* https://www.ofia.gov/decisions.html.

[7] SD Order at 4.

> [I]t is reasonably well-settled that although a judge is barred from making credibility determinations, weighing evidence, and drawing inferences from facts at summary judgment, there is no genuine issue [of material fact] if the evidence presented in the opposing affidavits is of insufficient caliber or quantity to allow a rational finder of fact to find for the non-movant. In other words, *in granting a motion for summary disposition[,] a trier of fact is not obliged to credit the non-moving party's factual assertions when they are not supported on the record*. When opposing parties tell two different stories, one of which is blatantly contradicted by the record, . . . a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment. *A court is not required to move a case past the summary judgment stage when inferences drawn from the evidence and upon which the non-moving party relies are implausible*. Finally, inferences may be drawn from underlying facts that are not in dispute, such as background or contextual facts, and assuming the existence of such underlying facts, an inference as to another material fact may be in favor of the non-movant only if it is rational and reasonable and permissible under the governing substantive law.[8]

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[8] *In the Matter of William R. Blanton*, No. AA-EC-2015-24, 2017 WL 4510840, at *6 (July 10, 2017) (OCC final decision) ("*Blanton*"), *aff'd on other grounds*, *Blanton v. OCC*, 909 F.3d 1162 (D.C. Cir. 2018) (affirming recommended decision on summary disposition) (internal quotation marks and citations

With respect to the misconduct elements of Section 1818, the undersigned concluded as follows: First, that Respondent caused the Bank to violate its statutory duty under 12 U.S.C. § 481 "when she failed to provide the Crowe Report to OCC examiners upon request in March 2013, despite knowingly having that document in her possession and understanding it to be responsive to the OCC's inquiry."[9] Second, that Respondent violated 12 U.S.C. § 1001(a)(1) by "knowingly and willfully conceal[ing] material facts from OCC examiners regarding the nature of the Crowe work product provided to Bank officials in January and February 2013."[10] Third, that the information concealed by Respondent in her March 22, 2013 and March 25, 2013 emails had the propensity to influence "the OCC's actions and decision-making with respect to its examination of the Bank's BSA/AML program" and was therefore material.[11] Fourth, that Respondent's conduct constituted actionably unsafe and unsound practices that departed from an established standard of prudent operation and foreseeably exposed the Bank to an abnormal risk of loss or damage (and that the

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omitted) (emphases added); *see also* SD Order at 6, 59 n. 205 (citing *Blanton* for this proposition); Recommended Decision at 58 n. 247 (same).

[9] SD Order at 32; *see also id.* at 32-37.

[10] *Id.* at 37; *see also id.* at 39 (finding that if "Respondent is asked for a specific document that is in her possession, it is Respondent's duty to disclose the existence of that document rather than withholding it and contriving to create the impression that the document does not exist"), 40-43 (providing detailed examples of "Respondent's tendencies toward concealment" as reflected in underlying facts that are not in dispute).

[11] *Id.* at 48; *see also id.* at 46-49.

OCC examiner conclusions in this regard presented by Enforcement Counsel were based on "objectively verifiable facts" and entitled to significant deference).[12]

With respect to Section 1818's effect elements, the undersigned concluded that the Bank suffered actionable loss in February 2018 "by reason of" Respondent's misconduct when it pled guilty to obstructing the OCC's examination into its BSA/AML program and paid a $500,000 fine.[13] Specifically, the Bank's admission that it conspired with "Executive A" (an undisputed reference to Respondent) to make "false and misleading statements to the OCC regarding the existence of reports developed by a third-party consultant" during the OCC's 2013 examination undoubtedly linked the misconduct alleged in this action to the loss suffered by the Bank in connection with its guilty plea.[14] The undersigned also held that Respondent can cause the Bank to incur loss through payments made in furtherance of a plea agreement even if Respondent was not party to that prosecution, because "[a] bank's decision to plead guilty to a prosecution for some certain loss now rather than risking a much greater loss and more severe consequences later should not absolve from liability the individual on whose conduct such claims are based."[15] Finally, the undersigned applied case law from the Comptroller and OFIA's other constituent agencies to find that "as long as some of the loss as a result of that guilty plea is fairly attributable to Respondent," it is immaterial to the

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[12] *See id.* at 50-54.

[13] *See id.* at 55-59.

[14] *Id.* at 55 (internal quotation marks and citation omitted).

[15] *Id.* at 57.

effect element that others may have also contributed to the Bank's loss through their misconduct.[16]

And with respect to the culpability element of 12 U.S.C. § 1818(e), the undersigned concluded that Respondent acted with personal dishonesty and willful disregard for the safety and soundness of the Bank based on the undisputed material facts of the case, even after resolving all reasonable inferences in favor of Respondent.[17] Although it is typically appropriate to resolve questions of culpability at the hearing stage rather than on summary disposition, the undersigned found that "[t]he extensive record of email evidence [did] not fairly admit to multiple interpretations of Respondent's actions other than that she knew that the Crowe Report and its contents were responsive to requests by [the OCC] and took steps to mislead the examiner, withhold the document, and convey the impression that it had not been provided to the Bank."[18] Respondent, moreover, offered no evidence in support of her position that she had responded to the OCC in good faith beyond an implausible post hoc characterization of her actions that was contradicted by the contemporaneous emails.[19] Bearing in mind *Blanton*'s maxim that "a

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[16] *Id.* at 58 (citing cases).

[17] *See id.* at 59-63.

[18] *Id.* at 60.

[19] *See Blanton*, 2017 WL 4510840, at *6 ("A court is not required to move a case past the summary judgment stage when inferences drawn from the evidence and upon which the non-moving party relies are implausible.") (internal quotation marks and citation omitted); *see also*, *e.g.*, SD Order at 15-17 & n.62 (Respondent's contention that Bank management did not interpret the OCC examiner's March 25, 2013 request as encompassing the draft Crowe Report contradicted by "contemporaneous correspondence [that] reveals a clear

trier of fact is not obliged to credit the non-moving party's factual assertions when they are not supported on the record," the undersigned therefore found that the culpability element had been met as to personal dishonesty and willful disregard.[20]

There were a number of issues that were briefed but not resolved on summary disposition, including whether Respondent's misconduct constituted a violation of 18 U.S.C. § 1001(a)(2), whether the Bank suffered reputational harm as a result of that

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understanding among Respondent and the Bank officials with whom she was communicating that the Crowe Report was the document to which [the examiner's] request most centrally referred"), 16-18 & n.69 (Respondent's litigation position that her reference to a "draft report" in her March 25, 2013 email to OCC examiner meant a PowerPoint deck rather than the Crowe Report contradicted by Respondent's correspondence immediately prior to that email in which she received multiple copies of "the draft Crowe Report" that she did not reference or share with the examiner), 35-36 (detailing additional ways in which Respondent's internal emails with her colleagues around the time of the OCC's requests are flatly inconsistent with her litigation position), 40-43 (same).

[20] *Blanton*, 2017 WL 4510840, at *6 (internal quotation marks and citation omitted); *see also In the Matter of Carl V. Thomas et al.*, Nos. 99-027-B-I, -CMP-I, & E-I, 2005 WL 1520020, at *7 (June 7, 2005) (FRB final decision) (finding Section 1818(e) culpability elements satisfied on summary disposition); *In the Matter of Charles F. Watts*, Nos. 98-046e & -044k, 2002 WL 31259465, at *6 (Aug. 6, 2002) (FDIC final decision) (same); *cf. Brodie v. Dep't of HHS*, 715 F. Supp. 2d 74, 81-82 (D.D.C. 2010) (affirming ALJ's summary disposition against respondent where "the record . . . supported only one reasonable inference regarding [respondent's] state of mind: [that he] had been either knowing or reckless with regard to the falsification of information," and where respondent "had failed to offer any specific facts or evidence at the summary disposition stage that would support his claims of blamelessness or counter [the agency's] evidence").

misconduct, and whether Respondent acted with continuing disregard for the Bank's safety and soundness.[21] However, because at least one aspect of each of the three necessary statutory elements of misconduct, effect, and culpability had been met, the Parties jointly agreed on August 16, 2021 to forgo a hearing on the outstanding prongs of those elements and to contest the lone remaining issue—that of the appropriateness of the proposed civil money penalty amount—on the papers.

The Parties briefed the civil money penalty issue on October 22, 2021, with responses filed on November 22, 2021. Respondent then requested and received leave to file a brief reply to the civil money penalty submissions on December 23, 2021. On February 10, 2022, the undersigned issued a 69-page Recommended Decision, which adopted the findings and conclusions of the summary disposition order and further concluded that $30,000, rather than the $50,000 sought in the Notice of Charges, was an appropriate monetary penalty for Respondent's misconduct.[22] The undersigned also rejected, once more, Respondent's argument that the proceedings were defective because the official who signed the Notice was unlawfully and unconstitutionally appointed.[23]

On April 18, 2022, Respondent filed her exceptions to the Recommended Decision pursuant to 12 C.F.R. § 19.39. These exceptions, which spanned 143 pages, reiterated all of Respondent's constitutional and merits arguments from before this Tribunal as well

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[21] *See* SD Order at 69; Recommended Decision at 2 n.7.

[22] *See* Recommended Decision at 60-67.

[23] *See id.* at 67-69.

as asserting, for the first time since a passing reference in her Answer, that her Seventh Amendment right had been violated due to the lack of a jury trial.[24] The Uniform Rules of Practice and Procedure that govern these proceedings do not provide Enforcement Counsel the opportunity to respond to a party's exceptions once they have been filed, *see generally* 12 C.F.R. § 19.39, and so Respondent's many arguments and selective characterizations of the factual record went unrebutted.

On April 5, 2023, the Comptroller issued his Final Decision, which concluded that the undersigned had misapplied the summary disposition standard by failing to appropriately credit Respondent's present-day denials of misconduct and culpability where they conflicted with contemporaneous record evidence.[25] Instead of remanding the case back to this Tribunal to act consistently with his instructions, the Comptroller opted to terminate the action against

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[24] *See* Answer ¶ 12; Respondent's Exceptions to the Final Recommended Decision at 121-27. The Seventh Amendment issue was never substantively raised or addressed in this proceeding before the undersigned, who therefore had no occasion to rule on it. *See* 12 C.F.R. § 19.39(c)(1) ("All exceptions . . . must be confined to the particular matters in, or omissions from, the administrative law judge's recommendations to which that party takes exception.").

[25] *See* Final Decision, *available at* 2023 WL 2859144, at **8-9. The undersigned respectfully disagrees. *See* notes 8, 19, & 20 *supra* and supporting citations; *see also* Enforcement Counsel's Answer to Respondent's Application for an Award of Attorney's Fees and Costs Pursuant to the Equal Access to Justice Act ("EC Response") at 21 n.101 ("Self-serving statements by a party regarding elements of its case are generally entitled to so little weight that they are insufficient to survive a motion for summary judgment.") (citing cases).

Respondent in its entirety "in the interest of adjudicatory efficiency and economy," citing the many years that had lapsed since the events that gave rise to the Notice's allegations, the prior delay in this action for reasons beyond the agency's control, and the difficulty inherent in asking "witnesses to accurately recall the events in question and their attendant states of mind."[26]

Notably, the Final Decision at no point reached the merits of the allegations against Respondent, concluded that the alleged conduct was not actionable, or suggested that the agency had been unjustified in bringing this action. To the contrary, the Comptroller repeatedly emphasized the seriousness of the Notice's allegations:

> The OCC should and must act when facts suggest that an Institution Affiliated Party ("IAP") is obstructing an examination or impeding a bank's response to an examiner's request for information.
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> ***
>
> [T]oday's decision in no way condones or vindicates Respondent's conduct.
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> ***
>
> The actions giving rise to the allegations of misconduct in this case are deeply troubling.
>
> ***
>
> Based on the evidence in the current record, Rabobank executives appear to have demonstrated a troubling lack of responsiveness to OCC demands. The record

[26] Final Decision at *11.

> shows that Respondent received a direct request from an OCC examiner to provide "a copy of the [Crowe] assessment report" on March 21, 2013. Instead of immediately furnishing all documents (i) within their possession and (ii) plainly responsive to the examiner's request, Respondent and her colleagues waited nearly a month before taking steps to hand them over. One plausible interpretation of the record is that Respondent and others adopted a strategy of deflection and delay designed to hinder the OCC's efforts (reflected by multiple written and oral requests) to collect these materials. This unacceptable delay—and, more troubling, possible lack of candor—is exactly the type of conduct that the OCC's enforcement ability is designed to deter.
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> ***
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> It is certainly plausible that, after a hearing, a neutral factfinder could determine that Enforcement Counsel's interpretation of events is more credible than Respondent's. . . . The record evidence certainly suggests that, at minimum, the path to providing the OCC with the requested Crowe Report was not as straight as it should have been, and that Respondent played an important role in the deliberations within the Bank that resulted in the delay.[27]

In other words, far from questioning the agency's decision to institute these proceedings or casting doubt upon Enforcement Counsel's legal theories or

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[27] *Id.* at **2, 7, 9.

development of the factual record in any way, the Comptroller went out of his way to make it clear that the alleged misconduct was a valid predicate for an enforcement action and that it was, if nothing else, "certainly plausible" that Enforcement Counsel's version of the facts could ultimately prove to be the correct one, as the evidence already supported such a finding. Nonetheless, Respondent filed her EAJA application within the statutorily prescribed time, seeking $4.2 million in costs and fees on the grounds, *inter alia*, that "the OCC's legal and factual positions were egregiously wrong," that the enforcement action itself was "void from inception," and that Respondent was required to expend resources "to defend against the OCC's shifting tactics and theories seeking to salvage a case that should never have been brought."[28] It is to that application that the undersigned now turns.

EAJA Standard

The EAJA was enacted to "eliminat[e] financial disincentives for those who would defend against unjustified governmental action" and to "deter[] the unreasonable exercise of governmental authority."[29] In practice under 5 U.S.C. § 504,[30] this means that applicants who have been the "prevailing party" against an agency in an adversary adjudication and

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[28] EAJA Application at 21, 28, 49.

[29] *Ardestani v. INS*, 502 U.S. 129, 130 (1991); *see also*, *e.g.*, *Sullivan v. Hudson*, 490 U.S. 877, 890 (1989).

[30] The EAJA comprises two statutory fee-shifting provisions that are similar but not identical: 28 U.S.C. § 2412, which covers civil judicial proceedings brought by or against the government, and 5 U.S.C. § 504, which applies to administrative proceedings such as the enforcement action at issue here.

who meet other eligibility requirements are entitled to an award of reasonable costs and fees *unless*, upon review of the full administrative record, the official who presided at the adjudication finds that 1) "the position of the agency was substantially justified" or 2) "special circumstances make an award unjust."[31] With respect to the substantial justification requirement, it is unnecessary for the agency's position to be retrospectively deemed "correct" or even better-founded than the contrary arguments asserted by the respondent during the proceeding, so long as it—and the decision to commence and prosecute the action[32]—"was, on the whole, 'justified to a degree that could satisfy a reasonable person.'"[33] As the Supreme Court has observed, "[c]onceivably, the Government could take a position that is not substantially justified, yet win; even more likely, it could take a position that is substantially justified, yet lose."[34] For these purposes, then, "[a] position is substantially justified if the underlying agency action and the legal arguments in defense of the action had

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[31] 5 U.S.C. § 504(a)(1). As noted *supra*, as the officer who presided at the adversary adjudication, the undersigned was referred Respondent's EAJA application for review by order of the Comptroller dated May 26, 2023.

[32] The "position of the agency" is defined in the EAJA as both "the position taken by the agency in the adversary adjudication" as well as "the action or failure to act by the agency upon which the adversary adjudication is based." 5 U.S.C. § 504(b)(1)(E).

[33] *Hill v. Gould*, 555 F.3d 1003, 1008 (D.C. Cir. 2009) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988)); *see also*, *e.g.*, *Pierce*, 487 U.S. at 566 n.2 ("[A] position can be substantially justified even though it is not correct, and we believe that it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct.").

[34] *Pierce*, 487 U.S. at 569.

'a reasonable basis both in law and fact.'"[35] In *Hill v. Gould*, for example, the D.C. Circuit found that the substantial justification standard had been met when the agency had taken "a reasoned position on a novel issue" and "a reasonable approach to [a] relatively unsettled area of administrative law," in contrast to a position that was "flatly at odds with the controlling caselaw" or pressed by the agency "in the face of an unbroken line of [contrary] authority or against a string of losses."[36]

Analysis

Here, there can be no doubt that the agency's position was substantially justified. Respondent describes this action as "a false statements case without false statements; a concealment case without concealment; and a case about failing to disclose documents that were disclosed on the exact timeframe to which the OCC agreed."[37] But this is the same argument, nearly to the letter, that Respondent made at the outset of her summary disposition briefing.[38] It was not persuasive before, and nothing has changed. Neither does Respondent's reiteration of any other merits arguments previously and unsuccessfully raised in this action yield any different result at this stage; the facts and law that led the undersigned, earlier in this proceeding, to agree with Enforcement Counsel regarding the materiality of the Crowe Report, for example, have

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[35] *Hill*, 555 F.3d at 1006 (quoting *Pierce*, 487 U.S. at 565).

[36] *Id.* at 1007-08.

[37] EAJA Application at 2.

[38] *See* Respondent's Motion for Summary Disposition and Memorandum of Law in Support at 1.

equal force here and now.[39] To the extent that Respondent presently argues that Enforcement Counsel's theory of the case is not just wrong but *so wrong* that she is entitled to a multi-million dollar award, the many rulings against Respondent on merits issues throughout this proceeding are evidence, at the very least, that the undersigned does not share that view.

Likewise, with the exception of Respondent's newly-developed Seventh Amendment argument, the undersigned has already considered and rejected the many "tribunal objections" that Respondent again asserts as to the validity of the underlying action or the vindication of Respondent's right to due process. The undersigned has repeatedly concluded, for instance, that the individual who signed the Notice on behalf of the OCC, Deputy Comptroller for Special

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[39] The undersigned notes that Respondent inaccurately characterizes the Recommended Decision as concluding that "the draft Crowe documents lacked materiality" for purposes of 18 U.S.C. § 1001. EAJA Application at 25. As both the summary disposition order and the Recommended Decision make clear, the undersigned unequivocally agrees with Enforcement Counsel's position that the information allegedly concealed by Respondent regarding the Crowe Report satisfies Section 1001's materiality threshold. *See* SD Order at 46-50; Recommended Decision at 45-50. Respondent's assertion to the contrary in her EAJA application misleadingly conflates a discussion of potential mitigating factors for the civil money penalty amount with the legal standard for materiality under Section 1001. *See* EAJA Application at 24-25; Recommended Decision at 64-65. The fact that "the concealment was brief and [] the examination itself was to all appearances unaffected in the end by Respondent's actions," Recommended Decision at 64, has no bearing on whether knowledge of the Crowe Report and its conclusions had the propensity to influence OCC examiners' decision-making for materiality purposes, which it undoubtedly did. *See id.* at 48.

Supervision Michael Brickman, is a "mere employee" whose appointment was not subject to the Appointments Clause yet who could be validly delegated the authority to issue Notices of Charges.[40] Respondent may take as read, then, that the agency's position on that issue meets the substantial justification standard sufficient to rebuff an application for fees and costs under the EAJA.[41] And while Enforcement Counsel did not have occasion to take a position on Respondent's purported Seventh Amendment entitlement to a jury trial in this matter while it was before this Tribunal, the undersigned does not agree with Respondent (*see* EAJA Application at 37-39) that such a right attaches to Section 1818 enforcement actions.[42]

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[40] *See* Recommended Decision at 67-68; SD Order at 68; April 24, 2020 Order Reviewing Prior Administrative Law Judges' Prehearing Actions at 6; *see also* 12 U.S.C. § 4a (providing that the Comptroller "may delegate to *any duly authorized employee*, representative, or agent *any power* vested in the office by law") (emphases added); *Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976) ("Employees are lesser functionaries subordinate to officers of the United States."); *Lucia*, 138 S. Ct. at 2051 (distinguishing between constitutional officers and "mere employees").

[41] *See* EAJA Application at 28-30 (arguing that "[t]here was no substantial justification for the agency to prosecute [Respondent] for years based on a void accusatory instrument issued by a non-constitutionally-appointed officer").

[42] *See*, *e.g.*, Order No. 4: Granting Requests for Hearing and Denying Demands for Jury Trial, *In the Matter of Robert S. Catanzaro et al.*, FDIC Nos. 22-0112e, -0113k, -0107e, -0108k, -0143b, -0109e, & -0110k, 2023 WL 2859145, at **1-3 (Mar. 21, 2023) (OFIA) (holding that "this action concerns the adjudication of public rights, for which the Seventh Amendment does not guarantee a jury trial"); Order Denying Respondents' Demand For Jury Trial and Motion to Dismiss, *In the Matter of Saul Ortega and David Rogers, Jr.*, OCC Nos. AA-EC-2017-44 & -45, 2022 WL 2668526, at **1-3 (July 7, 2022) (OFIA) (same).

Nor does the Final Decision rescue Respondent's application. To the limited extent that the Comptroller there spoke to the substance of the underlying claims against Respondent, he took care to emphasize the seriousness of the Notice's allegations.[43] Furthermore, although the Comptroller did not rule on any merits issues and expressly declined to consider Respondent's numerous other exceptions to the proceeding,[44] the Final Decision also noted multiple times that the record evidence offered substantial support for Enforcement Counsel's legal position.[45] And certainly there is no suggestion that the arguments advanced by Enforcement Counsel were "flatly at odds with the controlling caselaw" or pressed "in the face of an unbroken line of authority."[46] From the Comptroller's apparent perspective as well as that of the undersigned, then,

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[43] *See* Final Decision at **2 (stating that the agency "should and must act when facts suggest that an [IAP] is obstructing an examination or impeding a bank's response to an examiner's request for information"), 7 (noting that "[t]he actions giving rise to the allegations of misconduct in this case are deeply troubling").

[44] *See id.* at *11 (concluding that "[b]ecause this action is now dismissed, the remaining issues raised in the Parties' exceptions and any pending motions are moot").

[45] *See id.* at **7 ("Based on the evidence in the current record, Rabobank executives appear to have demonstrated a troubling lack of responsiveness to OCC demands. . . . This unacceptable delay—and, more troubling, possible lack of candor—is exactly the type of conduct that the OCC's enforcement ability is designed to deter."), 9 ("The record evidence certainly suggests that, at minimum, the path to providing the OCC with the requested Crowe Report was not as straight as it should have been, and that Respondent played an important role in the deliberations within the Bank that resulted in the delay.").

[46] *Hill*, 555 F.3d at 1007-08.

both "the underlying agency action and the legal arguments in defense of the action had 'a reasonable basis both in law and fact'" that easily clears the EAJA's substantial justification threshold.[47]

In summary, Respondent's contention that the agency's position in this case was not substantially justified—as necessary for an award under the EAJA—rests on factual and legal arguments that the undersigned has already considered and deemed non-meritorious over the course of the proceeding. Both the undersigned and the Comptroller, on the strength of the administrative record as a whole, also find it plausible, at minimum, that Enforcement Counsel's interpretation of the events at issue, and its legal theories regarding those events, would have prevailed had the matter proceeded to hearing.[48] In other words, as Enforcement Counsel puts it, "there is ample evidence that [Respondent] violated laws and engaged in unsafe and unsound practices, and that Enforcement Counsel satisfied the requisite elements of 12 U.S.C. §§ 1818(e) and (i)," even if in this instance the matter has been terminated for reasons unrelated to the merits of the underlying case.[49] Accordingly, Respondent's EAJA application does not meet the statutory criteria of 5 U.S.C. § 504(a)(1), and it is therefore DENIED.

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[47] *Id.* at 1006 (quoting *Pierce*, 487 U.S. at 565).

[48] *See* Final Decision at *9 (stating that "[i]t is certainly plausible that, after a hearing, a neutral factfinder could determine that Enforcement Counsel's interpretation of events is more credible than Respondent's")

[49] EC Response at 36.

Enforcement Counsel's Other Arguments

In addition to arguing that its position in this action was substantially justified, Enforcement Counsel contends that Respondent's EAJA application should be denied because Respondent is not a "prevailing party" within the meaning of the statute and because Respondent herself did not incur the fees and costs that she now seeks to recoup.[50] Enforcement Counsel also argues that "special circumstances would make an award unjust" and that the fees and expenses sought by Respondent are both unreasonable and unsupported.[51] Because the undersigned concludes, for the reasons above, that denial of Respondent's Application is warranted on the grounds that the agency's position was substantially justified, it is unnecessary to address any of Enforcement Counsel's additional arguments.

SO ORDERED.

Dated: June 14, 2023

/s/ Jennifer Whang
Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication

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[50] *See id.* at 31-35.

[51] *Id.* at 35 (quoting 5 U.S.C. § 504(a)(1)) (alteration in original); *see id.* at 36-37 & Appendix A.

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
COMPTROLLER OF THE CURRENCY
WASHINGTON, D.C

OCC AA-EC-2018-20

In the Matter of

LAURA AKAHOSHI,
former Chief Compliance Officer

Rabobank, N.A.
Roseville, California

FINAL DECISION TERMINATING ENFORCEMENT ACTION

This is an administrative enforcement action commenced by the Enforcement Division ("Enforcement Counsel") of the Office of the Comptroller of the Currency ("OCC") against Laura Akahoshi ("Respondent") (collectively, "Parties"), a former OCC examiner and, during the period in which the events underlying this action occurred, the Chief Compliance Officer at Rabobank, N.A. (the "Bank"). Pursuant to 12 U.S.C. §§ 1818(e) and (i), Enforcement Counsel filed a Notice of Charges ("Notice") seeking a prohibition order and a civil money penalty ("CMP") against Respondent, alleging that she improperly withheld information from OCC examiners during an

on-site examination at the Bank. Though this action largely stems from events that occurred during a short three-week period in 2013, its considerable and lengthy procedural history—replete with multiple changes in adjudicators following the issuance of *Lucia v. SEC*, 138 S. Ct. 2044 (2018), an intervening criminal investigation by the Department of Justice ("DOJ"), and substantial discovery taken by both sides, *see infra* at 10—has extended the matter to the present day.

After enduring these procedural hurdles, Enforcement Counsel and Respondent each filed cross-motions for summary disposition, with both parties contending that no material facts in dispute would preclude resolution of their respective motions in their favor as a matter of law. On August 5, 2021, Administrative Law Judge ("ALJ") Jennifer Whang issued an Order Regarding the Parties' Cross Motions for Summary Disposition, in which she concluded that at least one aspect of each of the statutory elements for a prohibition order under 12 U.S.C. § 1818(e) and first- and second-tier CMPs under 12 U.S.C. § 1818(i) had been met. 2021-08-05 Order at 69. On August 16, 2021, the Parties filed a Joint Status Report memorializing the Parties' agreement that, while contested issues remained, the only remaining issue requiring resolution for purposes of a recommended decision was the appropriate amount of the first- and second-tier civil money penalties. The Parties further agreed that such resolution did not require a hearing and should be resolved based on written submissions. 2021-08-16 Joint Status Report at 2. Accordingly, the ALJ adopted the Parties' recommendation and cancelled the scheduled hearing.

On February 10, 2022, following submission of the Parties' respective motions for summary disposition,

the ALJ issued a Recommended Decision ("RD") granting summary disposition in favor of Enforcement Counsel and recommending that the Comptroller enter a prohibition order against Respondent and assess a second-tier CMP for $30,000. RD at 68-69. On April 18, 2022, Respondent and Enforcement Counsel filed with the Comptroller their respective exceptions to the Recommended Decision. On July 5, 2022, the Comptroller issued an Order on Supplemental Briefing in response to contemporaneous caselaw developments concerning issues that the Comptroller ultimately determines do not affect the disposition of this case.. 2022-07-05 Order at 1. On November 21, 2022, after additional briefing and a subsequent motion filed by Respondent, the Comptroller certified that the record of the proceeding was complete. 2022-11-21 Order at 1.

Upon review of the entire record, the Comptroller hereby declines to adopt the ALJ's Recommended Decision. The ALJ's recommended findings of fact and conclusions of law are predicated upon a misapplication of the summary disposition standard and do not form an adequate basis for the Comptroller to assess a CMP or a prohibition order. Typically, this tribunal would cure such an issue by remanding this matter back to the ALJ for further proceedings and, most likely, a hearing. Given the serious charges in this case, that remedy is a tempting one. The OCC should and must act when facts suggest that an Institution Affiliated Party ("IAP") is obstructing an examination or impeding a bank's response to an examiner's request for information. Nevertheless, given the substantial delays that have taken place that were beyond the control of this tribunal (discussed *infra* at 10), the

Comptroller concludes that the more appropriate course of action is to terminate the proceeding.

As set forth below, the Comptroller reluctantly orders that the action be terminated and the outstanding Notice of Charges and Assessment be dismissed. But today's decision in no way condones or vindicates Respondent's conduct. The OCC expects prompt, unrestricted access to a national bank's books, records, and documents of any type during any supervisory activity. Bank personnel are required to give any OCC examiner prompt and complete access to all such materials during examinations of any length, scope, or type. Nothing in this decision alters, lessens, or obviates these supervisory expectations.

FACTUAL BACKGROUND

Unless otherwise noted, the following facts are either undisputed or established by record evidence. Respondent joined the Bank as its Chief Compliance Officer ("CCO") in 2008. *See* EC-SOF at 3. As the Bank's CCO, she was responsible for overseeing the Bank's BSA/AML program, supervising the Bank's BSA/AML officer, and advising the Bank's board of directors on compliance and regulatory matters, including BSA/AML. *Id.* In addition, Respondent was responsible for "ensuring clear communications between the Bank and national and international regulatory authorities" as well as for "providing advice to executive management and the board on matters that could impact how the Bank is perceived by its regulator." OCC-MSD-03 at 2.

Prior to joining the Bank, Respondent served as an OCC examiner for nearly ten years. *See* EC-SOF at 2-3. She earned her commission at the OCC in 2000

as a National Bank Examiner in the field of regulatory compliance and thereafter specialized in Bank Secrecy Act/Anti-Money Laundering ("BSA/AML") compliance. Respondent participated in approximately 150 bank examinations during her roughly decade-long tenure with the OCC, including approximately 75 BSA-related matters. In 2007, the OCC promoted Respondent to Compliance Lead Expert for the OCC's Western District, a position in which she bore responsibility for advising other OCC examiners on BSA/AML matters. *Id.*

In July 2012, Respondent was promoted to a Global Compliance Manager role with the Bank's parent company and moved to the Netherlands. EC-SOF at 5. Meanwhile, the Bank hired Respondent's replacement as CCO, Lynn Sullivan. Sullivan very quickly identified "serious deficiencies" in the Bank's BSA/AML program. Shortly thereafter—in November 2012—the OCC commenced a full-scope, on-site examination of the Bank's BSA/AML compliance program. *Id.* at 5-6.

In December 2012, the Bank engaged Crowe Horwath LLP ("Crowe") to perform a BSA/AML program assessment. *Id.* at 6. As part of this assessment, Crowe produced at least two significant pieces of written work product: a report, referred to throughout this litigation as "the Crowe Report," and a PowerPoint deck that synthesized the report's findings. RD at 7. Both documents contained Crowe's own conclusions that there were significant deficiencies in the Bank's BSA/AML compliance program. Between January and February 2013, various draft versions of both documents circulated among Bank leadership. Crowe also presented the PowerPoint to Bank management on February 5, 2013. EC-SOF at 7.

On February 28, 2013, Respondent was called back to the Bank to support its response to the OCC examination; Sullivan, meanwhile, was placed on forced leave for reasons that are not entirely clear based on the current record. *Id.* at 11; *see also* Sullivan Dep. Tr. at 322:13-20. Now Acting CCO, Respondent assisted the Bank in responding to a draft OCC Supervisory Letter identifying deficiencies in the Bank's BSA/AML program. *Id.* at 11; *see also* Ryan Dep. Tr. at 213: 13-18; R-SOF at 5.

On March 18, 2013, Sullivan notified the OCC, from her personal email account, that the Bank had engaged Crowe to perform a BSA/AML assessment. *Id.* at 13. The ensuing communications between the OCC and Respondent are central to the dispute in this case.

On March 21, 2013, OCC examiner Shirley Omi emailed Respondent, asking her to "please provide us [the OCC] with a copy of the assessment report of the Bank's BSA program that Crowe LLC was engaged to perform in January 2013." OCC-MSD-47. Respondent then forwarded Omi's email to Bank General Counsel Dan Weiss, writing that "I think the right answer is that Crowe did not perform an assessment" and that "the project was shelved before any report could be issued." OCC-MSD-48 at 2. Weiss sent Respondent the following in response:

> To the best of my knowledge, Crowe never provided a final report. As you note, they were engaged to provide an assessment and road map. They did produce a draft that was shared with management and perhaps Terry [Schwakopf, another Bank official]? My guess is that copies of the draft are floating around although our intention was to not

> keep any draft documents. So I believe your statement is accurate, although should we say no "final report was issued"? The obvious concern is they then ask for the draft from Crowe.

Upon receiving this from GC Weiss, Respondent replied and said she would call him to discuss it further. *Id.* at 1.

On March 22, 2013, Respondent replied to OCC examiner Omi's request with the following:

> Crowe did not complete an assessment. While they were engaged to perform a market study/peer benchmark analysis for the benefit of management and the board, the project was suspended before any report was issued. The decision to suspend was made in light of information coming out of the internal investigation being done to develop the OCC response. In part, it became clear that Crowe had not been provided all facts necessary to understand the organization so the emerging observations and action plan were not tailored to our situation. Rather than move in a direction that wasn't reflective of the current state of affairs, management elected to take some time to more thoughtfully determine next steps.
>
> Having taken this time to better consider where we need to go in enhancing our program, we have recently asked Crowe to assist us on several projects, including the BSA/AML risk assessment. We anticipate having a draft in time for the next board

> meeting in early May. I'd be happy to send you a copy of the draft report.

OCC-MSD-52 at 2. Respondent then forwarded that email to Bank CEO John Ryan and GC Weiss. Ryan replied by asking, "I wonder where Shirley heard Crowe did a program assessment?" Respondent answered him the following day:

> Lynn mentioned it at the exit meeting in February in SF. What I don't know is whether she took it upon herself to share the draft report. If I hear back from Shirley indicating they have a draft report, I'll schedule a call to discuss with her why we reject the initial conclusions. I'll also make it clear to her that management did not accept the report and thus it is not considered an 'official bank document.'

CEO Ryan responded, "Ok let's hope she did not provide a draft report. If she did your approach with Shirley is a good one." *Id.* at 1.

On March 25, 2013, Omi sent another request to Respondent, this time asking for "a copy of what bank management received from Crowe, even if it was only preliminary or partial." OCC-MSD-53. Respondent then met with CEO Ryan and GC Weiss to discuss how to respond. In advance of this meeting, she asked GC Weiss for a copy of the Crowe document because she could not locate a copy. OCC-MSD-55 at 2. GC Weiss replied that he "never kept an electronic copy" but that "Sharon [Edgar] may have found a copy in Lynn's papers." Respondent then wrote back, "[a]ll the better if you don't have it as we can then tell Shirley, truthfully, that only Lynn was in receipt of the letter and we are unable to locate a copy." *Id.* at 1. Shortly after this, both Sharon Edgar—a Bank

employee then in communication with Respondent—and GC Weiss sent Respondent a copy of the draft Crowe report. OCC-MSD-56 at 1; OCC-MSD-58.

After her meeting with CEO Ryan and GC Weiss, Respondent circulated a proposed response to Omi's second request, to which GC Weiss offered suggested edits. OCC-MSD-63. Respondent then replied to Omi later that day with the following:

> I've spoken with both John Ryan and Dan Weiss regarding the existence of a draft report coming out of the January BSA Program Review by Crowe Horwath. They each reported the same information which is that Crowe had a discussion with the board and members of executive management at the February 4th meeting. And while Crowe did utilize a PowerPoint presentation during the discussion, it was not provided to the Bank, as indicated by the fact that it was not included in the board packet. In this meeting and in subsequent conversations, both board members and executive management were very critical of the information being provided noting that there lacked foundation and that assumptions appeared to be based on inaccurate information. . . . [Respondent then identifies the specific concerns the Board had with the Crowe presentation].
>
> In all, the participants did not find the presentation particularly useful. It was this presentation that prompted management to suspend the work being done by Crowe around the BSA/AML Program Assessment until clearer instructions and parameters

> could be established with the goal of an end product that the board and management could rely upon to make decisions going forward. Crowe has since been provided with additional information and has, in fact, altered their recommendations on several fronts.
>
> Now that there is more effective sharing of information and clearer communication as to the direction of work, we have picked up where the work ended in mid-February and are utilizing Crowe resources to assist us in completing the BSA/AML Risk Assessment. . . . I've attached a copy of a proposal Crowe submitted to the Executive Oversight Committee on March 1, 2013, which outlines their recommendations for next steps, as described above, and which we've generally accepted. We're happy to discuss further and will certainly share the BSA/AML Risk Assessment when it comes out in draft near the end of April or early May.

OCC-MSD-64 at 1. Respondent attached to this email a copy of the aforementioned proposal, a seven-page document that did not contain conclusions referenced in the Crowe Report or in the PowerPoint presented to Bank management. She did not attach the Crowe Report or the PowerPoint. *Id.*; *see also* RD at 17.

After these two unsuccessful requests, OCC Assistant Deputy Comptroller ("ADC") Thomas Jorn called CEO Ryan on April 8, 2013 and verbally requested the Crowe documents directly from him. RD at 21. CEO Ryan agreed to provide the materials on the timeline ADC Jorn requested—by April 19,

2013—along with a cover letter explaining why the Bank believed the assessment was "inaccurate" and "misleading." OCC-MSD-66; OCC-MSD-67. On April 18, 2013, Respondent emailed ADC Jorn, attaching a draft of the Crowe Report, a copy of the PowerPoint, and the Bank's cover letter explaining why management rejected Crowe's conclusions. OCC-MSD-79-81.

Enforcement Counsel characterizes these communications as evasive and misleading, while Respondent characterizes them as reflecting an honest effort to summarize information gathered from Bank officers—such as CEO Ryan and GC Weiss—who had more direct knowledge of the Crowe engagement.

The record reflects that the OCC took no immediate formal action with respect to Respondent concerning this incident. Five years later, on February 7, 2018, the Bank entered into a plea agreement with the Department of Justice relating to a criminal investigation into the Bank's BSA/AML program. OCC-MSD-88. As a condition of the agreement, the Bank—which, on its own initiative, had previously terminated Respondent's employment at the institution—pled guilty to conspiring with its executive officers to "defraud the United States" and "corruptly obstruct and attempt to obstruct an examination of a financial institution." *Id.* Respondent was not a party to the plea agreement between the Bank and the DOJ, and she was not named personally, but the Parties do not dispute that the person identified as "Executive A" in the plea agreement is Respondent. The Bank's plea agreement carried a fine of $500,000 and a civil money forfeiture totaling $368,701,259. On the same day, the Bank also entered into a consent order with the OCC, agreeing to a $50 million civil money

penalty based on the Bank's failure to address its BSA/AML deficiencies and its concealment of documents from OCC examiners. OCC-MSD-90.

Approximately two months later, on April 16, 2018, Enforcement Counsel filed the Notice of Charges against Respondent in this case. Almost immediately, these proceedings were subject to multiple false starts and delays stemming from unforeseen factors beyond the control of this tribunal. One month after Enforcement Counsel filed the Notice of Charges, the Attorney General requested that the OCC stay its enforcement proceedings against Respondent pending the completion of the DOJ's "related, ongoing criminal investigation, as well as any additional criminal proceedings that may result from the investigation." *See* Attorney General Request, May 25, 2018. ALJ McNeil, who was the initial ALJ assigned to this case, issued an order staying discovery pending the completion of the criminal investigation. *See* 2018-06-20 Order. The next day, the Supreme Court issued its decision in *Lucia v. Securities & Exchange Commission*, holding that the SEC's ALJ's were "Officers of the United States" and therefore subject to the Appointments Clause of the Constitution. 138 S. Ct. at 2055. Respondent subsequently filed a motion on August 16, 2018, arguing, inter alia, that ALJ McNeil's assignment to the case violated the holding set forth in *Lucia*. The Office of Financial Adjudication acknowledged Respondent's request and stated that "all orders issued by [ALJ] McNeil in this case are null and void and effectively this matter is stayed" until the OCC could properly appoint a new ALJ. The OCC subsequently issued an order on August 21, 2018, reassigning the case from ALJ McNeil to ALJ Miserendino per *Lucia*'s remedial instructions. *See id.* (directing that

to cure an Appointments Clause error, "another ALJ . . . must hold the new hearing to which [a Respondent] is entitled"). On September 7, 2018, the DOJ notified Respondent that it had completed its investigation and it would not seek to prosecute individuals associated with the Bank, effectively mooting the DOJ-related stay of the proceedings. The *Lucia*-related delays persisted, however, as ALJ Miserendino retired from federal service on December 31, 2018, leaving this case without an ALJ for a second time. The Secretary of the Treasury later appointed ALJ Miserendino's replacement—ALJ Jennifer Whang—as an officer for the OCC on November 14, 2019, and the OCC issued an order shortly thereafter assigning this case to her. *See* 2020-01-06 Order.

DISCUSSION

The actions giving rise to the allegations of misconduct in this case are deeply troubling. In accordance with 12 U.S.C. § 481, the OCC expects prompt, unrestricted access to a national bank's officers, directors, and employees, as well as to a national bank's books, records, and documents of any type during any supervisory activity.[1] Bank personnel are therefore required to give any OCC examiner prompt and complete access to all personnel and materials during onsite examinations of any length, scope, or type.

Based on the evidence in the current record, Rabobank executives appear to have demonstrated a

[1] In addition, the Comptroller may call for special reports from any national bank whenever necessary for the Comptroller's use in the performance of the Agency's supervisory duties. *See* 12 U.S.C. § 161.

troubling lack of responsiveness to OCC demands. The record shows that Respondent received a direct request from an OCC examiner to provide "a copy of the [Crowe] assessment report" on March 21, 2013. Instead of immediately furnishing all documents (i) within their possession and control and (ii) plainly responsive to the examiner's request, Respondent and her colleagues waited nearly a month before taking steps to hand them over. One plausible interpretation of the record is that Respondent and others adopted a strategy of deflection and delay designed to hinder the OCC's efforts (reflected by multiple written and oral requests) to collect these materials. This unacceptable delay—and, more troubling, possible lack of candor—is exactly the type of conduct that the OCC's enforcement authority is designed to deter.

Nevertheless, the current posture requires the Comptroller to consider whether it was appropriate, at the summary disposition stage, for the ALJ to make conclusive determinations regarding Respondent's culpability under 12 U.S.C. §§ 1818(e) and (i). Despite the extremely troubling nature of the allegations at the core of this case and the evidence adduced, the Comptroller concludes that summary disposition was improperly granted.

a. Summary Disposition Standard

The operative standard is set forth in 12 C.F.R. § 19.29(a), which states that summary disposition is warranted if there is "no genuine issue as to any material fact" and "the moving party is entitled to decision in its favor as a matter of law." This standard mirrors the summary judgment standard in the Federal Rules of Civil Procedure. *See In re Blanton*, OCC AA-EC2015-24, 2017 WL 4510840, at

*6 (OCC July 10, 2017). As the ALJ noted in her August 5, 2021 Order, the summary disposition standard requires the tribunal to evaluate all evidence "in the light most favorable to the non-moving party" and draw "all justifiable inferences" in favor of the non-moving party. 2021-08-05 Order at 5 (internal quotations removed).

As relevant to this decision, Respondent argues in her exceptions that the ALJ misapplied this standard by failing to draw the appropriate inferences in Respondent's favor and resolving genuine factual disputes against her. Upon review of the record, the Comptroller concludes that the ALJ committed reversible error by misapplying the summary disposition standard for both § 1818 charges.[2]

b. Misapplication of the Standard

The ALJ recommended that the Comptroller enter a prohibition order and assess a second-tier civil money penalty against Respondent. RD at 69. As the following analysis demonstrates, there are still material factual disputes surrounding the elements of both §§ 1818(e) and 1818(i). Accordingly, the Comptroller declines to adopt this finding of the Recommended Decision.

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[2] The Recommended Decision incorporated factual findings from the ALJ's Order Regarding the Parties' Cross Motions for Summary Disposition on August 5, 2021. Many of the issues surrounding the misapplication of the summary disposition standard originated in the August 5 Order. However, the analysis set forth in this Final Decision addresses errors in the ALJ's Recommended Decision, both because the Recommended Decision is the decision currently before the Comptroller for review and because the Recommended Decision incorporated any errors that may have originated with the prior order.

i. Prohibition

Entry of a prohibition order under 12 U.S.C. § 1818(e) requires a finding of misconduct, effect, and culpability. Most relevant here is the final prong, culpability. To demonstrate culpability, Enforcement must prove that Respondent's misconduct "involves personal dishonesty" or "demonstrates willful or continuing disregard . . . for the safety or soundness of such insured depository institution." 12 U.S.C. § 1818(e)(1)(C). The Recommended Decision determined that Respondent acted with both "personal dishonesty" and "willful disregard" within the meaning of § 1818(e). RD at 58.

As the ALJ noted in her Recommended Decision, "personal dishonesty" and "willful disregard" both require a finding that Respondent acted with scienter—that is, knowledge of the wrongfulness of her conduct. RD at 58-59; *see also Dodge v. Comptroller of the Currency*, 744 F.3d 148, 160 (D.C. Cir. 2014). The ALJ recognized that it is typically inappropriate to resolve questions of this nature at the summary disposition stage. RD at 58 (citing *Miller v. FDIC*, 906 F.2d 972, 974 (4th Cir. 1990) (noting "the general rule that summary judgment is seldom appropriate in cases wherein particular states of mind are decisive elements of a claim or defense") and *Gomez v. Trustees of Harvard Univ.*, 677 F. Supp. 23, 24 (D.D.C. 1988) (noting that "intent and state of mind [are] areas that are particularly ill-suited for summary disposition")). Nevertheless, the ALJ determined that "the undisputed facts" made it clear that Respondent acted with the requisite scienter to satisfy the culpability prong of § 1818(e). *Id.*

Upon scrutiny, it is evident that the ALJ did not fully address documents and testimony favoring

Respondent on this point. The ALJ spent several pages of the Recommended Decision discussing how Respondent's actions constituted, in her view, a lack of "transparency and seeming good faith." RD at 41. But, she declined to address record materials proffered by Respondent that challenged this conclusion. Respondent repeatedly stated in her deposition, for example, that she was not trying to conceal any information from the OCC. Akahoshi Dep. Tr. at 94:15-16 ("Knowing what I knew then, I believe I answered it in the most truthful and honest way I could"); *id.* at 287:20-23 (agreeing with suggestion that she was not "intending to conceal from the OCC that Crowe had created some draft documents"). Instead, Respondent testified that she believed that the Bank viewed the Crowe Report as "fraught with inaccuracies" and "unsubstantiated." *Id.* at 289:14-16. More importantly, Respondent testified that she believed her responses were consistent with what her superiors at the Bank believed to be the best course of action, given that they knew much more about the Crowe engagement than she did. *See id.* at 43:13-17 ("I relied on a lot of people [including CEO Ryan] to provide information—and especially given that I had been away from the program for over six months—so I needed their help to understand . . . the current condition of the BSA/AML program"); *id.* at 167:4-5 (stating that she didn't share other documents with OCC Examiner Omi "because Dan Weiss and John Ryan had not approved that"). CEO Ryan's testimony is consistent. He described a call with Respondent after she received Ms. Omi's March 25th email as an opportunity for him and General Counsel Weiss to "provide [Respondent] with information of what was actually presented, to the best of our

knowledge . . . so she could appropriately respond to Shirley," especially given that Respondent "was not at that February meeting." Ryan Dep. Tr. at 97:1-5.

Equally problematic, the ALJ based her finding that Respondent had the requisite scienter on her conclusion that Respondent knew that Crowe's draft report—rather than the PowerPoint, or any other Crowe document—was the operative document that would be responsive to the OCC's request. RD at 36. But Respondent proffered evidence sufficient to create a genuine dispute about this material fact. CEO Ryan testified that he believed the "official document" was the PowerPoint that was "presented to our board" on February 5. Ryan Dep. Tr. at 97:16-17, 98:18-20. Respondent's testimony similarly tends to support her assertion that she initially believed the PowerPoint was the operative document, or at the very least, that she did not *know* which was the operative document. *See* Akahoshi Dep. Tr. at 131:16-23 (discussing how, when she spoke with someone at Crowe, they discussed "the deck, and more specifically . . . the presentation to the board"); *id.* at 94:23-24 ("Shirley's request was a vague one, and on a subject matter that I was not familiar with.").

It is certainly plausible that, after a hearing, a neutral factfinder could determine that Enforcement Counsel's interpretation of events is more credible than Respondent's. It is also plausible that, after a hearing, a factfinder could conclude that Respondent acted with the necessary "personal dishonesty" and "willful disregard" for the safety and soundness of the Bank and thereby meet the culpability prong of 12 U.S.C. § 1818(e)(1)(C). The record evidence certainly suggests that, at minimum, the path to providing the OCC with the requested Crowe Report was not as

straight as it should have been, and that Respondent played an important role in the deliberations within the Bank that resulted in the delay. But the summary disposition standard requires the tribunal to evaluate all evidence "in the light most favorable to the nonmoving party" and draw "all justifiable inferences" in favor of the non-moving party. *See Blanton*, 2017 WL 4510840, at *6. Here, the ALJ made credibility determinations, weighed competing evidence, and drew inferences against Respondent at the summary disposition stage without a meaningful discussion of why she chose to discount the evidence supporting Respondent. Because there are still material factual disputes regarding Respondent's state of mind, the Comptroller finds—in a decision that is limited to the specific facts of this case—that the ALJ erred in determining at this stage in the litigation that Enforcement Counsel had satisfied the culpability prong of 12 U.S.C. 1818(e).

ii. Second-tier civil money penalty

The Comptroller's conclusion regarding the summary disposition standard articulated above also precludes the Comptroller from imposing a civil money penalty at this stage. Assessment of a second-tier civil money penalty under 12 U.S.C. § 1818(i) requires a finding of misconduct and effect. Misconduct can take the form of a violation of law, breach of a fiduciary duty, or "reckless" engagement in an unsafe or unsound banking practice. 12 U.S.C. § 1818(i)(2)(B)(i). The Recommended Decision found that § 1818(i)'s misconduct prong could be premised on any of three

alleged violations: (1) violation of 12 U.S.C. § 481;[3] (2) violation of 18 U.S.C. § 1001(a)(1);[4] or (3) reckless engagement in an unsafe or unsound practice. RD at 7.

The primary difficulty regarding the latter two predicate violations—18 U.S.C. § 1001(a)(1) and recklessly engaging in an unsafe or unsound practice—is that both types of misconduct require proof of Respondent's state of mind. Section 1001(a)(1) requires showing that Respondent's actions were "knowing and willful," and § 1818(i) requires that the unsafe or unsound practice be engaged in "recklessly." 18 U.S.C. § 1001(a); 12 U.S.C. § 1818(i)(2)(B)(i)(II). Viewing the record evidence in the light most favorable to Respondent— as this tribunal is required to do at this stage—the Comptroller recognizes that there are genuine factual disputes about what Respondent knew and whether, as a result, she acted in good faith based on her understanding at the time. Under the current posture, it would therefore be improper for the Comptroller to uphold a civil money penalty premised on a disputed conclusion that Respondent acted "knowingly" or "recklessly."

This leaves the alleged violation of 12 U.S.C. § 481. Section 481 gives the OCC broad authority to "make a thorough examination of all the affairs of the bank," including the power to "administer oaths" and "examine any of the officer and agents" of the bank.

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[3] As relevant here, this provision provides that OCC examiners "shall have power to make a thorough examination of all the affairs of the bank." 12 U.S.C. § 481.

[4] This provision provides that any person "within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States" commits an offense if they "knowingly and willfully falsif[y], conceal[], or cover[] up by any trick, scheme, or device a material fact." 18 U.S.C. § 1001(a)(1).

12 U.S.C. § 481. The statute also authorizes the OCC to impose penalties on banks and affiliates of banks who "refuse to give any information required in the course of any such examination." *Id.*

The Comptroller is not aware of any caselaw that squarely addresses the elements of § 481 for the purposes of upholding a violation of §§ 1818(e) or 1818(i). At minimum, however, a violation of § 481 would likely require a showing that an IAP, as an agent acting on behalf of an OCC-supervised institution, had a duty to furnish OCC examiners with certain information and that the IAP subsequently breached that duty. This theory of liability is consistent with the text of § 481 and its statutory purpose. *See In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 210, 215 (E.D.N.Y. 1979) (recognizing that § 481 enables the OCC to "collect the information necessary to perform [the] broader regulatory function" of "supervis[ing] the banking system for the protection of the public and the national economy as a whole"). It also aligns with a core premise underlying 12 U.S.C. § 1818, namely, that *IAPs* can violate banking laws—or contribute to their violation—even though many banking statutes are phrased in terms of a bank's obligations. Even so, because the Recommended Decision misapplied the summary disposition standard, it is unnecessary—and the Comptroller declines—to define § 481's elements with more precision here.

In addition to the disputed issues concerning Respondent's state of mind discussed supra, the ALJ misapplied the summary disposition standard when drawing conclusions about Respondent's communications with the OCC. Take, for instance, the Recommended Decision's discussion of the Bank's April 18 email that transmitted the Crowe Report to

the OCC. As noted previously, whether the Respondent reasonably interpreted the OCC's request as being limited to the PAR PowerPoint was a disputed issue. The Recommended Decision reflected that:

> The undersigned observes *sua sponte* that this email inaccurately characterizes the OCC's March 25, 2013 request to the extent that it suggests that the OCC at that time had requested only the PAR PowerPoint, or even principally the PAR PowerPoint, rather than the draft Crowe Report itself.

RD at 23. Rather than evaluate the evidence "in the light most favorable to the non-moving party" or draw "all justifiable inferences" in favor of the Respondent, the ALJ offered a "sua sponte" observation that clearly drew a factual inference against the non-moving party on a key issue.[5] *See Blanton*, 2017 WL 4510840, at *6. If Respondent reasonably believed that the PowerPoint was the sole operative document, it might not be misleading or inaccurate to characterize the OCC's request in this manner. While the Comptroller reaches no conclusion about which view is correct, he notes that Enforcement Counsel's own expert witness confirmed that there

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[5] The Recommended Decision went on to discuss a passage in the April 18 cover letter attaching the Crowe Report. But its analysis reads more as a de novo review of the record evidence than as a review of that evidence in a light most favorable to the non-moving party. The ALJ acknowledged that the Parties disagreed over whether Respondent authored the passage in question but still held that the passage was "factually inaccurate and [] in any event misleading." RD at 24. The ALJ also described her interpretation of the passage as it is "most reasonably read," in clear violation of the summary disposition standard. *Id.*

was "nothing false or misleading about the [April 18] cover e-mail." OCC-MSD-112.

One final example suffices: the Recommended Decision stated that Respondent's March 25 email "conveyed the clear impression, again, that there were no other documents responsive to the examiner's request and that a 'draft report' separate from the February 5 presentation simply did not exist." Regardless of whether the email in question conveyed a "clear impression," that is not the applicable standard. The tribunal is required to determine whether, viewing the evidence in the light most favorable to Respondent and drawing all inferences in her favor, a dispute with respect to a material fact still exists. When viewed in this way, existence of a material factual dispute was plain to see. The Recommended Decision erred in determining that the undisputed facts proved that Respondent met the "misconduct" prong of § 1818(i).

It is worth emphasizing again that the Comptroller's holding in this case is a narrow one: the Recommended Decision misapplied the summary disposition standard required by 12 C.F.R. § 19.29(a), and therefore entry of summary disposition against Respondent is inappropriate.

c. Dismissal Is an Appropriate Remedy

In nearly all cases involving misapplications of the summary disposition standard, the normal remedy is for the Comptroller to remand the matter for a hearing on the disputed factual questions. 12 C.F.R. § 19.40(c)(2). But for the following reasons, the Comptroller concludes that a departure from this general rule is appropriate. While the allegations in this matter are troubling and allude to conduct that

does not comport with the OCC's expectations of a banking professional, the Comptroller, reluctantly, will not remand this matter and will not reach final findings of fact, given the unique circumstances underlying this case and the further lapse of time necessary to effect such a remand. Instead, the Comptroller finds it appropriate to dismiss this case in the interest of adjudicatory efficiency and economy given the substantial delay that has already taken place, in large part owing to the multi-year delay resulting from the DOJ investigation into the Bank as well as the ALJ transfer caused by the Supreme Court's decision in *Lucia* (discussed *supra* at 10). The Comptroller also finds that dismissal is appropriate here since the factual disputes that would need to be resolved at a hearing predominantly relate to Respondent's state of mind. While the Comptroller does not condone Respondent's alleged actions—and reminds institutions and IAPs, in the strongest possible terms, that institutions subject to the OCC's supervisory authority must promptly produce their books, records, or documents to OCC examiners on request—the delay in this action would likely make it difficult for witnesses to accurately recall the events in question and their attendant states of mind. More than ten years have passed since the events that gave rise to this matter. Accordingly, in an exercise of his plenary discretion over remedies, the Comptroller hereby orders that the action be terminated and the outstanding Notice of Charges and Assessment be dismissed. Because this action is now dismissed, the remaining issues raised in the Parties' exceptions and any pending motions are moot.

CONCLUSION

For the foregoing reasons, the Comptroller declines to adopt the ALJ's Recommended Findings of Fact and Recommended Conclusions of Law because the ALJ erred in her application of the summary disposition standard. The Comptroller also declines to remand the case to the ALJ for new findings of fact and conclusions for the reasons stated above.

Accordingly, the charges against Respondent Laura Akahoshi are hereby dismissed.

IT IS SO ORDERED.

Date: _____, 2023

/s/ Michael J. Hsu
MICHAEL J. HSU
ACTING COMPTROLLER
OF THE CURRENCY

Digitally signed by Michael S. Hsu
Date: 2023.04.05
11:23:21 -04'00'

UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
COMPTROLLER OF THE CURRENCY
WASHINGTON, D.C

OCC AA-EC-2018-20

In the Matter of

LAURA AKAHOSHI,
Former Chief Compliance Officer

RABOBANK, N.A.
Roseville, California

ORDER ON SUPPLEMENTAL BRIEFING

On April 18, 2022, Respondent Laura Akahoshi ("Respondent") and Enforcement Counsel on Behalf of the Office of the Comptroller of the Currency ("OCC") filed their respective exceptions to the Administrative Law Judge's Recommended Decision, dated February 10, 2022. Subsequently, a panel of the United States Court of Appeals for the Fifth Circuit issued its decision in *Jarkesy v. SEC*, 34 F.4th 446 (5th Cir. 2022) and a panel of the United States Court of Appeals for the Sixth Circuit issued its decision in *Calcutt v. FDIC*, __ F.4th __, 2022 WL 2081430, at *24 (6th Cir. June 10, 2022).

In light of these recent developments in the caselaw, IT IS ORDERED THAT:

1) The parties shall file supplemental briefs addressing the following questions:

   a. Does the Seventh Amendment jury trial right apply to OCC enforcement actions brought pursuant to 12 U.S.C. §§ 1818(e) and (i)?

   b. What is the appropriate causation standard applicable to the "by reason of" language in Section 8(e) of the Federal Deposit Insurance Act, 12 U.S.C. § 1818(e), and did Respondent's misconduct satisfy that standard?

   c. Does a finding that the effect prongs of 12 U.S.C. § 1818(e)(1)(B) and 1818(i)(2)(B)(ii) are satisfied as against Respondent based solely upon the bank's guilty plea and subsequent payment of a fine to the Department of Justice comport with the Due Process Clause of the Fifth Amendment?

2) The parties' supplemental briefs, not to exceed 50 pages in length per side except for good cause shown, shall be filed no later than September 16, 2022.

IT IS SO ORDERED.

Date: July 1, 2022

/s/ Michael J. Hsu
MICHAEL J. HSU
ACTING COMPTROLLER
OF THE CURRENCY

Digitally signed by Michael S. Hsu
Date: 2022.07.01
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UNITED STATES OF AMERICA
DEPARTMENT OF THE TREASURY
OFFICE OF THE COMPTROLLER
OF THE CURRENCY

Docket No.: AA-EC-2018-20

In the Matter of

LAURA AKAHOSHI,
Former Chief Compliance Officer

RABOBANK, N.A.
Roseville, California

RECOMMENDED DECISION

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication
(February 10, 2022)

Appearances:

For Enforcement Counsel for the Office of the Comptroller of the Currency:
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The Office of the Comptroller of the Currency ("OCC") commenced this action against Respondent Laura Akahoshi ("Respondent"), a former OCC examiner, on April 17, 2018, filing a Notice of Charges ("Notice") that seeks an order of prohibition and the imposition of a $50,000 civil money penalty against Respondent pursuant to Section 8 of the Federal Deposit Insurance ("FDI") Act, 12 U.S.C. §§ 1818(e) and (i). The Notice alleges that Respondent, in her capacity as Chief Compliance Officer for Rabobank, N.A. ("the Bank"), "continuously concealed" from OCC examiners the existence of a third-party auditor's draft report (hereinafter "the Crowe Report") regarding deficiencies in the Bank's Bank Secrecy Act and Anti-Money Laundering ("BSA/AML") compliance program, despite the agency's "unambiguous, repeated, and direct requests" for that document, which was in Respondent's possession at the time.[1] The Notice further alleges that Respondent's concealment of the Crowe Report during March and April 2013—and her false statements and misrepresentations in furtherance thereof—constituted continuing violations of 12 U.S.C. § 481 and 18 U.S.C. § 1001 as well as actionably unsafe or unsound practices in conducting the Bank's affairs.[2] Finally, the Notice alleges that Respondent's misconduct ultimately resulted in the Bank suffering financial loss and "significant reputational harm" as the result, *inter alia*, of its February 2018 entry of a guilty plea to conspiracy to obstruct an OCC examination.[3]

Following discovery, Enforcement Counsel for the OCC ("Enforcement Counsel") and Respondent

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[1] Notice ¶ 40.

[2] *See id.* ¶ 48(a).

[3] *Id.* ¶ 46.

(collectively "the Parties") filed cross-motions for summary disposition, each contending that there were no material facts in dispute that would preclude a resolution of their motion as a matter of law. Specifically, Enforcement Counsel contended that according to the undisputed facts, "Respondent colluded with other members of Bank management to withhold and conceal the [Crowe Report] and its contents from the OCC" in a manner, and with a result, that satisfies the statutory elements for the issuance of a prohibition order and assessment of a civil money penalty.[4] Respondent, in turn, maintained that "facts not in dispute show[ed] there was no misconduct,"[5] and that the agency could not prove the requisite culpability and effect elements of its prohibition and civil money penalty actions.[6]

On August 5, 2021, the undersigned issued an order denying Respondent's motion for summary disposition and recommending the grant of Enforcement Counsel's motion with respect to certain aspects of the statutory elements of misconduct, culpability, and effect ("MSD Order"). The MSD Order concluded, based on the undisputed material facts, that (1) Respondent violated 12 U.S.C. § 481 and 18 U.S.C. § 1001(a)(1) by contriving to conceal the existence of the Crowe Report and related materials from OCC examiners; (2) Respondent engaged in unsafe or unsound practices in conducting

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[4] Brief in Support of Enforcement Counsel's Motion for Summary Disposition ("OCC Mot.") at 1.

[5] Respondent's Amended Motion for Summary Disposition and Memorandum of Law in Support ("Resp. Mot.") at 1.

[6] *See id.* at 26-42. The Parties' opposition briefs in connection with the cross-motions for summary disposition are styled "OCC Opp." and "Resp. Opp.," respectively.

the affairs of the Bank; (3) the Bank suffered loss as a result of Respondent's misconduct by virtue of its February 2018 guilty plea for obstructing an OCC examination and attendant $500,000 fine; and (4) Respondent exhibited personal dishonesty and willful disregard for the Bank's safety and soundness. The MSD Order further found that disposition of the other issues on which Enforcement Counsel sought summary disposition was either not possible or unnecessary on the factual record as developed.[7]

On August 16, 2021, the Parties filed a Joint Status Report recognizing that the MSD Order had found that at least one aspect of each element for a 12 U.S.C. § 1818(e) prohibition order and 12 U.S.C. § 1818(i) first- and second-tier civil money penalty had been met, and stating the Parties' agreement that, while contested issues remain, the only remaining issue that requires resolution for purposes of a recommended decision is the appropriateness of the civil money penalty amount. The Parties further agreed that the issue regarding the civil money

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[7] In particular, the undersigned did not resolve, in the MSD Order, (a) whether Respondent's misconduct met the elements of 18 U.S.C. § 1001(a)(2); (b) whether the Bank suffered reputational harm as a result of Respondent's misconduct; (c) whether Respondent acted with continuing disregard for the safety and soundness of the Bank; (d) whether Respondent recklessly engaged in unsafe or unsound practices for purposes of 12 U.S.C. § 1818(i)(2)(B)(i)(II); (e) whether Respondent's misconduct constituted a pattern of misconduct; and (f) the appropriateness of the amount of the civil money penalty sought by the OCC. *See* MSD Order at 69. It is the undersigned's understanding, based on the Parties' agreement in the August 16, 2021 Joint Status Report, that Enforcement Counsel is no longer pursuing these unadjudicated claims, with the exception of the appropriateness of the civil money penalty amount, and she makes no recommendations regarding them.

penalty did not require an in-person hearing and should be resolved on the papers. Accordingly, and pursuant to the Parties' agreement, the undersigned cancelled the scheduled hearing and set dates for the Parties to make written submissions on that topic.

On October 22, 2021, the Parties filed their initial submissions ("OCC CMP Br." and "Resp. CMP Br." respectively) regarding the appropriateness of the civil money penalty amount in light of the mitigating factors set forth in 12 U.S.C. § 1818(i)(2)(G), including supporting exhibits. On November 22, 2021, the Parties filed responses to the initial submissions ("OCC CMP Response" and "Resp. CMP Response"). The undersigned then permitted Respondent to file a brief reply to address what Respondent characterized as new factual assertions raised in Enforcement Counsel's response, which Respondent duly did on December 23, 2021 ("Resp. CMP Reply").

Now, on the strength of the full record in this case, based on the weight of the evidence adduced and arguments made in connection with the MSD Order, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole, and after considering the Parties' submissions on the civil money penalty, the undersigned makes the following findings of fact, conclusions of law, and recommended orders.

I. Jurisdiction

At all times pertinent to this proceeding, the Bank was an insured depository institution pursuant to 12 U.S.C. § 1813(c)(2), and Respondent was an institution-affiliated party ("IAP") as that term is

defined in 12 U.S.C. § 1818(u).[8] The Bank is a national banking association within the meaning of 12 U.S.C. § 1813(q)(1)(A) and is chartered and examined by the OCC.[9] As a result, the OCC is the appropriate federal banking agency with jurisdiction over the Bank and its IAPs for purposes of 12 U.S.C. § 1813(q), and it is authorized to initiate and maintain this prohibition and civil money penalty action against Respondent.[10]

II. Applicable Standard

The burden of proof in an administrative proceeding, unless otherwise provided by statute, is on the administrative agency to establish its charges by a preponderance of the evidence.[11] Under the preponderance-of-the-evidence standard, the party with the burden of proof must adduce evidence making it more likely than not that the facts it seeks to prove are true.[12] Here, the OCC has the burden to prove that the statutory elements for the entry of a prohibition order and the assessment of a second-tier

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[8] *See* Notice ¶¶ 1-2.

[9] *See id.* ¶ 3.

[10] *See id.* ¶ 4.

[11] *See* 5 U.S.C. § 556(d); *Steadman v. SEC*, 450 U.S. 91, 102 (1981).

[12] *See In the Matter of Patrick Adams*, No. AA-EC-11-50, 2014 WL 8735096, at *23 (Sep. 30, 2014) (OCC final decision) (applying preponderance standard in OCC enforcement action); *Concrete Pipe & Prods. of Calif. v. Constr. Laborers Pension Tr.*, 508 U.S. 602 (1993) ("The burden of showing something by a preponderance of the evidence . . . simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence.") (internal quotation marks and citation omitted).

civil money penalty have been satisfied.[13] This Tribunal is then tasked with making "a comparative judgment" to determine whether the agency has presented "the greater weight of the evidence" as to the satisfaction of the statutory elements.[14]

III. Elements of Sections 1818(e) and 1818(i)

To merit the entry of a prohibition order against an IAP under 12 U.S.C. § 1818(e), an agency must prove the separate elements of misconduct, effect, and culpability. The misconduct element may be satisfied, among other ways, by a showing that the IAP has (1) "violated any law or regulation," (2) "engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution," or (3) "committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty."[15] The effect element may be satisfied, in turn, by showing either that the institution at issue thereby "has suffered or probably will suffer financial loss or other damage," that the institution's depositors' interests "have been or could be prejudiced," or that the charged party "has received financial gain or other benefit."[16] And the culpability element may be satisfied when the alleged violation, practice, or breach either "involves personal dishonesty" by the IAP or "demonstrates willful or continuing disregard by such party for the

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[13] *See* 12 U.S.C. §§ 1818(e), 1818(i).

[14] *Almerfedi v. Obama*, 654 F.3d 1, 5 (D.C. Cir. 2011) (internal quotation marks and citations omitted).

[15] 12 U.S.C. § 1818(e)(1)(A).

[16] *Id.* § 1818(e)(1)(B).

safety or soundness of such insured depository institution."[17]

The imposition of a second-tier civil money penalty under 12 U.S.C. § 1818(i) also requires the satisfaction of multiple elements. First, the agency must show misconduct, which can take the form of a violation of "any law or regulation,"[18] the breach of "any fiduciary duty," or the reckless engagement "in an unsafe or unsound practice in conducting the affairs" of the institution in question.[19] Second, the agency must show some external consequence or characteristic of the IAP's alleged misconduct, likewise generally termed "effect" in past decisions issued by the Comptroller of the Currency ("Comptroller"): (1) that it "is part of a pattern of misconduct"; (2) that it "causes or is likely to cause more than a minimal loss to such depository institution"; or (3) that it "results in pecuniary gain or other benefit to such party."[20] Moreover, before any civil money penalty can be assessed upon satisfaction of these elements, the agency must take into account the appropriateness of the amount of penalty sought

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[17] *Id.* § 1818(e)(1)(C).

[18] The misconduct elements of both Section 1818(e) and (i) can also be satisfied by the violation of (a) an agency cease-and-desist order, (b) a condition imposed in writing by a federal banking agency, or (c) any written agreement between such an agency and the depository institution in question. *See id.* §§ 1818(e)(1)(A)(i), (i)(2)(A). The OCC does not allege any such violations in this case.

[19] *Id.* § 1818(i)(2)(B)(i).

[20] *Id.* § 1818(i)(2)(B)(ii). *See In the Matter of William R. Blanton*, No. AA-EC-2015-24, 2017 WL 4510840, at *16 (July 10, 2017) (OCC final decision), *aff'd on other grounds*, *Blanton v. OCC*, 909 F.3d 1162 (D.C. Cir. 2018) (referring to this as the statute's "effect" prong).

when considered in light of certain potentially mitigating factors, including the "good faith of the . . . person charged," "the gravity of the violation," and "such other matters as justice may require."[21]

Although the misconduct prongs of both Sections 1818(e) and (i) may be satisfied by an IAP's engagement or participation in an "unsafe or unsound practice" related to the depository institution with whom he or she is affiliated, that phrase is nowhere defined in the FDI Act or its subsequent amendments. John Horne, Chairman of the Federal Home Loan Bank Board ("FHLBB") during the passage of the Financial Institutions Supervisory Act of 1966, submitted a memorandum to Congress that described such practices as encompassing "any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds."[22] This so-called Horne Standard has long guided federal banking agencies, including the Comptroller, in bringing and resolving enforcement actions.[23] It has also been recognized as "the authoritative definition of an

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[21] 12 U.S.C. § 1818(i)(2)(G); *see also In re Sealed Case (Admin. Subpoena)*, 42 F.3d 1412, 1416 (D.C. Cir. 1994) ("In assessing money penalties, Congress requires [banking] agencies to consider several mitigating factors."); *accord*, *e.g.*, *Blanton*, 2017 WL 4510840, at *27.

[22] *Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before the House Comm. on Banking and Currency*, 89th Cong., 2d Sess. 49 (1966) (statement of John H. Horne, Chairman of the FHLBB), 122 Cong. Rec. 26,474 (1966).

[23] *See*, *e.g.*, *Patrick Adams*, 2014 WL 8735096, at **8-24 (discussing Horne Standard in detail).

unsafe or unsound practice" by federal appellate courts.[24] The undersigned accordingly adopts the Horne Standard when evaluating charges of unsafe or unsound banking practices under the relevant statutes.

It is a central aspect of this statutory scheme that *only one* of the potential triggering conditions is necessary for the satisfaction of each element of Sections 1818(e) and 1818(i). That is, the "misconduct" element of Section 1818(e) is fulfilled if an IAP has breached a fiduciary duty to the institution, regardless of whether the IAP has also violated any laws or engaged in unsafe or unsound practices, and vice versa. Likewise, a second-tier civil money penalty may be assessed (assuming misconduct can be shown) if the misconduct has resulted in pecuniary gain to the IAP, even if it has not caused loss to the institution and is not part of an actionable pattern. Each component of the "misconduct" element is an independent and sufficient basis on which to ground an enforcement action if the other elements have also been shown. The same is true of the "effect" element and the "culpability" element. The OCC need only prove one component of each.

In this case, the OCC has chrged that, in concealing the existence of the Crowe Report and related materials from examiners, Respondent committed actionable misconduct by violating the law, namely 12 U.S.C. § 481 and 18 U.S.C. § 1001, and engaged in unsafe or unsound practices in

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[24] *Gulf Federal Sav. & Loan Ass'n of Jefferson Parish v. FHLBB*, 651 F.2d 259, 264 (5th Cir. 1981); *see also Patrick Adams*, 2014 WL 8735096, at **14-17 (surveying application of Horne Standard by various circuits).

conducting the Bank's affairs.[25] Further, with respect to the effect and culpability elements of the relevant statutes, the OCC has asserted, *inter alia*, that Respondent caused the Bank to suffer financial loss as a result of her misconduct; that the conduct involved personal dishonesty on the part of Respondent; and that Respondent demonstrated a willful disregard for the safety and soundness of the Bank.[26] Having concluded in the MSD Order that each of these elements had been satisfied by the undisputed facts of the case, the undersigned finds that the entry of a prohibition order and assessment of a second-tier civil money penalty are both therefore appropriate. Upon consideration of the mitigating factors set forth in 12 U.S.C. § 1818(i)(2)(G), the undersigned also finds that there are some grounds for mitigation of the assessed penalty and that $30,000, rather than $50,000, is the appropriate amount to achieve the punitive, deterrent, and remedial goals for which civil money penalties are intended.

IV. Findings of Fact

These findings are consistent with the undisputed material facts set forth in the MSD Order and drawn as appropriate from the Parties' pleadings, from the Parties' respective statements of material fact ("OCC SOF" and "Resp. SOF") and Respondent's counter-statement of material fact ("Resp. Opp. SOF") submitted in connection with the summary disposition briefing and the exhibits thereto ("OCC-MSD," "R-MSD," "OCC-OPP," and "R-OPP"), and from the post-motion submissions on the topic of the civil money penalty

[25] *See* Notice ¶ 48(a).

[26] *See id.* ¶ 48(b), (c).

and exhibits thereto ("OCC-CMP" and "RCMP"). Where relevant, the undersigned will identify genuine factual disputes between the Parties as well as the evidence each side has marshaled in support, although she makes no further factual findings regarding those disputes than were made at summary disposition, given the Parties' agreement that resolution of the remaining contested issues is no longer necessary.

Respondent is a former OCC examiner with significant experience in BSA/AML compliance matters.[27] Following her participation in a 2007 OCC examination of the Bank's BSA/AML compliance program, Respondent assumed the position of Chief Compliance Officer ("CCO") for the Bank, in which capacity she served until she transferred overseas in July 2012 and was replaced by Lynn Sullivan, an individual who the Notice terms Executive A.[28]

The OCC commenced a full-scope, on-site examination of the Bank's BSA/AML compliance program in November 2012, after deficiencies in that

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[27] *See* OCC SOF ¶¶ 4-8; Notice ¶ 5. Except where noted, a citation to the Notice in this section indicates that the corresponding portion of Respondent's Answer does not dispute the substance of the facts as stated. *See*, *e.g.*, Answer ¶ 5 (admitting that Respondent "was a commissioned national bank examiner with the OCC from on or about June 8, 1998 to on or about February 16, 2008," including as "Compliance Lead Expert for the OCC Western District" beginning in September 2007, and that part of her duties entailed providing expertise and advice on "BSA/AML compliance-related matters").

[28] *See* Notice ¶¶ 6-10; OCC SOF ¶¶ 10-11, 17-18. Respondent's transfer was the result of her promotion to the position of Compliance Manager—Rural and Retail of the Bank's parent company, Rabobank International, in Utrecht, Netherlands. *See* OCC SOF ¶ 17.

program had been identified and brought to the Bank's attention by then-CCO Sullivan and others.[29] In December 2012, the Bank contracted with audit firm Crowe Horwath LLP ("Crowe") to perform a BSA/AML program assessment "designed to measure the maturity of the Bank's BSA program and provide a strategic and tactical roadmap for the remediation of those areas management identifies as needing improvement."[30] As part of this assessment, Crowe provided the Bank with two major pieces of written work product—a Program Assessment & Roadmap ("PAR") Executive Report, referred to in this action as *the Crowe Report*, and a PAR PowerPoint deck (*"the PAR PowerPoint"*) synthesizing the report's conclusions.[31]

Between late January and mid-February 2013, various draft versions of the Crowe Report and, to a lesser extent, the PAR PowerPoint were distributed to and among Bank employees and management, including then-CCO Sullivan, then-CEO John Ryan ("CEO Ryan"), then-General Counsel Daniel Weiss ("GC Weiss"), and Terry Schwakopf, then-head of the Board Compliance Committee.[32] Although the Crowe

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[29] *See* OCC SOF ¶¶ 19-20; Resp. Opp. SOF at 18-20.

[30] OCC SOF ¶ 22 (quoting OCC-MSD-10 (Statement of Work dated December 27, 2012) at 1); *see also* Resp. SOF ¶ 54 (citing R-MSD-47 (January 14, 2013 minutes of Board Compliance Committee meeting).

[31] For representative iterations of each, see OCC-MSD-57 (version 0.9 of Crowe Report, dated January 31, 2013) and OCC-MSD-23 (version of PAR PowerPoint dated February 5, 2013).

[32] *See* OCC SOF ¶¶ 23-26, 32-35; Resp. SOF ¶ 62. During the summary disposition briefing, Respondent generally challenged the provenance of "the exhibits used by Enforcement Counsel as purportedly constituting cover emails and their attached documents," arguing that they were produced during discovery

Report itself was seemingly never presented to the Bank in "final" form—*i.e.*, without being denoted as a draft—the PAR PowerPoint was used as the basis of a February 5, 2013 presentation to the Compliance Committee regarding Crowe's preliminary findings and observations.[33] Both the Crowe Report and the

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"as stand-alone emails with no attachments[] and separate stand-alone documents with no cover emails." Resp. Opp. SOF at 24 (emphasis omitted). Respondent further observed that documents represented as being cover emails and their attachments were sometimes "produced in reverse order and separated by" hundreds of pages of document production. *Id.* As a result, Respondent argued that "Enforcement Counsel's claims about which documents were attached to which emails were unsupported by evidence, and were in direct contravention of the Tribunal's order regarding production methodologies and Enforcement Counsel's representations." *Id.* at 25. The undersigned noted Respondent's objections and stated that to the extent that Respondent wished to contest the authenticity of specific documents proffered by Enforcement Counsel or argue that specific materials were not attached to specific emails, it could be done at an appropriate later stage, but that the ability of the undersigned to render conclusions in the MSD Order did not require such a granular view. *See* MSD Order at 8 n.19. It is undisputed that draft versions of the Crowe Report and PAR PowerPoint existed and were distributed to Bank personnel during the relevant timeframe. As discussed *infra*, it is undisputed that the draft Crowe Report, in particular, was in the possession of Respondent, in particular, at the time that the OCC requested it from her. Given Respondent's repeated references to the draft report in internal correspondence (also discussed *infra*) at or around the time of the OCC's requests, her knowledge of the existence of the Crowe Report writ large is likewise undisputed. There is no need to delve into the minutiae of Crowe work product distribution within the Bank in order to render some judgment on Respondent's conduct during March and April 2013, the OCC's claims there regarding, and the parties' arguments on the disposition of the same.

[33] *See* OCC SOF ¶ 28; Resp. SOF ¶ 61. Respondent contended without apparent dispute that the *specific version* of the PAR

PAR PowerPoint concluded that multiple, significant deficiencies existed in the Bank's BSA/AML compliance program.[34]

At the same time, the OCC was conducting its own examination. On February 8, 2013, OCC examination staff presented to the Bank, at an exit meeting and in the form of a draft Supervisory Letter, their preliminary conclusions regarding "deficiencies in three out of four pillars of the Bank's BSA program: internal controls, independent testing, and training."[35] Among

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PowerPoint deck presented at the February 5, 2013 Compliance Committee meeting was not distributed to, or possessed by, Bank employees and management. *See* Resp. SOF ¶ 61; Resp. Opp. SOF at 23-24. Respondent agreed, however, that earlier versions of the PAR PowerPoint were distributed to Bank personnel, *see* Resp. SOF ¶ 62, and Enforcement Counsel identified at least one instance in which a document identified as "the final draft of the BSA/AML presentation" was provided to the Bank by Crowe, although the document itself is dated January 31, 2013, rather than February 5, and is slightly shorter than the version represented as having been presented to the Compliance Committee. OCC-MSD-19 (January 31, 2013 email to Lynn Sullivan from Troy La Huis of Crowe); *see* OCC SOF ¶ 32; *compare* OCC-MSD-20 (61-page PAR PowerPoint dated January 31, 2013) *with* OCC-MSD23 (63-page PAR PowerPoint dated February 5, 2013).

[34] *See* OCC SOF ¶ 24; Resp. SOF ¶ 60; *see also*, *e.g.*, OCC-MSD-57 (version 0.9 of Crowe Report, dated January 31, 2013) at 4 (finding, among other things, that "[t]he AML department does not appear to be taking an accurate riskbased approach to focus mitigation efforts on the most significant money laundering risks to the institution" and that "[t]he BSA/AML self-testing and internal audit functions have not identified operational limitations which are likely resulting in a lack of compliance with [OCC] expectations").

[35] OCC SOF ¶ 30; *see also* Resp. SOF ¶¶ 38-39; OCC-MSD-7 (February 8, 2013 cover letter from Assistant Deputy Comptroller Thomas Jorn to CEO Ryan and letter from OCC to Bank Board of Directors) ("Draft Supervisory Letter").

other things, the letter stated that the OCC was "considering whether the Bank has failed to maintain a compliance program reasonably designed to assure and monitor compliance with the Bank Secrecy Act, requiring the issuance of a Cease and Desist Order pursuant to 12 U.S.C. § 1818(s)."[36] The OCC directed the Bank to "provide a written response to the BSA/AML examination findings" detailed therein, which the agency would consider "during [its] supervisory review process."[37]

Around this point, Respondent returned to the United States to attend the February 8, 2013 meeting with the OCC and to assist the Bank in its response to the Draft Supervisory Letter.[38] Respondent and CCO Sullivan disagreed on their assessments of the state of the Bank's BSA/AML program and the appropriate response to the OCC's examination findings, and CCO Sullivan relayed her particular concerns (including about the disagreement with Respondent) to Bank management in several communications in late February 2013.[39] On or

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[36] OCC-MSD-7 (Draft Supervisory Letter) at 3.

[37] *Id.* at 1.

[38] *See* OCC SOF ¶¶ 30, 41; Resp. SOF ¶¶ 38, 40; *see also* OCC-MSD-110 (second part of Sworn Statement Transcript of John Ryan) ("Ryan Dep.") at 213:13-18 (stating that Respondent had returned "to take a lead role in responding to the OCC").

[39] *See* OCC SOF ¶¶ 38-39; *see also* OCC-MSD-37 (email thread including February 26, 2013 email from CCO Sullivan to CEO Ryan and GC Weiss) at 4 (stating, *inter alia*, that "there continues to be a divide in my opinion on the state of the AML program and [Respondent's] assessment of the Program, including what are the key risks to [the Bank]"); OCC-MSD-38 (materials provided by CCO Sullivan to OCC, including copy of February 27, 2013 email from CCO Sullivan to CEO Ryan and GC Weiss) at 280-81 (stating that "I am disturbed that [Respondent] and I differ on the key risks to the organization.

around February 28, 2013, CCO Sullivan was placed on a forced leave of absence, and Respondent reassumed her prior role as the Bank's Chief Compliance Officer.[40]

On March 15, 2013, the Bank responded to the OCC's Draft Supervisory Letter with a letter drafted by Bank senior management, including Respondent, CEO Ryan, and GC Weiss ("Bank Response Letter").[41] In this letter, the Bank largely disagreed with the OCC's preliminary findings, stating that it "believe[d] that a closer examination of the Bank's BSA/AML program does not support a finding of a deficiency in any of the four pillars of its compliance program."[42] The letter concluded by recognizing "that it is the Bank's responsibility to provide complete, accurate, and timely information to the OCC in the examination process."[43] The letter did not mention that Crowe had been engaged to conduct an assessment of the Bank's BSA/AML program, nor did it advert to the conclusions of the Crowe Report in any way.[44]

On March 18, 2013, Ms. Sullivan emailed the OCC from her personal email account, alerting the agency to her forced leave of absence and detailing for it the concerns that she had "raised to management and the Board about the deficiencies within [the Bank's] BSA

. . . I do not believe it is prudent to rely on the advice of the person who had oversight when the problem developed. . . . I do not see [Respondent] as a source of advice going forward.").

[40] *See* OCC SOF ¶¶ 40, 42; Resp. SOF ¶¶ 43, 48.

[41] OCC SOF ¶ 45; *see* OCC-MSD-42 (Bank Response Letter).

[42] OCC-MSD-42 (Bank Response Letter) at 23-24.

[43] *Id.* at 24.

[44] *See id.*

Program."[45] In this email, which was also copied to CEO Ryan, Ms. Sullivan noted that Crowe had been engaged in January 2013 to assess the Bank's BSA/AML compliance program and that "*[t]he Crowe assessment that was shared with management and the Board* found [] core components of the Bank's program to be below industry standards."[46] Ms. Sullivan went on to state that "the Crowe Report [was] discussed in detail with Management and the Board," along with the program risks detailed in her email.[47] The email to the OCC also forwarded Ms. Sullivan's February 26, 2013 communication to CEO Ryan and GC Weiss, in which the Crowe Report was mentioned again: "*[A]s the Crowe assessment confirms*, there are multiple shortcomings across the program, with interdependencies, that with an aggressive project plan will take 9-12 months to fully address."[48]

In short, then, Ms. Sullivan's whistleblower email to the OCC mentions the Crowe Report—as well as its conclusions regarding deficiencies in the Bank's BSA/AML program and the fact that it had been provided to Bank management—three separate times, on the heels of an official response from the Bank several days earlier that did not acknowledge the existence of any Crowe assessment at all. And the OCC examiners who received Ms. Sullivan's email took notice: On the morning of March 19, 2013, Karen Boehler asked the other OCC recipients of the

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[45] OCC-MSD-43 (email thread including March 18, 2013 email from Lynn Sullivan to various individuals at the OCC) ("March 18, 2013 Whistleblower Email Thread") at 2.

[46] *Id.* (emphasis added).

[47] *Id.*

[48] *Id.* at 3 (emphasis added).

whistleblower communication whether they have "seen the Crowe [Horwath] assessment referenced in this email."[49] Later that afternoon, Shirley Omi responded, saying that she had "checked with Heidi who did [the] audit in February, and she doesn't recall seeing the Crowe [Horwath] assessment."[50] In other words, it is beyond dispute that Ms. Sullivan's March 18, 2013 email alerted the OCC to the existence of a document alternately termed "the Crowe Report" and "the Crowe assessment" that was both inarguably relevant to the scope of its ongoing examination and had not previously been seen by OCC examiners.

The OCC's March 21st Email and Respondent's Response

The OCC followed up on this revelation on March 21, 2013 by emailing Respondent, as acting CCO, to request the Crowe assessment.[51] In particular, the communication from Ms. Omi to Respondent asked her to "please provide us with ***a copy of the assessment report of the Bank's BSA program*** that Crowe [Horwath] LLC was engaged to perform in January 2013."[52] There is no dispute that Respondent had herself received a copy of the Crowe Report from Bank Vice President ("VP") Sharon Edgar on March 9, 2013,[53] although Respondent

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[49] *Id.* at 1.

[50] *Id.*

[51] *See* OCC SOF ¶ 49; OCC-MSD-47 (March 21, 2013 email from Shirley Omi to Respondent).

[52] OCC-MSD-47 (March 21, 2013 email from Shirley Omi to Respondent) (emphasis added).

[53] *See* OCC SOF ¶ 44; Resp. SOF ¶ 64; OCC-MSD-40 (March 9, 2013 email from Sharon Edgar to Respondent attaching "some

contends that Enforcement Counsel offers no evidence that she had read it or was even consciously aware of its existence at the time of this request.[54] Regardless, VP Edgar's March 9th cover email sending the Crowe Report to Respondent stated, in part: "This is their actual draft report, *so when you hear someone mention a report it is most likely this document*."[55]

Upon receiving Ms. Omi's request, Respondent forwarded it to GC Weiss, writing, in relevant part, that "I think the right answer is that ***Crowe did not perform an assessment***. That while they were engaged to perform a market study/peer benchmark for management and the board, the project was shelved before any report could be issued."[56] In

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of the Crowe Horwath documents," including the "Rabobank Anti-Money Laundering Program Assessment and Roadmap"); OCC-MSD-41 (version 0.9 of Crowe Report, dated January 31, 2013).

[54] *See* Resp. SOF ¶¶ 64(a), 65.

[55] OCC-MSD-40 (March 9, 2013 email from Sharon Edgar to Respondent) at 1 (emphasis added).

[56] OCC-MSD-48 (email thread including March 21, 2013 email from Respondent to GC Weiss) at 2 (emphasis added). The undersigned notes that Respondent herself denies that Crowe ever "conducted a 'peer-benchmarking' analysis," Resp. SOF ¶ 58, and a review of Crowe's Statement of Work and the Crowe Report itself compel the conclusion that Respondent's statement that Crowe was "engaged to perform a market study/peer benchmark" is, at best, an extremely incomplete characterization of the scope of what Crowe was being tasked to do with respect to the Bank's BSA/AML compliance program. *See* OCC-MSD-10 (Statement of Work dated December 27, 2012) at 1 (stating that of Crowe's "three primary objectives" under this agreement, two involved an "assessment" of aspects of the Bank's BSA/AML program, and none were characterized as a "market study" or "peer benchmark"); OCC-MSD41 (version 0.9 of the Crowe Report, dated January 31, 2013) at 3 (stating that "[t]he

response, GC Weiss began by questioning, "I wonder why they are asking for this now?"[57] He then went on to write:

> To the best of my knowledge, Crowe never provided a final report. As you note, they were engaged to provide an assessment and road map. ***They did produce a draft that was shared with management*** and perhaps Terry [Schwakopf]? My guess is that copies of the draft are floating around although our intention was to not keep any draft documents. So I believe your statement is accurate, although should we say no "final report was issued"? ***The obvious concern is they then ask for the draft from Crowe.***[58]

Respondent then wrote back to GC Weiss, stating "I don't know the reason for the request. It is interesting. I'll call you to discuss."[59]

On March 22, 2013, Respondent responded to Ms. Omi ("the March 22, 2013 Email").[60] As GC Weiss

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objective of this assessment was to review the maturity of the existing [BSA/AML] program at [the Bank]"). The undersigned therefore finds that Respondent's description of Crowe's scope of work in her March 21, 2013 email to GC Weiss, in conjunction with her statement that "Crowe did not perform an assessment," does not accurately or fully capture the work done by Crowe in January and February 2013, nor is it responsive to Ms. Omi's specific request.

[57] OCC-MSD-48 (email thread including March 21, 2013 email from GC Weiss to Respondent) at 1.

[58] *Id.* at 1 (March 21, 2013 email from GC Weiss to Respondent) (emphases added).

[59] *Id.* at 1 (March 21, 2013 email from Respondent to GC Weiss).

[60] *See* OCC SOF ¶ 50(a); OCC-MSD-52 (email thread including March 22, 2013 email from Respondent to Shirley Omi) at 2.

suggested, Respondent did not draw any express distinction between draft assessments and final assessments in this response, instead writing:

> *Crowe did not complete an assessment.* While they were engaged to perform a market study/peer benchmark analysis for the benefit of management and the board, the project was suspended before any report was issued. The decision to suspend was made in light of information coming out of the internal investigation being done to develop the OCC response. In part, it became clear that Crowe had not been provided all facts necessary to understand the organization so the emerging observations and action plan were not tailored to our situation. Rather than move in a direction that wasn't reflective of the current state of affairs, management elected to take some time to more thoughtfully determine next steps.
>
> Having taken this time to better consider where we need to go in enhancing our program, we have recently asked Crowe to assist us on several projects, including the BSA/AML risk assessment. We anticipate having a draft in time for the next board meeting in early May. I'd be happy to send you a copy of the draft report.[61]

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[61] OCC-MSD-52 (email thread including March 22, 2013 email from Respondent to Shirley Omi) at 2 (emphasis added). The parties disagree about the factual accuracy of Respondent's statement that the Bank had suspended its BSA/AML engagement with Crowe by this date. *See*, *e.g.*, OCC Mot. at 17 ("Crowe completed all of its services/obligations to the Bank; the Bank never suspended the engagement."); Resp. Mot. at 13

Respondent then forwarded this email to CEO Ryan and GC Weiss, stating: "FYI. My response to Shirley's request for any assessment completed by Crowe."[62] CEO Ryan responded to Respondent and GC Weiss, asking "I wonder where Shirley heard Crowe did a program assessment?"[63] On March 23, 2013, Respondent answered CEO Ryan's question:

> Lynn mentioned it at the exit meeting in February in SF. *What I don't know is whether she took it upon herself to share the draft report.* If I hear back from Shirley indicating they have a draft report, I'll schedule a call to discuss with her why we reject the initial conclusions. I'll also make it clear to her that management did not accept the report and thus it is not considered an 'official bank document.'[64]

Finally, CEO Ryan then wrote, "***Ok let's hope she did not provide a draft report.*** If she did your approach with Shirley is a good one."[65] In all, and as discussed further *infra*, these exchanges between Respondent, CEO Ryan, and GC Weiss paint a clear

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(claiming that the Bank "ended Crowe's project that had culminated in the failed February 5 PowerPoint presentation"). In the MSD Order, the undersigned found that this was a disputed question of fact that could be resolved if necessary at the hearing but was not material to the disposition of the issues before her. *See* MSD Order at 13 n.48.

[62] OCC-MSD-52 at 1 (March 22, 2013 email from Respondent to CEO Ryan and GC Weiss).

[63] *Id.* at 1 (March 22, 2013 email from CEO Ryan to Respondent and GC Weiss).

[64] *Id.* at 1 (March 23, 2013 email from Respondent to CEO Ryan and GC Weiss).

[65] *Id.* at 1 (March 23, 2013 email from CEO Ryan to Respondent and GC Weiss).

picture of three individuals who (1) are aware of a draft report that is responsive to Ms. Omi's request; (2) have taken pains to respond to Ms. Omi in a way that does not specifically reference the existence of the report or its conclusions, and which gives the impression that no report was created at all; (3) are uncertain whether and to what extent the OCC knows about or possesses a copy of the draft report; (4) are hopeful that OCC examiners do *not* know about or possess the report; and (5) have no apparent intention to tell the OCC about the report or provide the agency with a copy if it transpires that the agency does not already have one in its possession (but were making contingency plans for their response in the event that they learn the agency does possess a copy).

The OCC's March 25th email and Respondent's Response

OCC examiners evinced an awareness that Respondent's March 22, 2013 communication did not match up with their understanding that the Bank had received work product from Crowe relating to that firm's assessment of the Bank's BSA/AML compliance program. Following Respondent's response, Ms. Omi emailed her supervisor, Assistant Deputy Comptroller ("ADC") Thomas Jorn, asking what she should say in return.[66] ADC Jorn suggested that Ms. Omi contact Respondent again to "[i]ndicate that in going through the information we have it was our understanding that Crowe had provided management with *a report or documents of some type related to BSA*," and expressly request any such materials in whatever form the Bank had received

[66] *See* R-MSD-101 (email thread including March 22, 2013 email from Shirley Omi to Thomas Jorn and Brian Eagan).

them.[67] On March 25, 2013, Ms. Omi emailed Respondent, relayed the agency's understanding that Crowe had created BSA-related work product for the Bank, and specifically asked for "a copy of what bank management received from Crowe, ***even if it was only preliminary or partial***."[68]

In her deposition, Respondent testified that, during her time as an OCC examiner, it was her expectation that any documents she requested from a bank would be provided "promptly and completely."[69] Respondent also testified that she was aware, as a bank officer, "that there was authority that required the bank to provide books and records to the OCC."[70] Nevertheless, Respondent's initial reaction to Ms. Omi's express request for any draft BSA-related materials that had been given to the Bank by Crowe was not to procure and provide those documents "promptly and completely," but to confirm with CEO Ryan and GC Weiss that the draft Crowe Report was not supposed to be something that the OCC knew about: "It sounds as though Shirley may have the early assessment even though it was never issued and certainly never accepted by management. *To my knowledge we didn't make any statement to the OCC*

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[67] *Id.* at 1 (March 23, 2013 email from Thomas Jorn to Shirley Omi and Brian Eagan) (emphasis added).

[68] OCC-MSD-53 (March 25, 2013 email from Shirley Omi to Respondent) (emphasis added).

[69] OCC-MSD-108 (March 19, 2021 Deposition of Laura Akahoshi) ("Akahoshi Dep.") at 39:13-19 (adding that if such documents could not be produced promptly, she would expect "an explanation as to why not"); *see also id.* at 41:8-9 (stating that banks should comply with document requests from the OCC "timely and transparently and to the best of their abilities").

[70] *Id.* at 66:5-8.

that management received 'a report or document of some type.' Let's meet to discuss some time today."[71]

In advance of this meeting, Respondent emailed GC Weiss again, asking him to send a copy of "the Crowe document . . . to review before our meeting at 10:30" because she could not locate the copy she thought she had.[72] GC Weiss responded that he "never kept an electronic copy," but that "Sharon [Edgar] may have found a copy in Lynn's papers."[73] Respondent then wrote, "*All the better if you don't have it* as we can then tell Shirley, truthfully, that only Lynn was in receipt of the letter and we are unable to locate a copy."[74] Responding to GC Weiss's earlier email, Ms. Edgar then sent Respondent a copy of the version of the Crowe Report dated January 31, 2013, writing, "*This is the draft Crowe report with an overview of their findings.*[75] I also have a variety of

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[71] OCC-MSD-54 (email thread including March 25, 2013 email from Respondent to CEO Ryan and GC Weiss) at 1 (emphasis added).

[72] OCC-MSD-55 (email thread including March 25, 2013 email from Respondent to GC Weiss) at 2.

[73] *Id.* at 1 (March 25, 2013 email from GC Weiss to Respondent and Sharon Edgar).

[74] *Id.* at 1 (March 25, 2013 email from Respondent to GC Weiss) (emphasis added).

[75] In her summary disposition briefing, Respondent repeatedly contended that Bank management did not interpret Ms. Omi's March 25, 2013 request as encompassing the draft Crowe Report at all. *See*, *e.g.*, Resp. Opp. at 11 (asserting that "Ms. Akahoshi, Weiss, and Ryan did not 'join issue' with Omi as to what document she was requesting"), 12 (stating that "[t]he bankers plainly thought . . . that the document relevant to Omi's request for 'what bank management received from Crowe' referred to the February 5 PowerPoint presentation by Crowe to the key players in the bank"); Resp. Mot. at 12 (asserting that the PAR PowerPoint, not the Crowe Report, was "the operative Crowe

other Crowe documents from Gantt charts to Board and Management presentations so if you want to see them all I can put them together onto the SharePoint site."[76] Several minutes later, GC Weiss also forwarded the January 31, 2013 Crowe Report to Respondent, as part of a package of BSA-related Crowe materials that had been provided to Bank executives in advance of a BSA Executive Oversight Committee meeting on February 19, 2013.[77]

Following her meeting with CEO Ryan and GC Weiss,[78] Respondent circulated to those individuals a proposed response to Ms. Omi's email, to which GC Weiss offered suggested edits.[79] Respondent then responded to Ms. Omi later that day ("the March 25,

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document (and responsive to Omi's request for what Crowe had provided to management) in the bank's view"). The undersigned finds that these assertions are not credible, as the contemporaneous correspondence cited here reveals a clear understanding among Respondent and the Bank officials with whom she was communicating that the Crowe Report was the document to which Ms. Omi's request most centrally referred. *See also* OCC-MSD-40 (March 9, 2013 email from Sharon Edgar to Respondent) (sending Crowe Report to Respondent and stating that "[t]his is their actual draft report, so when you hear someone mention a report it is most likely this document").

[76] OCC-MSD-56 (email thread including March 25, 2013 email from Sharon Edgar to Respondent and GC Weiss) (emphasis added); *see also* OCC-MSD-57 (version 0.9 of Crowe Report, dated January 31, 2013).

[77] *See* OCC-MSD-58 (email thread including March 25, 2013 email from GC Weiss to Respondent); OCC-MSD-59 (version 0.9 of Crowe Report, dated January 31, 2013).

[78] *See* OCC-MSD-108 (Akahoshi Dep.) at 253:6-16.

[79] *See* OCC-MSD-63 (email thread including March 25, 2013 emails from Respondent to CEO Ryan and GC Weiss and from GC Weiss to Respondent and CEO Ryan).

2013 Email").[80] Notwithstanding Ms. Omi's clear request for all Crowe BSA-related reports or documents to the Bank "even if . . . only preliminary or partial," and despite the fact that Respondent had that day been given, and was now in possession of, multiple, lengthy BSA-related Crowe documents that had been provided to Bank management in January and February 2013, including two copies of the Crowe Report, Respondent's response to Ms. Omi attached only a single Crowe document: a seven-page "copy of a proposal Crowe submitted to the Executive Oversight Committee on March 1, 2013" that did not contain any of the conclusions found in the Crowe Report or the PAR PowerPoint regarding deficiencies in the Bank's BSA/AML program.[81] Moreover, although Respondent and her colleagues referred to the Crowe Report repeatedly in their correspondence with each other immediately beforehand as the presumptive subject of Ms. Omi's request,[82] the March 25, 2013 Email again gave the impression of disclaiming any awareness of the Crowe Report's existence even in preliminary or partial form, raising

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[80] *See* OCC-MSD-64 (March 25, 2013 email from Respondent to Shirley Omi et al.).

[81] *Id.* at 1; *see* OCC-MSD-65 (Crowe presentation entitled "AML Program Development" and dated March 1, 2013).

[82] *See*, *e.g.*, OCC-MSD-52 at 1 (March 23, 2013 email from Respondent to CEO Ryan and GC Weiss) (referencing "the draft report"); OCC-MSD-54 at 1 (March 25, 2013 email from Respondent to CEO Ryan and GC Weiss) (referencing "the early assessment"); OCC-MSD-55 at 2 (March 25, 2013 email from Respondent to GC Weiss) (referencing "the Crowe document"); OCC-MSD-56 at 1 (March 25, 2013 email from Sharon Edgar to Respondent and GC Weiss) (referencing "the draft Crowe report"); OCC-MSD-63 at 1 (March 25, 2013 email from GC Weiss to Respondent and CEO Ryan) (referencing "the draft assessment").

the notion of a report briefly before pivoting to the far more cabined question of whether Crowe had provided Bank management with a copy of the specific PowerPoint deck used during its early February 2013 presentation:

> I've spoken with both John Ryan and Dan Weiss *regarding the existence of a draft report coming out of the January BSA Program Review by Crowe Horwath*. They each reported the same information which is that Crowe had a discussion with the board and members of executive management at the February 4th meeting.[83] And while Crowe did utilize a PowerPoint presentation during the discussion, it was not provided to the Bank, as indicated by the fact that it was not included in the board packet. In this meeting and in subsequent conversations, both board members and executive management were very critical of the information being provided noting that there lacked foundation and that assumptions appeared to be based on inaccurate information. . . .
>
> In all, the participants did not find the presentation particularly useful. It was this presentation that prompted management to suspend the work being done by Crowe around the BSA/AML Program Assessment until clearer instructions and parameters could be established with the goal of an end product that the board and management could rely

[83] Respondent's statement that the meeting in question occurred on February 4, 2013, rather than February 5, 2013, appears to be in error. *See*, *e.g.*, OCC SOF ¶ 28; Resp. SOF ¶ 61.

> upon to make decisions going forward. Crowe has since been provided with additional information and has, in fact, altered their recommendations on several fronts.
>
> Now that there is more effective sharing of information and clearer communication as to the direction of work, we have picked up where the work ended in mid-February and are utilizing Crowe resources to assist us in completing the BSA/AML Risk Assessment. . . . I've attached a copy of a proposal Crowe submitted to the Executive Oversight Committee on March 1, 2013, which outlines their recommendations for next steps, as described above, and which we've generally accepted. We're happy to discuss further and will certainly share the BSA/AML Risk Assessment when it comes out in draft near the end of April or early May.[84]

In short, Respondent expended many words to respond to a clear and direct request for draft Crowe documents from January and February 2013, without providing any draft Crowe documents from January and February 2013, and while having multiple draft Crowe documents from January and February 2013 in her possession.

The OCC Requests the Crowe Assessment Again

Still unsuccessful in obtaining the Crowe assessment described to the OCC by Ms. Sullivan

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[84] OCC-MSD-64 (March 25, 2013 email from Respondent to Shirley Omi et al.) at 1 (emphasis added).

following her forced leave of absence,[85] ADC Jorn contacted CEO Ryan on April 8, 2013 to request the document directly from him.[86] The undersigned notes that ADC Jorn's initial conversation with CEO Ryan appears to have accepted Respondent's framing that the PowerPoint presentation to the Compliance Committee in early February, rather than the significantly more detailed draft Crowe Report upon which the PAR PowerPoint was based, was the operative document that the agency needed to see.[87] Nevertheless, by the time of the follow-up conversation between the two individuals on April 10, 2013, ADC Jorn had made it clear to CEO Ryan that his request was specifically targeted at the draft Crowe Report as well.[88] CEO Ryan agreed to provide

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[85] *See* OCC-MSD-43 (March 18, 2013 Whistleblower Email Thread) at 2, 3.

[86] *See* OCC SOF ¶ 58. CEO Ryan had been copied on Ms. Sullivan's March 18, 2013 whistleblower email.

[87] *See* OCC-MSD-66 (handwritten notes of ADC Jorn following telephone conversations with CEO Ryan on April 8, 2013 and April 10, 2013) at 3 (after April 8th conversation, seeking Crowe engagement letters, "Feb 4th [sic] Board/Exec Mgmt meeting PowerPoint presentation," and "[a]ny other reports provided on BSA"), 9 (noting "PowerPoint – not left with Bank (we want it)") (emphasis in original); OCC-MSD-67 (email thread including April 8, 2013 email from CEO Ryan to other Bank personnel) at 1 ("I received a call from Tom Jorn this morning requesting additional information. He has requested a copy of the Crowe Horwath power point presentation that went to the Compliance Committee in early February. I explained to him I do not have a copy but would obtain one directly from Crowe.").

[88] *See* OCC-MSD-66 (handwritten notes of ADC Jorn following telephone conversations with CEO Ryan on April 8, 2013 and April 10, 2013) at 1 ("Request for PPT from Crowe – have PPT & narrative – 'speaking notes' – separate report one & same – from that the PPT was put together. – Can send both of them – Draft for discussion purposes"); R-MSD-11 (April 11, 2013 email from

the materials requested by ADC Jorn along with a cover letter addressing any information contained therein that was, in the Bank's view, "inaccurate, incomplete, or misleading."[89] To give the Bank "time to do a proper cover letter," ADC Jorn agreed to target "sometime next week to [the] end of next week"—that is, by April 19, 2013—for the delivery of the requested materials.[90]

CEO Ryan then went about collecting Crowe documents from others at the Bank and from Crowe itself, including a copy of the February 5, 2013 PAR PowerPoint and the January 31, 2013 "version 0.9" of the Crowe Report that Respondent, GC Weiss, and VP Edgar, among others, already possessed.[91] Bank personnel, including Respondent, began formulating

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CEO Ryan to other Bank personnel) ("I had my call with Tom this afternoon and he advised that the examination is still ongoing and they will consider the contents of ***the Crowe report*** and other information as they feel appropriate in finalizing the examination.") (emphasis added).

[89] OCC-MSD-67 at 1 (April 8, 2013 email from CEO Ryan to other Bank personnel); *see also* R-MSD-11 (April 11, 2013 email from CEO Ryan to other Bank personnel) ("I advised that our intent is to provide a cover note outlining why we did not accept all the observations/conclusions made.").

[90] OCC-MSD-66 at 1 (handwritten notes of ADC Jorn following telephone conversations with CEO Ryan on April 8, 2013 and April 10, 2013); *see also* R-MSD-11 (April 11, 2013 email from CEO Ryan to other Bank personnel) ("In terms of timing Tom was agreeable to mid next week and if really need be Friday 19th.").

[91] *See* OCC SOF ¶¶ 59-62; *see also* OCC-MSD-68 (email thread including April 8, 2013 email from Troy La Huis to CEO Ryan attaching February 5th PAR PowerPoint); OCC-MSD-74 (email thread including April 10, 2013 email from Respondent to CEO Ryan and others attaching version 0.9 of Crowe Report, dated January 31, 2013).

the draft cover letter to accompany the Crowe materials.[92] In so doing, Respondent noted that the agency's focus was likely to be on the Crowe Report rather than the PAR PowerPoint, because it was what had been mentioned in the whistleblower communications and because it "provide[d] the most detailed views of Crowe at the time."[93] Respondent expressed the concern that if the cover letter did not "speak specifically to [the Crowe Report]," then the Bank would "run the risk of the OCC making their own inferences."[94] Concurrently, on April 12, 2013, Ms. Sullivan provided the OCC with materials relating to her whistleblower claims, including a copy of an earlier version of the Crowe Report, denoted as "version 0.1."[95]

The Bank's April 18th Cover Letter

On April 18, 2013, Respondent emailed ADC Jorn and others at the OCC, attaching version 0.9 of the Crowe Report, a copy of the PAR PowerPoint dated February 5, 2013, and a cover letter "providing background and context to the Crowe Horwath

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[92] *See*, *e.g.*, OCC-MSD-82 (email thread between Respondent, GC Weiss, and CEO Ryan regarding edits to the draft response to the OCC); R-MSD-82 (redline version of Bank response to OCC to be sent with Crowe materials).

[93] OCC-MSD-77 (email thread including April 16, 2013 email from Respondent to GC Weiss) at 1.

[94] *Id.*

[95] *See* OCC-MSD-38 (various materials represented without apparent dispute to have been provided to the OCC by Lynn Sullivan on April 12, 2013, including a version of the Crowe Report dated January 31, 2013 but denoted as "version 0.1") at 66-95.

engagement and Management's response thereto."[96] The email states that the PAR PowerPoint (which the Bank terms "the Deck") is being provided in response to the OCC's March 25, 2013 request.[97] Respondent then adds that the Bank has "also included a narrative provided by Crowe Horwath on which the Deck was designed"—in other words, the Crowe Report.[98] The undersigned observes *sua sponte* that this email inaccurately characterizes the OCC's March 25, 2013 request to the extent that it suggests that the OCC at that time had requested only the PAR PowerPoint, or even principally the PAR PowerPoint, rather than the draft Crowe Report itself.[99]

The Bank's seven-page cover letter addresses a number of aspects of Crowe's engagement and the whistleblower claims made by Ms. Sullivan and Ann Marie Wood, another Bank employee who had raised concerns about the Bank's BSA/AML program, but there is one passage in particular that is relevant to

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[96] OCC-MSD-78 (April 18, 2013 email from Respondent to ADC Jorn, Shirley Omi, et al.); *see also* OCC-MSD-79 (version 0.9 of the Crowe Report, dated January 31, 2013); OCC-MSD-80 (PAR PowerPoint dated February 5, 2013); OCC-MSD-81 (April 18, 2013 letter from CEO Ryan to ADC Jorn). Respondent's email mistakenly refers to the PAR PowerPoint as being dated February 8, 2013, rather than February 5th.

[97] OCC-MSD-78 (April 18, 2013 email from Respondent to ADC Jorn, Shirley Omi, et al.).

[98] *Id.*

[99] *See* OCC-MSD-53 (March 25, 2013 email from Shirley Omi to Respondent) (stating that "it was [the agency's] understanding that [Crowe] provided management with a report or documents of some type related to BSA" and requesting "a copy of what bank management received from Crowe, even if it was only preliminary or partial").

the instant action. In discussing the scope of work performed by Crowe in January and February 2013, the letter represented the following:

> Prior to the OCC request for the "Crowe Report" on March 25, 2013, the bank was not in possession of the Deck, which was used by Crowe Horwath to present observations at a meeting of the Compliance Committee on February 5, 2013. The PAR, dated January 31, 2013 [that is, the Crowe Report], was provided only to the Chief Compliance Officer with a copy to Legal Counsel. It was left with Ms. Sullivan who continued to work with Crowe Horwath to develop an execution plan. Management now understands from correspondence sent to the OCC by Ms. Wood that Ms. Sullivan shared the document with her. *We are not aware of further distribution.*[100]

The parties disagree as to the factual accuracy of this paragraph.[101] The undersigned finds that the passage is most reasonably read to be purporting to describe the full extent, at least to the knowledge of the paragraph's drafter, that the Crowe Report was distributed among Bank personnel prior to the OCC's March 25, 2013 Email, whether by the OCC or by people within the Bank itself. The undersigned

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[100] OCC-MSD-81 (April 18, 2013 letter from CEO Ryan to ADC Jorn) (emphasis added).

[101] *See* OCC Mot. at 9, 19; Resp. SOF ¶ 77. The parties also dispute the extent to which Respondent was responsible for drafting the passage in question. *See* OCC Opp. at 16; Resp. SOF ¶ 77(g). The undersigned finds that resolution of this issue is not possible on the present record and unnecessary regardless given the matter's current posture.

further finds that the Crowe Report indisputably (and contrary to the representations in this paragraph) was in the possession of Bank personnel other than Ms. Sullivan, Ms. Wood, and GC Weiss prior to March 25, 2013, including Respondent, VP Edgar, and several members of the Bank's Executive Oversight Committee.[102] Thus, if the drafter of this passage were, in fact, aware of this additional distribution of the Crowe Report at the time the cover letter was drafted, the undersigned finds that that portion of the paragraph would be factually inaccurate and is in any event misleading.[103]

Events Leading to Respondent's Dismissal from the Bank

Following the production of the Crowe Report, the OCC returned to the Bank to conduct a further examination in May 2013.[104] On July 2, 2013, the OCC issued a Supervisory Letter documenting its findings from the follow-up examination and concluding that the Bank's BSA/AML compliance program was "deficient" in multiple respects, with

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[102] *See* OCC SOF ¶¶ 34-36 (citing exhibits).

[103] The first sentence of the paragraph is likewise inaccurate, or at least misleading, inasmuch as it operates to obscure the undisputed distribution of earlier versions of the PAR PowerPoint to Bank personnel prior to March 25, 2013, even if the February 5th version itself was not so distributed. *See* note 33, *supra*.

[104] OCC SOF ¶ 69; *see* OCC-MSD-83 (July 2, 2013 letter from OCC to Bank Board of Directors) at 1 (indicating that the new examination was conducted "[i]n order to reconcile the information provided in management's response with the OCC's initial findings and information obtained from bank employees").

"significant issues resulting in violations of laws."[105] The Bank subsequently entered into a Consent Order with the OCC in December 2013 to address the Bank's statutory and regulatory violations and remediate deficiencies in the Bank's BSA/AML program.[106]

On August 13, 2015, the Bank's Remediation Committee issued a decision concluding, *inter alia*, that Respondent (1) had improperly withheld materials responsive to the OCC's March 21, 2013 email and March 25, 2013 email; (2) had made statements that "were less than candid and failed to include pertinent information" in response to those emails, such as failing to acknowledge the existence of the draft Crowe Report; and (3) had "shared drafting responsibility" for the April 18, 2013 letter to the OCC that "was inaccurate in that it understated the scope of distribution of the [Crowe] Report within [the Bank] as of March 25, 2013."[107] The Remediation Committee further, and unanimously, concluded that Respondent had engaged in misconduct that violated Bank policy and "has resulted, or will result, in considerable loss and/or damage to the reputation of [the Bank]."[108] On September 9, 2015, Respondent's employment with the Bank was terminated for cause.[109]

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[105] OCC-MSD-83 (July 2, 2013 letter from OCC to Bank Board of Directors) at 2; *see also* OCC SOF ¶ 70.

[106] *See* OCC SOF ¶ 71; OCC-MSD-84 (December 2013 Consent Order).

[107] OCC-MSD-86 (August 13, 2015 memo entitled "Remediation Committee Decision Regarding Ms. Laura Akahoshi") ("Remediation Committee Decision") at 3; *see* OCC SOF ¶ 73.

[108] OCC-MSD-86 (Remediation Committee Decision) at 4.

[109] *See* OCC SOF ¶ 74.

The Bank's Guilty Plea

On February 7, 2018, the Bank pled guilty to criminally conspiring with "Executive A, Executive B, and Executive C, and others . . . to corruptly obstruct and attempt to obstruct an examination of a financial institution by [the OCC]."[110] It is undisputed that Executive A is Respondent[111] and that the charges involving Executive A to which the Bank pled guilty arose in part out of Respondent's conduct in March and April 2013 related to the OCC's requests for the draft Crowe Report.[112] For example, the charging document against the Bank alleged that Respondent, along with others at the Bank, conspired to (1) "conceal from the OCC the existence of, and the substance of the information contained within [the Crowe Report]"; and (2) "delay and limit disclosure of [the Crowe Report] to the OCC, despite specific and repeated requests by OCC examiners."[113] As a result of the guilty plea, the Bank was fined $500,000 and was subject to a civil money forfeiture totaling $368,701,259.[114]

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[110] OCC-MSD-88 (Plea Agreement) at 2; *see* OCC SOF ¶ 75.

[111] *See* OCC SOF ¶ 75(a); OCC-MSD-89 (Bank Charging Document) at 4. For avoidance of confusion, the undersigned notes that the Plea Agreement and the Notice both use the term "Executive A," but to refer to two different individuals—Respondent and Ms. Sullivan, respectively. *See supra* at 9; *see also* Notice ¶ 10.

[112] *See* OCC-MSD-89 (Bank Charging Document) at 14-17.

[113] *Id.* at 14.

[114] OCC-MSD-88 (Plea Agreement) at 8; *see* OCC SOF ¶¶ 75(b), (c). In her summary disposition briefing, Respondent argued that the civil money forfeiture was wholly attributable to alleged offenses separate from the misconduct at issue here. *See* Resp. Mot. at 32 (arguing that forfeiture arose from "money

On the same day that the Bank entered its guilty plea, it also entered into a Consent Order with the OCC for a $50 million civil money penalty arising in part from the alleged efforts of "[f]ormer senior officers of the Bank" to "conceal[] from the OCC documents requested by OCC officials and examiners that were relevant to the OCC's evaluation of the Bank's BSA/AML compliance program."[115]

The Instant Action

The OCC commenced these proceedings against Respondent on April 17, 2018. The agency's allegations against Respondent center around her statements in the March 22, 2013 Email, the March 25, 2013 Email, and (allegedly) the April 18, 2013 cover letter, as well as her general course of conduct in allegedly concealing and seeking to divert the

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laundering and structuring offenses, not the discrete false statement and concealment violations alleged here") (emphasis omitted) (citing OCC-MSD88 (Plea Agreement) at 38). Even if true, it appears without dispute that the $500,000 fine paid by the Bank in connection with its guilty plea was attributable at least in part to the criminal conspiracy charges involving Respondent and the Crowe Report.

[115] OCC-MSD-90 (February 2018 Consent Order) at 2-3; *see also* OCC SOF ¶ 76. Respondent contended at the summary disposition stage that because this $50 million civil money penalty "was paid out of the funds subject to forfeiture (*i.e.*, funds involved in money laundering), it caused no marginal loss at all beyond the losses attributed entirely to money laundering and structuring." Resp. Mot. at 32 (emphasis omitted). Again, even assuming the truth of this assertion, it would not alter the undersigned's conclusion *infra* that the statutory effect element has been satisfied by loss caused to the Bank in the form of the $500,000 fine in connection with the guilty plea for criminal conspiracy to obstruct an OCC examination, which indisputably involved Respondent's alleged misconduct here.

OCC's attention from the existence of, and conclusions contained in, the Crowe Report, despite repeated overt requests by OCC examiners.[116] According to the OCC, Respondent's conduct constitutes a violation of 12 U.S.C. § 481, which addresses the power of OCC examiners to conduct bank examinations, and of 18 U.S.C. § 1001, which governs the willful concealment or misstatement of material facts in the course of a federal investigation or other proceeding, as well as being actionably unsafe or unsound. Each of these potential violations is addressed in further detail *infra*.

On April 24, 2020, following the reassignment of this case from Administrative Law Judge ("ALJ") C. Richard Miserendino to the undersigned in the wake of the Supreme Court's decision in *Lucia v. Securities & Exchange Commission*,[117] the undersigned denied Respondent's motion to dismiss this action on the various grounds that the previous ALJs presiding over the action had not been constitutionally

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[116] The timeliness of OCC enforcement actions is governed by the five-year statutory limitations period set forth in 28 U.S.C. § 2462, under which an agency has five years from "the date when the claim first accrued" to initiate enforcement proceedings. *See also Gabelli v. SEC*, 568 U.S. 442, 448 (2013) (claim accrues when complainant "has a complete and present cause of action") (internal quotation marks and citation omitted). In her March 1, 2021 Order (see *infra)*, the undersigned concluded that, as pled in the Notice, the agency did not have a complete and present cause of action against Respondent until the effect prongs of 12 U.S.C. §§ 1818(e) and 1818(i) were satisfied by the Bank's forfeiture of $368 million and payment of a $500,000 fine arising from its February 2018 guilty plea to obstruct an OCC examination. *See* March 1, 2021 Order at 9-10. As such, the commencement of this action on April 17, 2018 was timely under Section 2462. *See id.*

[117] 585 U.S. ___, 138 S. Ct. 2044 (2018).

appointed; that the undersigned had not been constitutionally appointed; and that the individual who issued the Notice on behalf of the OCC was not an appropriately delegated signatory and had not been constitutionally appointed.[118] On October 16, 2020, as partially modified by an order on March 1, 2021, the undersigned rejected Respondent's argument that the claims against her should be dismissed as time-limited.[119] On March 8, 2021, the undersigned declined to grant Respondent's motion asserting "that the OCC has constructed a system of secret law" and seeking to preclude the Parties from citing any non-public, unpublished precedents.[120] In her summary disposition briefing, Respondent revisited her arguments regarding the applicable statute of limitations, the Appointments Clause of the United States Constitution, and the OCC's purported reliance on "secret law," each of which the undersigned again rejected.[121] Finally, on December 2, 2021, the undersigned denied Respondent's late-filed motion to dismiss this proceeding due to "agency prejudgment."[122] Each of these arguments was thereby recorded and preserved for appeal to the

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[118] *See* April 24, 2020 Order Reviewing Prior Administrative Law Judges' Prehearing Actions ("April 24, 2020 Order") at 2-9.

[119] *See* October 16, 2020 Order Recommending the Grant in Part and Denial in Part of Respondent's Initial Dispositive Motion ("October 16, 2020 Order") at 42-56; March 1, 2021 Order Modifying Sections A2, B2, and B3 of This Tribunal's October 16th, 2020 Order ("March 1, 2021 Order") at 8-10.

[120] March 8, 2021 Order Regarding Respondent's Motion to Prohibit Reliance on Secret Law ("March 8, 2021 Order") (internal quotation marks and citation omitted).

[121] *See* Resp. Mot. at 42-45; MSD Order at 66-69.

[122] *See* December 2, 2021 Order Denying Respondent's Motion to Dismiss.

Comptroller of the Currency ("Comptroller") at the appropriate stage in the proceedings, should Respondent wish to revisit them at that time.[123]

Respondent's Finances

Respondent declined to submit a personal financial statement when asked to do so as part of her response to the OCC's initial letter regarding its investigation,[124] and the information on this topic (which is relevant to the size of civil money penalty being assessed) in the Parties' filings is relatively scant. Respondent represents that she has earned an average salary of $50,000 per year since her September 2015 termination from the Bank, a sharp decline from the $220,000 yearly salary that she averaged during her career in banking.[125] She further states that she has net assets of approximately $98,000 excluding the assets in her 401(k) account,

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[123] *See*, *e.g.*, April 24, 2020 Order at 9 (preserving for appeal all "arguments regarding the constitutionality of the limitations on the removal of ALJs"); *see also* 12 C.F.R. §§ 19.39 (Exceptions to recommended decision), 19.40 (Review by the Comptroller). Because Respondent's Appointments Clause argument as related to the individual who issued the Notice of Charges on behalf of the OCC was raised again in her civil money penalty briefing (and has been raised and rejected in other cases before this Tribunal) but has not yet been treated by the Comptroller, the undersigned provides a fuller accounting of her reasoning for rejecting this argument in Part V.E *infra*, in the event it may prove helpful. *See* Resp. CMP Br. at 13 n.11, 34; Resp. CMP Response at 24 n.6.

[124] *See* OCC CMP Br. at 7-9.

[125] *See* Resp. CMP Br. at 9.

which she "understand[s] to be exempt from collections."[126]

It is apparently undisputed that Respondent received a lump sum payment of $291,358 from the Bank in August 2016 following settlement of an Equal Employment Opportunity Commission complaint in connection with her termination.[127] Respondent represents that she purchased a home staging business in 2018 with the remaining proceeds of this settlement, but that the business has "substantially diminished" in value from its purchase price of approximately $400,000 down to approximately $230,000.[128] According to Respondent, 34.9 percent of the home staging business is owned by her directly, while the remainder is owned through her and her husband's respective 401(k) accounts.[129] Respondent asserts that in 2021, she took out a personal loan for $45,000 "to stave off

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[126] R-CMP-8 (Declaration of Laura Akahoshi) ("Akahoshi Decl.") ¶ 5. Respondent estimates that her total net assets including her 401k account is "less than approximately $200,000." *Id.*

[127] *See* OCC CMP Response at 8; Resp. CMP Reply at 2.

[128] Resp. CMP Reply at 1-2; *see also id.* at 3 ("After paying attorney's fees, to make a living, Ms. Akahoshi used her remaining settlement with the Bank to purchase, renovate, and sell homes from 2016 to 2018. . . . In 2018 she used the funds remaining from that settlement to purchase part of 2212 Design.").

[129] *See id.* at 1 (stating that "[f]ederal and state laws . . . specifically exempt the holdings of 401K accounts, including the ownership interest in 2212 Design, from the reach of creditors"). The undersigned makes no finding regarding whether retirement assets or other assets that Respondent represents are unreachable by creditors can be accessed by the OCC when collecting payment for a civil money penalty assessment under 12 U.S.C. § 1818(i)(2)(I)(1).

shutting down the company," in addition to pre-existing debts totaling approximately $120,000.[130]

With respect to other assets, Respondent represents that she and her husband jointly own their home, which was appraised in 2020 for $780,000 and on which they have a combined mortgage and equity line of credit of $526,227.[131] Of the remaining $253,773 in equity on that house, she states that $105,000 is exempt from civil obligations under Colorado's Homestead Law and that the "total non-exempt value of $148,773 is unreachable because [Respondent] and her husband each own the house entirely, and his funds are unreachable to pay a penalty assessed against [Respondent]."[132] Regardless, Respondent states that her net worth calculation of $98,000 included her half of the home's non-exempt equity value.[133] Respondent also maintains that she does not have any pension.[134] She does not provide any information on other potential assets listed by Enforcement Counsel, such as "life insurances with cash surrender values," "personal property such as vehicles," or "any other real property besides her primary residence."[135]

V. Analysis

The August 5, 2021 MSD Order concluded, based on the undisputed material facts, that Respondent had engaged in misconduct with an actionably

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[130] Resp. CMP Reply at 2.

[131] *See id.*

[132] *Id.*

[133] *See id.*

[134] *See id.* at 3.

[135] OCC CMP Response at 8.

culpable state of mind when she withheld the Crowe Report from OCC examiners and endeavored to conceal its existence, and further that the Bank had suffered financial loss as a result. Having set forth the relevant factual findings in this case, the undersigned now summarizes the conclusions in the MSD Order as to why each of these statutory elements for the entry of a prohibition order under 12 U.S.C. § 1818(e) and the assessment of a second-tier civil money penalty under 12 U.S.C. § 1818(i) have been met. The undersigned also considers the appropriateness of the desired civil money penalty amount in light of the mitigating factors set forth in 12 U.S.C. § 1818(i)(2)(G).

A. Misconduct

Enforcement Counsel argued at the summary disposition stage that Respondent's conduct in March and April 2013 constituted an actionable violation of 12 U.S.C. § 481 (failure to provide timely and complete bank information to OCC examiner upon request) and 18 U.S.C. § 1001 (knowing and willful false statements and representations and concealment of material fact) as well as unsafe or unsound practices in conducting the Bank's affairs, any of which individually would, if proven, satisfy the misconduct elements of Sections 1818(e) and Section 1818(i).[136] In response, Respondent argued that her conduct was in no way improper, that she composed the emails in question accurately and in good faith, that she never withheld or sought to conceal the Crowe Report from OCC examiners, and that she did not draft the passages in question in the April 18,

[136] *See* OCC Mot. at 14-16 (12 U.S.C. § 481), 16-26 (18 U.S.C. § 1001), 26-28 (unsafe or unsound practices).

2013 letter. Respondent further argued that there was nothing material about the Crowe Report or any alleged misstatements on Respondent's part, that Respondent indisputably did not act knowingly or willfully, that no reasonable person would have understood Respondent's conduct to constitute a Section 481 violation, and that her conduct was demonstrably neither unsafe nor unsound.[137] For the reasons below, the undersigned agrees with Enforcement Counsel.

1. The OCC's Section 481 Claims

In its summary disposition brief, Enforcement Counsel argued that Respondent caused the Bank to violate its statutory duty under 12 U.S.C. § 481 when she failed to provide the Crowe Report to OCC examiners upon request in March 2013, despite knowingly having that document in her possession and understanding it to be responsive to the OCC's inquiry.[138] The undersigned concurs that Respondent's conduct constituted a violation of that statute.

The March 15, 2013 Bank Response Letter that Respondent participated in drafting recognized "that it is the Bank's responsibility to provide complete, accurate, and timely information to the OCC in the examination process."[139] Respondent does not dispute that the source of this responsibility is 12 U.S.C. § 481, which authorizes OCC examiners to conduct

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[137] *See* Resp. Mot. at 10-19 (12 U.S.C. § 481), 19-22 (18 U.S.C. § 1001), 22-23 (unsafe or unsound practices); *see also* Resp. Opp. at 2-17.

[138] *See* OCC Mot. at 14-16.

[139] OCC-MSD-42 (Bank Response Letter) at 23-24.

thorough examinations of the affairs of any national bank or its affiliates and "make a full and detailed report of the condition of said bank to the Comptroller of the Currency," something that would only be possible if those examiners had access to relevant bank information as needed during the course of their examination.[140] And Respondent acknowledges that, as both a former OCC examiner and a bank officer, she was aware during the relevant period "that there was authority that required the bank to provide books and records to the OCC."[141] It appears beyond dispute, then, that when the OCC sought any materials that Crowe had provided to the Bank in conjunction with its BSA/AML assessment, the Bank had an obligation to provide all such materials—in Respondent's words—"timely and transparently and to the best of [its] abilit[y]."[142]

Respondent contended at summary disposition, however, that a Section 1818 enforcement action may not be premised on even an unconditional and express refusal to comply with a bank's obligations under Section 481, whether this refusal comes from the bank itself or an officer charged with liaising with the OCC during its examination.[143] Respondent also argued that permitting the agency to maintain such

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[140] Section 481 itself refers in multiple instances to "information *required* in the course of an examination." 12 U.S.C. § 481 (emphasis added). While this phrase occurs only in the specific context of the OCC's examination of a bank's affiliates, *see* October 16, 2020 Order at 34 n.82, there is no reason to conclude that a bank's obligation to provide requested documents during its own examinations is any less than when its affiliates are being examined.

[141] OCC-MSD-108 (Akahoshi Dep.) at 66:5-8.

[142] *Id.* at 41:8-9.

[143] *See* Resp. Mot. at 19-20.

an action here would "violate[] basic due process," as no reasonable person in March 2013 would have known that misleading OCC examiners regarding the existence of documents they had specifically requested could, in some circumstances, lead the OCC to pursue adverse action against the individual in question.[144] The undersigned concludes that Respondent is incorrect in both respects.

It is Respondent's position that the OCC may not premise enforcement actions on any violation of Section 481 because Congress has not conferred upon the agency enforcement power over such violations.[145] Yet as explained in this Tribunal's October 16, 2020 Order denying Respondent's motion to dismiss this matter on similar grounds, Section 1818(e) authorizes the federal banking agencies to seek prohibition orders against any IAP who has "directly or indirectly violated any law or regulation," while Section 1818(i) likewise states that the violation of "any law or regulation" is grounds for the assessment of a civil money penalty, presuming in both cases that the other statutory criteria are also met.[146] And 12 U.S.C. § 1813(v) makes it clear that Congress intended the scope of an actionable "violation" under these statutes to be construed broadly to include "any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding

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[144] *Id.* at 20.

[145] *See id.* at 19. Note that Respondent does not argue that Section 481 *cannot* be violated, only that any violation would be unenforceable because the statute itself "does not create an offense of failing to provide prompt and unfettered access to a bank's records." *Id.* (internal quotation marks omitted).

[146] 12 U.S.C. §§ 1818(e)(1)(A)(i)(I), 1818(i)(2)(A)(i); *see* October 16, 2020 Order at 33-35.

or abetting a violation."[147] Thus, the conferral of enforcement power that Respondent seeks is contained within Section 1818 itself: if an IAP "brings about" a violation of Section 481 by, for example, causing the Bank to fail to fulfill its obligation to provide accurate and complete information regarding requested documents to OCC examiners, then the OCC is empowered by Sections 1818(e) and 1818(i) to make this violation the subject of an enforcement action, as it could with the violation of any other law.

Nor is it credible to claim that a bank official in the spring of 2013 would reasonably believe that they could conceal documents from an OCC examiner without consequence. To argue, as Respondent does, that there was no ascertainable standard of conduct "with which the agency expect[ed] parties to conform" when asked for bank information verges on disingenuity, especially given Respondent's own background at the OCC.[148] As the relevant section of the OCC's Policies and Procedures Manual observes, there are multiple statutory provisions even beyond 12 U.S.C. § 481 that make it clear that bank officials should cooperate fully with requests made in the course of an examination.[149] Could the law be clearer in specifically and unequivocally imputing to bank officials the duty of effectuating banks' responsibilities

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[147] 12 U.S.C. § 1813(v).

[148] Resp. Mot. at 20 (internal quotation marks and citation omitted).

[149] *See* R-MSD-110 (Issuance 5310-10 of OCC Policies and Procedures Manual, entitled "Guidance to Examiners in Securing Access to Bank Books and Records" and dated January 7, 2000) at 2 (citing, in addition to OCC's standard array of enforcement tools, 12 U.S.C. § 1821(c)(5) and 18 U.S.C. § 1517 as statutes that prescribe repercussions for a failure to provide examiners with access to requested books and records).

to the OCC during its examination process? Certainly. But Respondent cannot reasonably claim that she did not believe that she had such a duty at the time, when she herself has acknowledged it then and since, and when as a former long-time OCC examiner she should have been under no illusions about the need to give the agency what it asks for if you have access to the requested materials.[150] There may be circumstances in which the lack of a more precise standard should forestall enforcement actions against bank officials who make a good faith if incomplete effort to cooperate with examiners, but that is not the factual record here. As a standard of behavior, knowing not to withhold a document from the OCC and mislead the agency about the document's existence, when that document has been expressly requested and is in your possession, would be ascertainable under any light.

Respondent further argues that even if an enforcement action could be premised on a violation of a bank's duty to provide prompt and accurate bank information to examiners under Section 481, no such violation occurred in this case.[151] The undersigned cannot agree. The undisputed facts show that at every step, Respondent chose obfuscation, misdirection,

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[150] The OCC has also informed bank officials about this statutory responsibility in the form of public advisory letters. *See*, *e.g.*, OCC Advisory Letter 2004-9, *Issues Posed By Bank Electronic Record Keeping Systems* (June 21, 2004), *available at* https://www.occ.gov/news-issuances/advisory-letters/2004/advisory-letter-2004-9.pdf at 4 (stating that "a national bank that has digitized its records must maintain electronic records that provide OCC staff with prompt and sufficient access to reliable information to permit adequate examination and supervision") (citing 12 U.S.C. § 481).

[151] *See* Resp. Mot. at 21-22.

or diversion in formulating her responses to Ms. Omi's requests, rather than engaging with the requests themselves fully, candidly, and directly. On March 21, 2013, Ms. Omi asked for a copy of Crowe's BSA assessment report; in return, Respondent hinted heavily that no such report existed while privately making contingency plans in case the agency had obtained a copy of the draft report some other way.[152] On March 25, 2013, Ms. Omi made her request again, emphasizing this time that it encompassed *any* BSA-related report or document that Crowe had provided to Bank management, even if "only preliminary or partial." Instead of supplying the draft Crowe Report, which was unquestionably responsive to Ms. Omi's request and which multiple people at the Bank had sent Respondent *that day*, Respondent opted to inaccurately characterize the PAR PowerPoint (drafts of which she also could have provided Ms. Omi but did not) as if it were the only work product Crowe had created in the course of its January 2013 assessment, once more conveying the impression that the Crowe Report did not exist even in draft form.[153]

Respondent's lack of any mention of the Crowe Report in her March 22, 2013 Email to Ms. Omi could charitably be construed as grounded in a good faith belief that the OCC examiner was only interested in "final" documents (although even this is belied by Respondent's colloquies with CEO Ryan and GC Weiss regarding "the draft from Crowe" and "the draft report" immediately before and afterwards). Once Ms. Omi clarified that she was seeking any preliminary materials the Bank had received from Crowe, however, Respondent had an obligation to

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[152] *See* Part IV *supra* at 13-16 (citing exhibits).

[153] *See id.* at 17-21 (citing exhibits).

provide those materials—or, at the very least, complete and accurate information about those materials— in a "timely and transparent[]" manner and to the best of her ability.[154] Respondent could have attached the Crowe Report to her March 25, 2013 Email to Ms. Omi as she was requested (and required) to do, but she did not. Respondent could have acknowledged the existence of the Crowe Report in that same email; again, she did not. There is, in fact, no indication that she even contemplated either course of action, or indeed that she ever intended to give the Crowe Report to the OCC if left to her own devices, despite having it in her possession and knowing that it was responsive to the agency's request. Not until ADC Jorn contacted CEO Ryan two weeks later did the Bank finally take steps to provide the Crowe Report as requested, albeit with a cover letter inaccurately representing the extent to which the report had previously been circulated among Bank personnel.[155]

In sum, OCC examiners are entitled to prompt and complete access to bank information upon request during their examination, pursuant to the authority granted them in 12 U.S.C. § 481. Bank officials whose positions empower them to act as liaisons with OCC examiners have an obligation to make a reasonable effort to timely provide materials requested by those examiners in the scope of their duties and to otherwise provide accurate and responsive information relevant to those requests. Respondent possessed the Crowe Report, knew it to be responsive to the OCC's March 25, 2013 request, and yet withheld it from the examiner. In her March 25, 2013 Email, Respondent

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[154] OCC-MSD-108 (Akahoshi Dep.) at 41:8-9.

[155] *See* Part IV *supra* at 21-24 (citing exhibits).

also failed to fully or accurately characterize the extent to which Crowe had provided preliminary BSA/AML work product to the Bank, despite a direct request to turn over all such materials. As a result, Respondent caused the Bank to violate its undisputed duty under Section 481, thereby satisfying the misconduct prongs of a Section 1818 enforcement action for a prohibition order and the assessment of a civil money penalty.

2. The OCC's Section 1001 Claims

In addition to violating 12 U.S.C. § 481, Enforcement Counsel argued at summary disposition that Respondent's conduct constitutes a violation of 18 U.S.C. § 1001, which encompasses both the making of materially false statements and the concealment of material facts from government officials in the course of their duties.[156] The undersigned found that the undisputed record establishes that Respondent knowingly and willfully concealed material facts from OCC examiners regarding the nature of the Crowe work product provided to Bank officials in January and February 2013, thereby violating 18 U.S.C. § 1001(a)(1).[157] The undersigned concluded, however, that a determination of whether Respondent *also* knowingly and willfully made materially false statements or representations for the purposes of 12 U.S.C. § 1001(a)(2) was premature at that time, and accordingly made no findings in that regard.[158]

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[156] *See* OCC Mot. at 16-26.

[157] *See* MSD Order at 37-43, 46-50.

[158] *See id.* at 43-45.

18 U.S.C. § 1001 broadly prohibits "deceptive practices aimed at frustrating or impeding the legitimate functions of government departments or agencies."[159] Importantly, "[t]he several different types of fraudulent conduct proscribed by [S]ection 1001 are not separate offenses," but rather "describe different means by which the statute is violated."[160] Subsection (a)(1), for example, brings within the statute's ambit any knowing and willful conduct, in any matter within federal jurisdiction, that "falsifies, conceals, or covers up by any trick, scheme, or device a material fact."[161] By contrast, subsection (a)(2) proscribes the making of "any materially false, fictitious, or fraudulent statement or representation" in such circumstances and with the requisite state of mind.[162] The undersigned addresses each of these provisions in turn.

Concealment and a Duty to Disclose

The D.C. Circuit and the Ninth Circuit both hold that the concealment of a material fact from a government official is only actionable under 18 U.S.C.

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[159] *United States v. Tobon-Builes*, 706 F.2d 1092, 1101 (11th Cir. 1983); *accord*, *e.g.*, *United States v. Gilliland*, 312

U.S. 86, 93 (1941); *United States v. Hubbell*, 177 F.3d 11, 13 (D.C. Cir. 1999); *United States v. Arcadipane*, 41 F.3d 1, 4 (1st Cir. 1994); *United States v. Shanks*, 608 F.2d 73, 75 (2d Cir. 1979).

[160] *United States v. Stewart*, 433 F.3d 273, 319 (2d Cir. 2006).

[161] 18 U.S.C. § 1001(a)(1).

[162] *Id.* § 1001(a)(2). There is a third category of prohibited conduct, the making or use of "any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry," *id.* § 1001(a)(3), which Enforcement Counsel does not plead and which is not at issue here.

§ 1001(a)(1) if the individual in question had a specific duty to disclose that fact in that context.[163] Respondent asserted at summary disposition that Enforcement Counsel has not, and cannot, establish any duty on her part "to disclose the draft PAR or any Crowe document to the OCC."[164] As the undersigned explains in Part V.A.1 *supra*, however, that is incorrect. As acting CCO of the Bank, it was incumbent upon Respondent, to the best of her ability, to provide "complete, accurate, and timely information" to OCC examiners upon request.[165] If, in that capacity, Respondent is asked for a specific document that is in her possession, then it is Respondent's duty to disclose the existence of that document rather than withholding it and contriving to create the impression that the document does not exist. Respondent, moreover, was aware of this

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[163] *See*, *e.g.*, *United States v. Bowser*, 964 F.3d 26, 33 (D.C. Cir. 2020) (noting that the concealment prong of Section 1001 "requires the Government to establish a duty to disclose material facts on the basis of specific requirements for disclosure of specific information") (internal quotation marks, citation, and emphases omitted); *United States v. Dorey*, 711 F.2d 125, 128 (9th Cir. 1983) ("In a prosecution under Section 1001 it is incumbent upon the Government to prove that the defendant had the duty to disclose the material facts at the time he was alleged to have concealed them."). Where the Supreme Court and the Comptroller have not squarely addressed a matter, the undersigned gives deference to D.C. Circuit and Ninth Circuit law as the twin fora to which Respondent is entitled to appeal any final decision of the Comptroller. *See* 12 U.S.C. § 1818(h)(2) (parties may obtain review of agency final decisions in Section 1818 enforcement actions in "the circuit in which the home office of the depository institution is located, or in the United States Court of Appeals for the District of Columbia Circuit").

[164] Resp. Mot. at 11.

[165] OCC-MSD-108 (Akahoshi Dep.) at 45:17-20.

duty.[166] Any argument that she should escape liability under 18 U.S.C. § 1001 because she was entitled to conceal documents requested by the OCC must therefore fail.

Respondent also argues that Enforcement Counsel presents no evidence of any "concealment scheme" sufficient to satisfy the standard of Section 1001(a)(1).[167] According to Respondent, "[t]he March emails, on their face, did not conceal documents—they conveyed to the OCC Mrs. Akahoshi's (second-hand) understanding that Crowe's work was incomplete, unreliable, and thus might waste the OCC's time."[168] This, too, is wrong. Respondent's communications with CEO Ryan and GC Weiss and the carefully opaque phrasing of her responses to Ms. Omi, as detailed *supra* at 13-21, give every indication of a sustained, collusive effort on the part of Respondent and her colleagues to prevent an examiner charged with assessing deficiencies in the Bank's BSA/AML compliance program from learning about, or coming into possession of, a third-party report finding numerous such deficiencies, if in fact the agency was not already aware that the report existed.[169]

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[166] *See id.* at 66:5-8 (agreeing that she knew, as a Bank official, "that there was authority that required the bank to provide books and records to the OCC").

[167] Resp. Mot. at 11.

[168] *Id.*

[169] *See*, *e.g.*, OCC-MSD-52 (March 23, 2013 emails between Respondent and CEO Ryan) at 1 (Respondent expressing uncertainty as to whether CCO Sullivan "took it upon herself to share the draft report" with the OCC, and CEO Ryan responding "Ok let's hope she did not provide a draft report").

As an illustrative example of this effort, consider the exchange between Respondent and GC Weiss following Ms. Omi's initial request for "a copy of the assessment report of the Bank's BSA program that Crowe [Horwath] LLC was engaged to perform in January 2013."[170] Respondent forwarded Ms. Omi's request to GC Weiss and proposed responding that "Crowe did not perform an assessment" and that "the project was shelved before any report could be issued."[171] Replying to this, GC Weiss noted that while to his knowledge "Crowe never provided a final report[,] . . . [t]hey did produce a draft that was shared with management."[172] GC Weiss then suggested revising the wording of the response to state that "no '*final* report was issued,'" but added that "[t]he obvious concern is they then ask for the draft from Crowe."[173] Ultimately, the March 22, 2013 Email to Ms. Omi kept Respondent's initial language and did not distinguish between "final" reports and any draft versions of reports created in connection with the January 2013 engagement, asserting only that no report was issued.[174]

In other words, when formulating a response to the OCC's request for "the assessment report" that Crowe created as part of its engagement, Respondent and GC Weiss considered language that would make their

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[170] OCC-MSD-47 (March 21, 2013 email from Shirley Omi to Respondent).

[171] OCC-MSD-48 at 2 (March 21, 2013 email from Respondent to GC Weiss).

[172] *Id.* at 1 (March 21, 2013 email from GC Weiss to Respondent).

[173] *Id.* (emphasis added).

[174] OCC-MSD-52 at 2 (March 22, 2013 email from Respondent to Shirley Omi).

response more precise and accurate—specifying that Crowe did not complete a "final report," with the knowledge that a draft report of the January 2013 engagement had been created and shared with the Bank—but shelved that language amidst concerns that referring to a final report might prompt the agency to look into the existence of any remaining drafts. Indeed, when the March 22, 2013 Email does mention a draft report, it is solely in the context of Crowe's assertedly *new* BSA-related engagement with the Bank, for which a draft risk assessment was anticipated "in time for the next board meeting in early May."[175] By promising the OCC a copy of *that* draft report, the March 22, 2013 Email neatly closes the chapter on the OCC's request for January 2013 materials, leaving the reader with the unmistakable impression that had a draft report arising from the earlier engagement existed, Respondent certainly would have offered to share that as well. These are not the actions of individuals who are operating with transparency and seeming good faith in their dealings with OCC examiners.

One further example of Respondent's tendencies toward concealment should suffice. In the wake of Ms. Omi's express request on March 25, 2013 for all draft Crowe materials provided to the Bank, Respondent emailed GC Weiss for a copy of "the Crowe document . . . to review before our meeting at 10:30."[176] When GC Weiss responded that he did not have an electronic copy of the Crowe Report, Respondent expressed relief at being able to "tell Shirley, *truthfully*, that only Lynn was in receipt of

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[175] *Id.*

[176] OCC-MSD-55 at 2 (March 25, 2013 email from Respondent to GC Weiss).

the letter and we are unable to locate a copy."[177] Perhaps unfortunately for Respondent's preference for truth-telling, VP Edgar then provided Respondent with the Crowe Report and more, offering to create a SharePoint site where Respondent could see and obtain "a variety of other Crowe documents from Gantt charts to Board and Management presentations."[178] Respondent turned down the offer.[179]

To all appearances, every document that VP Edgar offered to provide Respondent was unquestionably responsive to Ms. Omi's request an hour prior. GC Weiss also emailed Respondent additional Crowe materials, forwarding her a February 19, 2013 email to the Bank's BSA Executive Oversight Committee that had provided Committee members with the Crowe Report and other responsive documents.[180] Yet remarkably, Respondent's response to Ms. Omi later that day did not advert to the existence of *any* of these documents, let alone attach them. Beyond an initial, glancing reference discussed further below, she did not mention the Crowe Report. She did not mention the "Gantt charts" referenced by VP Edgar or the AML Program Roadmap, High Level Roadmap,

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[177] *Id.* at 1 (emphasis added).

[178] OCC-MSD-56 at 1 (March 25, 2013 email from Sharon Edgar to Respondent and GC Weiss).

[179] *See* OCC-MSD-60 at 1 (email thread including March 25, 2013 email from Respondent to Sharon Edgar and GC Weiss) (responding to VP Edgar's offer with "Thank you Sharon. This is fine.").

[180] *See* OCC-MSD-58 at 1 (March 25, 2013 email from GC Weiss to Respondent forwarding Crowe documents entitled, *inter alia*, "Rabobank AML Program Roadmap – v.0.4.xlsx," "High Level Roadmap v.0.3.xlsx," and "Rabobank – AML Program Enhancement Update 02-19-13.pptx" that had been provided to the Executive Oversight Committee on February 19, 2013).

and Program Enhancement Update sent to her by GC Weiss. The *only* document from the January 2013 engagement that Respondent identified to Ms. Omi, despite having multiple such documents in her possession and knowing how to obtain others, was a single PowerPoint presentation from February 5, 2013, which Respondent misleadingly represented "was not provided to the Bank."[181] Moreover, in referencing the February 5, 2013 PowerPoint presentation immediately after stating that Respondent had spoken to CEO Ryan and GC Weiss "regarding the existence of a draft report coming out of the January BSA Program Review by Crowe Horwath," the March 25, 2013 Email conveyed the clear impression, again, that there were no other documents responsive to the examiner's request and that a "draft report" separate from the February 5 presentation simply did not exist.[182]

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[181] OCC-MSD-64 at 1 (March 25, 2013 email from Respondent to Shirley Omi et al.). As discussed in note 33 *supra*, this representation is misleading because even if the specific version of the PAR PowerPoint dated February 5, 2013 had not been circulated within the Bank, it is undisputed that other draft or related versions of the PowerPoint presentation were provided to Bank personnel, including a PowerPoint entitled "AML Program Enhancement Update" that was in Respondent's possession at the time of her response to Ms. Omi. *See* OCC-MSD-58 at 1 (March 25, 2013 email from GC Weiss to Respondent).

[182] *See supra* at 18 n.75 (finding, contrary to Respondent's assertions in the instant briefing, that "the contemporaneous correspondence . . . reveals a clear understanding among Respondent and the Bank officials with whom she was communicating that the Crowe Report was the document to which Ms. Omi's [March 25, 2013] request most centrally referred").

There is no reasonable interpretation of Respondent's actions in connection with Ms. Omi's requests on March 21, 2013 and March 25, 2013, when viewed in totality, that does not suggest that Respondent sought, to the best of her ability, to conceal the existence of the Crowe Report and the conclusions contained therein from the OCC. That she did so in a manner seemingly calculated towards plausible deniability if the agency was in fact aware of the report does not change this conclusion. The undersigned therefore rejects Respondent's assertion that no such concealment is cognizable from the face of Respondent's emails.

False Statements and Representations

Enforcement Counsel separately contended at summary disposition that the March 22, 2013 Email, the March 25, 2013 Email, and the April 18, 2013 Cover Letter all contained false statements and representations made by Respondent that constituted a violation of 18 U.S.C. § 1001(a)(2).[183] Specifically, Enforcement Counsel asserted that (1) the March 22, 2013 Email falsely stated that "Crowe did not complete an assessment," that Crowe was "engaged to perform a market study/peer benchmark analysis," and that "the project was suspended before any report was issued";[184] (2) the March 25, 2013 Email falsely represented "that the only relevant information [Respondent] had gathered 'regarding the existence of a draft report coming out of the January BSA Program Review by Crowe Horwath' after discussing with CEO Ryan and GC Weiss" was that Crowe

[183] *See* OCC Mot. at 17.

[184] *Id.* (quoting OCC-MSD-52 (March 22, 2013 email from Respondent to Shirley Omi)).

presented a PowerPoint to the Board and executive management in early February 2013, copies of which it did not provide to them;[185] and (3) the April 18, 2013 Cover Letter falsely represented that the Crowe Report had been circulated only to CCO Sullivan, GC Weiss, and Ms. Wood, when in fact a number of other Bank personnel also had received copies over the relevant time period.[186]

Respondent disputed the falsity of the statements in question, calling the representations made in the March emails "non-responsive" at worst and characterizing the inaccurate description of the Crowe Report's distribution within the Bank in the April cover letter as merely "ambiguous."[187] Respondent also disputed that she in fact authored the April 18 statements, averring that "the documentary evidence shows that [she] did not draft the bulk of the purportedly false parts."[188]

Because the undersigned could not find based on the factual record as developed that the assertedly false statements in question were made knowingly and willfully (see *infra*), the MSD Order concluded that it was unnecessary to determine exactly where along a spectrum of "false," "ambiguous," "non-responsive," "unhelpfully vague," and "technically true but extremely misleading" each of these statements fell.[189] With respect to the authorship of

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[185] *Id.* at 18 (quoting OCC-MSD-64 at 1 (March 25, 2013 email from Respondent to Shirley Omi et al.)) (internal bracketing omitted).

[186] *See id.* at 19.

[187] Resp. Mot. at 13, 14.

[188] *Id.* at 13 (emphasis omitted).

[189] *See* MSD Order at 44.

the relevant passages in the April 18, 2013 Cover Letter, moreover, and accepting each party's evidence as true in evaluating the other party's motion for summary disposition on that claim,[190] the undersigned found that there was a genuine dispute as to whether Respondent made the April 18 representations that would need to be resolved at the hearing that the Parties have now agreed to forego.[191]

Knowing and Willful Conduct

Both the false statement and concealment components of 18 U.S.C. § 1001 require that the objectionable nature of the conduct at issue be "knowing[] and willful[]," rather than uncalculated, mistaken, or inadvertent.[192] The undersigned concluded in the MSD Order that the undisputed evidence demonstrates that Respondent acted knowingly and willfully in concealing information regarding the Crowe Report and Crowe's January 2013 engagement from OCC examiners, but that Enforcement Counsel had not shown the same intentional state of mind in Respondent's allegedly false statements and representations. That is, it is clear that Respondent knowingly endeavored to prevent the OCC from becoming aware of the

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[190] *See Schaerr v. Dep't of Justice*, 435 F. Supp. 3d 99, 107 (D.D.C. 2020); *Heffernan v. Azar*, 417 F. Supp. 3d 1, 7 (D.D.C. 2019).

[191] *See* MSD Order at 44-45.

[192] 18 U.S.C. § 1001(a); *see also*, *e.g.*, *Dixon v. United States*, 548 U.S. 1, 5 (2006) ("[U]nless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense. And the term 'willfully' . . . requires a defendant to have acted with knowledge that his conduct was unlawful.") (internal quotation marks and citations omitted).

conclusions in the Crowe Report, for the reasons detailed *supra*. It is less clear, based on the totality of the record, that one part of Respondent's strategy in this endeavor was to consciously and affirmatively lie to the OCC examiner, rather than deliberately frame her responses in a manner contrived to mislead Ms. Omi, allow her to draw the wrong conclusions regarding the existence of the Crowe Report, and otherwise subtly thwart her examination, but without telling the examiner direct untruths or making provably false statements.[193] This element is therefore satisfied for concealment under 18 U.S.C. § 1001 but not for the making of false statements or representations.[194]

Materiality

To establish a violation of the relevant provisions of 18 U.S.C. § 1001, the government must show that either the allegedly false representations or the information alleged to have been concealed were material—which is to say, that the concealed facts or false statements had "a natural tendency to influence, or [were] capable of influencing, either a discrete decision or any other function of the agency

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[193] *See, e.g.*, *United States v. Yermian*, 468 U.S. 63, 75 (1984) (observing that the knowing and willful requirement of the false statement component of 18 U.S.C. § 1001 prohibits "intentional and deliberate lies"); *United States v. Trie*, 21 F. Supp. 2d 7, 15 (D.D.C. 1998) ("For purposes of Section 1001, the government must prove that a criminal defendant knew that the statement at issue was false and that he or she willfully made the statement.").

[194] *Cf. Blanton*, 909 F.3d at 1174-75 (material factual dispute existed as to whether bank official who filed inaccurate call reports reasonably believed in the reports' accuracy, precluding summary disposition in Section 1818 action).

to which [they were] addressed."[195] It is important to note that a misstatement or concealment need not *actually influence* the agency's decision or its functioning in order to be material, nor does materiality depend on whether the agency in fact relied on the information in question.[196] Rather, "propensity to influence is enough."[197] And "a false statement can be material even if the decision-maker actually knew or should have known that the statement was false."[198] In *United States v. Safavian*, for example, the D.C. Circuit concluded that a defendant's false statements were material even though "the agent who interviewed [the defendant] knew, based upon his knowledge of the case file, that the incriminating statements were false when [the defendant] uttered them."[199]

Respondent argued at summary disposition that neither the Crowe Report nor any of the other Crowe

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[195] *United States v. Moore*, 612 F.3d 698, 701 (D.C. Cir. 2010).

[196] *See*, *e.g.*, *United States v. Service Deli, Inc.*, 151 F.3d 938, 941 (9th Cir. 1998); *United States v. Herring*, 916 F.2d 1543, 1547 (11th Cir. 1990) ("Materiality is satisfied even if the federal government was not actually influenced by the false statements.").

[197] *United States v. King*, 735 F.3d 1098, 1108 (9th Cir. 2013) (emphasis added); *accord Moore*, 612 F.3d at 701-02 (use of false name to accept postal delivery was material misrepresentation even though postal officer never looked at signature, because the "false statement was capable of affecting the Postal Service's general function of tracking packages and identifying the recipients of packages entrusted to it").

[198] *United States v. Henderson*, 893 F.3d 1338, 1351 (11th Cir. 2018) (internal quotation marks and citation omitted).

[199] *United States v. Safavian*, 649 F.3d 688, 691 (D.C. Cir. 2011); *see also Henderson*, 893 F.3d at 1351 ("The test is not whether the agents were actually misled.") (internal quotation marks and citation omitted).

documents satisfy Section 1001's materiality threshold.[200] According to Respondent, the Crowe materials had no capacity to influence the agency's decision-making surrounding its follow-up examination of the Bank's BSA/AML compliance program, because "Crowe's draft observations about weaknesses were . . . already well known to the OCC," given the OCC's own preliminary conclusions and the information provided to OCC examiners by whistleblowers Sullivan and Wood.[201] Respondent also asserted that "the OCC had full information about the Crowe engagement" by the time it finally received a copy of the Crowe Report on April 18, 2013, noting among other things that "Board minutes provided to the OCC contained discussions of Crowe's work" and that CCO Sullivan had given the OCC copies of various Crowe materials, although not the Crowe Report itself.[202] Finally, Respondent argued that the Crowe Report merely "mirrored some of the OCC's findings" rather than providing the agency with "any new information or identify[ing] a new field of inquiry," and as such there was nothing about the Crowe engagement that did affect, or could have affected, the scope of the OCC's reentry into the Bank in May 2013 for a target exam.[203]

In return, Enforcement Counsel contended that knowledge of the Crowe Report and its conclusions not only could have but *did* influence the decisions and actions of the OCC as it investigated the condition of the Bank's BSA/AML compliance

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[200] *See* Resp. Mot. at 14.

[201] *Id.* at 15.

[202] *Id.*

[203] *Id.* at 16.

program.[204] Specifically, Enforcement Counsel asserted that the Crowe Report was one of several factors that influenced the OCC's scoping of its follow-up examination, the agency's final decision that the Bank's BSA program was deficient, the "tailoring" of the resultant remedial program imposed by the OCC, and the OCC's decision-making regarding a proposed merger between the Bank and an affiliate.[205] Enforcement Counsel noted that the Crowe Report's ability to corroborate the OCC's own findings was meaningful in light of the March 15, 2013 Bank Response Letter, co-authored by Respondent, that challenged the premise and validity of the agency's findings in numerous respects.[206] And Enforcement Counsel contested Respondent's claim that the OCC had full knowledge of the Crowe engagement from other sources, stating that the Board minutes to which Respondent refers provided little information and that the whistleblowers offered only "general summaries" of Crowe's conclusions.[207]

The undersigned concluded in the MSD Order that she need not determine whether the Crowe Report or the conclusions of the Crowe engagement generally in fact influenced the OCC's actions and decision-making with respect to its examination of the Bank's BSA/AML program, because it is beyond question that they had the propensity to do so. As Enforcement Counsel noted, the existence of a

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[204] *See* OCC Mot. at 24-26; OCC Opp. at 22-26.

[205] OCC Opp. at 24.

[206] *See id.*; *see also* OCC-MSD-42 (Bank Response Letter) at 23-24 ("[A] closer examination of the Bank's BSA/AML program does not support a finding of a deficiency in any of the four pillars of its compliance program.").

[207] OCC Opp. at 25.

detailed if preliminary report of a third-party auditor engaged by a bank to make an assessment of the adequacy of a program that is the subject of OCC examination would indisputably have "a natural tendency to influence decisions and actions at the OCC because it can provide additional information about deficiencies, root causes and extent of deficiencies, additional areas requiring examination or follow-up, and required corrective action."[208]

At the time that CCO Sullivan first alerted the OCC to the existence of the Crowe Report and Crowe's engagement generally, the agency had just received a dense and lengthy letter from the Bank, largely drafted by Respondent, that pushed back on each one of the OCC's conclusions regarding asserted deficiencies in the Bank's BSA/AML program.[209] That the Bank had engaged an auditor that had reached the same conclusions at the same time as the OCC— while perhaps using a different approach, reviewing different materials, or speaking to different witnesses— appears likely to be quite pertinent to the OCC's decision-making process at that time, especially since the Bank Response Letter omitted any mention of that auditor and its assessment entirely. The undersigned agrees with Enforcement Counsel that the Crowe Report could reasonably have been expected to offer the OCC "a roadmap . . . [as it] sought to reconcile the information provided in management's response with the OCC's initial findings and information obtained from bank employees."[210]

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[208] *Id.* at 23.

[209] *See generally* OCC-MSD-42 (Bank Response Letter).

[210] OCC Mot. at 25 (internal quotation marks and citations omitted).

With respect to the whistleblowers, moreover, it is also true that obtaining copies of the Crowe Report and other materials from that engagement provided a way for the OCC to substantiate the concerns that those individuals were raising.[211] As for Respondent's contention that the Crowe Report did not contain any new information or open up any new lines of inquiry, the undersigned found that this missed the mark: not only is the existence of the Crowe Report itself a material fact for the above-stated reasons, but the specific conclusions of the report are in some sense beside the point. The OCC received information that a BSA/AML assessment report drafted by Crowe existed, determined that obtaining that document would be useful to their examination process, and requested the report from Respondent multiple times.[212] There can be no debate that the subject of the Crowe engagement was directly related to the OCC's examination. The OCC examiners' desire to understand and collect what Crowe had provided to the Bank and to incorporate relevant information from the engagement into their examination—that is, to give the report and its conclusions *an opportunity to influence the agency's decision-making*—alone speaks to that information's materiality, and Respondent's refusal to accommodate the agency's requests or acknowledge the existence of the Crowe Report in her March 22, 2013 and March 25, 2013 Emails must in turn represent an actionable concealment of material facts.[213]

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[211] *See id.* at 26.

[212] *See generally* OCC-MSD-43 (March 18, 2013 Whistleblower Email Thread).

[213] The MSD Order found, however, that there was no evidence in the record that the allegedly false statements in the April 18,

3. The OCC's Unsafe and Unsound Practices Claims

Enforcement Counsel additionally argued at summary disposition that Respondent's conduct in connection with the OCC's requests for the Crowe Report constituted actionably unsafe or unsound practices in conducting the affairs of a financial institution for purposes of 12 U.S.C. § 1818(e). The undersigned concurs and finds that Respondent engaged in imprudent conduct that foreseeably could have, and did, cause an "abnormal risk" of loss or damage to the Bank, as the Horne Standard requires of any unsafe or unsound practices claim.[214]

Consistent with the Horne Standard, the Comptroller has held that unsafe and unsound practices for the purpose of Section 1818 encompass "any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies

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2013 Cover Letter regarding the scope of the Crowe Report's distribution within the Bank prior to March 25, 2013 would or could have influenced the scope of the OCC's then-ongoing examination as of that date or otherwise had the tendency to affect the agency's decision-making. *See* MSD Order at 49-50. The undersigned therefore concluded that Enforcement Counsel had not met its burden with respect to the materiality of those statements, notwithstanding their factual inaccuracy. *See* Part IV *supra* at 24 (finding that April 18, 2013 Cover Letter inaccurately and misleadingly characterizes the internal distribution of the Crowe Report to Bank personnel as of March 25, 2013).

[214] *Patrick Adams*, 2014 WL 8735096, at **11-14 (discussing Horne Standard); *see* MSD Order at 50-53.

administering the insurance funds."[215] An IAP's practices with respect to the financial institution with which they are affiliated are unsafe or unsound if they pose "reasonably foreseeable undue risk to the institution," which the Comptroller and the D.C. Circuit have interpreted to mean "increased risk of some kind."[216] Furthermore, to support a determination that the conduct in question is contrary to accepted standards of prudent operation, the agency "must make some showing as to the relevant standards and the departure from those standards."[217]

Respondent argued that her conduct was not an unsafe or unsound practice "[f]or the same reason that [it] did not constitute a violation of Section 1001 or Section 481."[218] She contended that her consultation with GC Weiss following Ms. Omi's requests was the prudent act of an individual seeking appropriate and accurate counsel from someone with "personal knowledge on the topic of Crowe."[219] Respondent also claimed that her responses to Ms. Omi were not obstructive and merely offered an "explanation of why the Bank had found [the Crowe materials] unhelpful."[220] Finally, Respondent

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[215] *In the Matter of Steven Ellsworth*, Nos. AA-EC-11-41 & -42, 2016 WL 11597958, at *11 (Mar. 23, 2016) (OCC final decision) (quoting *Financial Institutions Supervisory Act of 1966: Hearings on S. 3158 Before the House Comm. on Banking and Currency*, 89th Cong., 2d Sess. 49 (1966) (statement of John H. Horne, Chairman of the FHLBB), 122 Cong. Rec. 26,474 (1966)).

[216] *Patrick Adams*, 2014 WL 8735096, at *5; *accord Blanton*, 909 F.3d at 1172 (internal quotation marks and citation omitted).

[217] *Patrick Adams*, 2014 WL 8735096, at *37.

[218] Resp. Mot. at 23.

[219] *Id.*

[220] *Id.*

maintained that her decision to withhold the Crowe Report from Ms. Omi did not pose "a reasonably foreseeable undue risk" to the Bank, because any risk of exposure to government enforcement action as a result of this conduct would be "impermissibly circular" and wholly speculative.[221]

In this Tribunal's October 16, 2020 Order denying Respondent's initial dispositive motion, the undersigned concluded "that the Notice's allegations that Respondent knowingly and repeatedly lied to the OCC over a prolonged period and concealed a document central to the agency's examination of the Bank for which she acted as Chief Compliance Officer" met the threshold of unsafe and unsound practices with ease.[222] Nothing about the factual record as more fully developed on summary disposition changes this conclusion. As the Order stated, Respondent's conduct undoubtedly exposed the Bank to "reasonably foreseeable undue risk"—"namely, the risk that [concealing from the OCC] the existence of a third-party auditor report finding deficiencies in the Bank's BSA/AML compliance program and obstructing the agency's examination of that program could have negative consequences for the Bank if and when the deception was discovered."[223] There is no impermissible circularity in observing that statutes exist—and were known to exist by Respondent at that time, as a bank official and former longtime OCC examiner—proscribing the obstruction of OCC examinations and the concealment of facts from OCC examiners and imposing upon banks the obligation to accommodate

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[221] *Id.*

[222] October 16, 2020 Order at 51.

[223] *Id.* at 52.

requests made through the examination process.[224] Nor is it "speculative" to foresee that Respondent's actions risked subjecting both the Bank and herself to liability under those statutes if her conduct was discovered, *as in fact occurred*.

Enforcement Counsel also made an ample showing at this stage that Respondent's conduct departed from a relevant and established standard of prudent operation: the expectation and obligation that a bank official will not seek to conceal the existence of requested documents from an OCC examiner. Again, the facts here do not simply reflect that Respondent "dithered and dallied in providing the agency with the materials it had requested," but that she engaged in multiple internal discussions—including with the very individual whose counsel she now claims to have been prudently seeking—in which she and they unmistakably sought to "contrive[] ways to keep the Crowe Report out of the agency's hands and off its radar."[225]

This Tribunal has likewise enumerated the many ways in which Respondent's responses to Ms. Omi were themselves evasive, non-responsive, misleading, and less than fully accurate at every turn.[226] Particularly as a former examiner who has acknowledged that the refusal by bank officials to provide requested information is a "red flag" that could signal violations of law,[227] Respondent cannot

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[224] *See* 12 U.S.C. § 481; 18 U.S.C. §§ 1001(a)(1), 1517 (criminal penalties for "[w]hoever corruptly obstructs or attempts to obstruct any examination of a financial institution by an [authorized] agency of the United States").

[225] October 16, 2020 Order at 52.

[226] *See* Part IV *supra* at 13-24; Part V.A.2 *supra* at 39-43.

[227] OCC-MSD-108 (Akahoshi Dep.) at 56:9-18.

credibly claim that her conduct here adhered to accepted standards. The undersigned therefore finds that Respondent engaged in unsafe and unsound practices within the meaning of Section 1818(e).[228]

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[228] The fulfillment of this aspect of the corresponding prong of Section 1818(i) requires not only a conclusion that Respondent has engaged in unsafe or unsound practices, but that she has done so *recklessly*. *See* 12 U.S.C. § 1818(i)(2)(B)(i); *Patrick Adams*, 2014 WL 8735096, at *49 (articulating recklessness standard). Conduct is "reckless" for the purposes of this statute if "it is done in disregard of, and evidencing conscious indifference to, *a known or obvious risk of a substantial harm*." *Blanton*, 2017 WL 4510840, at *13 (internal quotation marks and citation omitted) (emphasis added). This is a rare instance in the statutory scheme of Sections 1818(e) and 1818(i) in which the agencies have found that the necessary harm or loss must be "substantial" to trigger an element, and the Comptroller has applied this standard in the past to find recklessness in situations where the misconduct in question risked especially dire consequences. In *In the Matter of Blanton*, for example, the Comptroller found a known or obvious risk of substantial harm sufficient for a finding of reckless engagement where the respondent had improperly and repeatedly approved overdrafts that "would have severely affected the Bank's capital" if they were not covered, at a time when "[t]he Bank was in a critically deficient capital condition," which likely would have led to the Bank's failure. *Id.* at *14. In *In the Matter of Grant Thornton LLP*, the Comptroller found recklessness under the same standard when an "auditor fail[ed] to execute basic procedures concerning the most material entries on an insured depository institution's financial statement," such as ignoring evidence "that directly and unequivocally demonstrated that a bank [was] overstating its assets by hundreds of millions of dollars." *In the Matter of Grant Thornton LLP*, Nos. AA-EC-04-02 & -03, 2006 WL 5432171, at *4 (Dec. 29, 2006) (OCC final decision). And in *Dodge v. Comptroller of the Currency*, the D.C. Circuit affirmed the Comptroller's finding of reckless engagement when the respondent manipulated that bank's capital by improperly reporting over $3 million in non-qualifying contributions at a time when the bank was experiencing "considerable losses,"

B. Effect

The effect elements of 12 U.S.C. §§ 1818(e) and 1818(i) may be satisfied with a showing that the financial institution suffered "financial loss or other damage" as a result of an IAP's misconduct and that the misconduct caused "more than a minimal loss" to the institution, respectively.[229] The undersigned concluded in the MSD Order that, at the very least, the $500,000 fine paid by the Bank for obstructing the OCC's examination into its BSA/AML program arose from Respondent's misconduct and constitutes actionable loss, and thus a triggering "effect," under these statutes.[230]

Any reasonable reading of the obstruction charges to which the Bank pled guilty in February 2018 reveals that they concerned, in significant part, precisely the same misconduct by Respondent that is the subject of the instant action.[231] There can be no dispute that Respondent is the "Executive A" referred to in the Plea Agreement and Charging Documents,[232]

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thereby "expos[ing] the Bank and its depositors to substantial risk." *Dodge v. Comptroller of the Currency*, 744 F.3d 148, 161 (D.C. Cir. 2014); *see also id.* at 162. Considering this precedent, and given that the undersigned had already concluded that the misconduct elements of Section 1818(i) have been satisfied, the undersigned declined to decide on summary disposition whether the harm "knowingly or obviously" risked by Respondent's misconduct was similarly and sufficiently substantial to constitute reckless engagement in unsafe or unsound practices.

[229] 12 U.S.C. §§ 1818(e)(1)(B), 1818(i)(2)(B)(ii).

[230] *See* MSD Order at 55-59; *see also* OCC SOF ¶¶ 75-76.

[231] *See* Part IV *supra* at 25-26.

[232] The undersigned notes again that "Executive A" in the Plea Agreement and "Executive A" in the Notice incontestably refer to two different individuals. *See* Part IV *supra* at 26 n.111.

and it is likewise undisputed that the Bank admitted to conspiring with Executive A, among others, to obstruct the OCC's examination in March and April 2013, including by making "false and misleading statements to the OCC regarding the existence of reports developed by a third-party consultant, which corroborated the OCC's findings regarding the ineffectiveness of [the Bank's] BSA/AML program."[233] It also cannot be disputed that as a result of this guilty plea, the Bank was fined $500,000.[234] This, by itself, is enough to satisfy the statutory effect elements.[235]

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[233] OCC-MSD-88 (Plea Agreement, Ex. A Statement of Facts) at 23; *see also*, *e.g.*, OCC-MSD-89 (Bank Charging Document) at 4, 14-17.

[234] *See* OCC-MSD-88 (Plea Agreement) at 8. For the purposes of the summary disposition motions, the undersigned assumed the truth of Respondent's assertions that the $368,701,259 civil forfeiture in this plea agreement and the $50 million civil money penalty assessed by the OCC in a Consent Order on the same day in fact were "paid out of the funds subject to forfeiture (*i.e.*, funds involved in money laundering)" and thus "caused no marginal loss [to the Bank] at all beyond the losses attributed entirely to money laundering and structuring." Resp. Mot. at 32. This does not change the fact, however, that the $500,000 fine appears undeniably both to have caused the Bank a loss and to have stemmed wholly or partly from the Bank's obstruction of the OCC examination in conjunction with Respondent and others.

[235] Enforcement Counsel also alleges, and argued at summary disposition, that the Bank suffered reputational damage as a result of Respondent's misconduct, proffering a statement by the Bank's Remediation Committee to that effect in their decisional document regarding Respondent. OCC Opp. at 8-9 ("[T]he Bank itself acknowledged that Respondent's misconduct 'has resulted, or will result, in considerable loss and/or damage to the reputation of the Bank and/or Rabobank Nederland.'") (quoting OCC-MSD-86 (Remediation Committee Decision) at 4). Despite

Respondent, of course, disagreed, arguing that the settlement of a separate litigation to which she was not a party—*i.e.*, the Bank's guilty plea to a criminal complaint brought by the Department of Justice ("DOJ")—and "based on the Bank's violation of different laws" cannot be used "to establish an element of her liability here," as a matter of constitutional due process.[236] Respondent contended that it is impossible to know how much the Bank's decision to enter into the guilty plea was based on Respondent's conduct rather than unrelated business judgment.[237] She asserted that the guilty plea of one party "may not be introduced as substantive evidence of another defendant's guilt."[238] And she claimed generally that "there is no plausible way to consider the alleged brief concealment of a draft consultant's report in March 2013" as the cause of Bank loss in connection with a DOJ investigation and prosecution "prompted by years-long BSA/AML violations that purportedly resulted in the laundering of hundreds of millions of dollars through [the Bank]."[239]

Respondent's arguments are off-base. To begin with, the undersigned concludes that payments made by a bank in furtherance of a settlement or plea

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Enforcement Counsel's further contention that "[e]vidence of that reputational harm to the Bank can be easily found through an internet search even today," *id.* at 9, the undersigned found that Enforcement Counsel had not yet presented sufficient evidence of reputational damage to the Bank as a result of Respondent's conduct for summary disposition of that issue in the agency's favor.

[236] Resp. Mot. at 26, 27 (emphases omitted).

[237] *See id.* at 28-29.

[238] *Id.* at 31 (internal quotation marks and citation omitted).

[239] *Id.* at 33.

agreement may be used as evidence of bank loss to fulfill the effect elements of Section 1818, if the enforcement agency can show that the settlement occurred "by reason of" a respondent's actionable misconduct.[240] Of course, evidence of causation is not evidence of liability for the underlying violations of law, and Enforcement Counsel must demonstrate separately that Respondent committed misconduct—that is, that she violated 12 U.S.C. § 481 or 18 U.S.C. § 1001 or engaged in unsafe or unsound practices—without adverting to the merits of any allegations or admissions made by the Bank in the Plea Agreement, which it has done.

Moreover, it should be without question that Respondent can "cause" the Bank to incur loss through the entry of a guilty plea even if Respondent was not a party to that prosecution and her conduct not adjudicated to rise to the level of the particular legal violations being asserted here. To hold otherwise would effectively immunize IAPs from any liability for unsafe or unsound practices or violations or law that exposed their institutions to significant legal or regulatory risk unless the IAP's institution chose to take its chances by contesting an enforcement action or prosecution until a final judgment is assessed against it (and perhaps not even then, under Respondent's logic). A bank's decision to plead guilty to a prosecution for some certain loss now rather than

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[240] *See In the Matter of Christopher Ashton*, No. 16-015-E-I, 2017 WL 2334473, at *5 (May 17, 2017) (FRB final decision) (on default, effect element satisfied when bank paid "$2.4 billion in criminal and civil fines in connection with the [alleged] conduct"); *In the Matter of Towe*, Nos. AA-EC- 93-42 & -43, 1997 WL 689309, at *3 (Oct. 1, 1997) (FRB final decision) ($20,000 settlement payment to Internal Revenue Service constituted loss to bank).

risking a much greater loss and more severe consequences later should not absolve from liability the individual on whose conduct such claims are based. No such restriction is apparent from the text of Section 1818, and the undersigned will not impose one. An IAP who transfers $100,000 of a bank's money into her personal account has caused loss to the bank; an IAP whose conduct is the impetus for a $500,000 fine following a guilty plea should be no less liable, if that conduct is actionable under Section 1818.

Nor does it present an insuperable barrier to eventual proof of causation that the Plea Agreement also resolved Bank exposures unrelated to Respondent's concealment of the Crowe Report, as Respondent contends.[241] As the Federal Deposit Insurance Corporation ("FDIC") Board of Directors has held, a respondent in an enforcement action under Sections 1818(e) and 1818(i) "cannot escape liability simply because others have contributed to the bank's loss as well."[242] Similarly, interpreting a related statutory provision in *In the Matter of Grant Thornton LLP*, the Comptroller concluded that an independent auditor had caused actionable loss to a bank through its issuance of an unqualified audit opinion, even though it was the bank's actions in

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[241] *See* Resp. Mot. at 33.

[242] *In the Matter of Michael R. Sapp*, Nos. 13-477(e) & 13-477(k), 2019 WL 5823871, at *15 (Sep. 17, 2019) (FDIC final decision); *see also Landry v. FDIC*, 204 F.3d 1125, 1139 (D.C. Cir. 2000) (IAP responsible for misconduct causing loss even if "others may have been more guilty"); *In the Matter of Jeffrey Adams*, No. 93-91(e), 1997 WL 805273, at *5 (Nov. 12, 1997) (FDIC final decision) (noting that "multiple factors, and individuals, may contribute to a bank's losses" without absolving respondent of liability).

response to the opinion that arguably were more directly responsible for any loss suffered.[243] Likewise here, it is immaterial that other misconduct related to the Bank's BSA/AML program may have played a part in the DOJ's prosecution and the Bank's eventual guilty plea, as long as some of the loss as a result of that guilty plea is fairly attributable to Respondent as well. And the Plea Agreement makes it clear that a primary driver of the obstruction of the OCC's 2013 examination to which the Bank pled guilty was Respondent's conduct in response to repeated examiner requests for the Crowe Report and related materials.

The DOJ prosecuted the Bank for its part in, among other things, the concealment from the OCC of the existence of the Crowe Report and the substance of the information contained therein, as well as the decision to "delay and limit disclosure of [the Crowe Report] to the OCC, despite specific and repeated requests by OCC examiners," in which actions Respondent played a central role.[244] As part of its resultant guilty plea, the Bank paid a fine of $500,000. Therefore, Respondent's misconduct caused the Bank to suffer financial loss. It is that straightforward.

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[243] *Grant Thornton LLP*, 2006 WL 5432171, at *25 (noting that under the auditor's theory of causation, "conduct of independent contractors could never be the cause of a loss or other adverse effect for purposes of [the applicable statute], because it would always be the financial institution's acts or omissions that led to the loss to, or adverse effect on, the bank").

[244] OCC-MSD-89 (Bank Charging Document) at 14; *see also* OCC-MSD-88 (Plea Agreement, Ex. A Statement of Facts) at 35-38.

C. Culpability

The final prong of a Section 1818(e) enforcement action for a prohibition order, the "culpability" element, is satisfied by a showing of either personal dishonesty or an IAP's continuing or willful disregard for the safety and soundness of an institution.[245] It is typically, although not exclusively, appropriate to resolve questions of culpability at the hearing stage rather than on summary disposition.[246] Here, however, the undersigned concludes that the undisputed facts regarding Respondent's conduct—and in particular the email traffic between herself, CEO Ryan, and GC Weiss following each of Ms. Omi's requests for Crowe materials—make her conscious concealment of material information regarding the Crowe Report sufficiently evident, without "making credibility determinations, weighing evidence, and drawing [impermissible] inferences from facts," to find that Respondent has acted with personal dishonesty and willful disregard within the meaning of Section 1818(e).[247]

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[245] 12 U.S.C. § 1818(e)(1)(C).

[246] *See, e.g.*, *Miller v. FDIC*, 906 F.2d 972, 974 (4th Cir. 1990) (noting "the general rule that summary judgment is seldom appropriate in cases wherein particular states of mind are decisive elements of a claim or defense"); *Gomez v. Trustees of Harvard Univ.*, 677 F. Supp. 23, 24 (D.D.C. 1988) (noting that "intent and state of mind [are] areas that are particularly ill-suited for summary disposition"); *but see In the Matter of Carl V. Thomas et al.*, Nos. 99027-B-I, -CMP-I, & E-I, 2005 WL 1520020, at *7 (June 7, 2005) (FRB final decision) (finding Section 1818(e) culpability elements satisfied on summary disposition); *In the Matter of Charles F. Watts*, Nos. 98-046e & -044k, 2002 WL 31259465, at *6 (Aug. 6, 2002) (FDIC final decision) (same).

[247] *Blanton*, 2017 WL 4510840, at *6 (internal quotation marks and citation omitted) (noting that "there is no genuine issue [of

As Respondent acknowledged in her summary disposition briefing, "[t]he personal dishonesty standard of [Section] 1818(e) is satisfied when a person disguises wrongdoing from the institution's board and regulators, or fails to disclose material information."[248] A finding of personal dishonesty requires evidence that an individual acted with scienter, or some knowledge of the wrongfulness of their actions.[249] In this instance, the MSD Order concluded for the reasons discussed in Part V.A.2 *supra* that Respondent's evasive and occlusive course of conduct in response to Ms. Omi's requests for information and materials related to the January 2013 Crowe engagement exhibited a thoroughgoing lack of straightforwardness and an intent to deceive or mislead that is more than sufficient to support a finding of personal dishonesty. The extensive record of email evidence does not fairly admit to multiple

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fact] if the evidence presented [by the non-moving party] is of insufficient caliber or quantity to allow a rational finder of fact to find for the non-movant"); *cf. Brodie v. Dep't of HHS*, 715 F. Supp. 2d 74, 81-82 (D.D.C. 2010) (affirming ALJ's summary disposition against respondent where "the record . . . supported only one reasonable inference regarding [respondent's] state of mind: [that he] had been either knowing or reckless with regard to the falsification of information," and where respondent "had failed to offer any specific facts or evidence at the summary disposition stage that would support his claims of blamelessness or counter [the agency's] evidence").

[248] Resp. Mot. at 35 (quoting *Dodge*, 744 F.3d at 160; *accord In the Matter of Frank Smith and Mark Kiolbasa*, No. 18-036-E-I, 2021 WL 1590337, at *28 (Mar. 24, 2021) (FRB final decision).

[249] *See Dodge*, 744 F.3d at 160; *see also*, *e.g.*, *Michael v. FDIC*, 687 F.3d 337, 351 (7th Cir. 2012) (personal dishonesty under Section 1818(e) includes "deliberate deception by pretense and stealth," a "lack of integrity," and "want of fairness and straightforwardness") (internal quotation marks and citations omitted).

interpretations of Respondent's actions other than that she knew that the Crowe Report and its contents were responsive to requests by Ms. Omi and took steps to mislead the examiner, withhold the document, and convey the impression that it had not been provided to the Bank.

Willful disregard also requires some showing of scienter.[250] As the Comptroller has stated, "[w]illful disregard is deliberate conduct that exposes the bank to abnormal risk of loss or harm contrary to prudent banking practices, while continuing disregard is conduct that has been voluntarily engaged in over a period of time with heedless indifference to the prospective consequences."[251] For conduct to constitute willful disregard, it is not necessary to find that an IAP "deliberately exposed the Bank to abnormal risk of loss or harm,"[252] only that the unsafe or unsound banking practice engaged in by the individual was done intentionally—that is, that the conduct *itself* was deliberate—and was not "technical or inadvertent."[253]

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[250] *Dodge*, 744 F.3d at 160; ; *see also*, *e.g.*, *In the Matter of Donald V. Watkins, Sr.*, Nos. 17-154e & -155k, 2019 WL 6700075, at *8 (Oct. 15, 2019) (FDIC final decision)

[251] *Ellsworth*, 2016 11597958, at *17 (internal quotation marks and citation omitted).

[252] *In the Matter of Charles R. Vickery, Jr.*, No. AA-EC-96-95, 1997 WL 269105, at *8 (Apr. 14, 1997) (OCC final decision); *see also Smith and Kiolbasa*, 2021 WL 1590337, at *29 (noting that "[a]n officer acts willfully when he is aware of his conduct; willfulness does not require a showing that Respondent was aware of the law") (internal quotation marks and citation omitted).

[253] *In the Matter of Douglas V. Conover*, Nos. 13-214e & -217k, 2016 WL 10822038, at *28 (Dec. 14, 2016) (FDIC final decision) (internal quotation marks and citation omitted).

The undersigned has already concluded that Respondent "knowingly and willfully" sought to conceal material facts regarding the existence of the Crowe Report from OCC examiners. *See supra* at 44-45. The undersigned also concluded that, in so doing, Respondent engaged in unsafe or unsound practices in conducting the Bank's affairs—that is, imprudent practices that exposed the Bank to abnormal risk of loss or harm. *See supra* at 50-53. It is therefore no great step to find that the actions taken to effectuate this concealment were "intentional conduct that constitute[d] an unsafe or unsound banking practice," as necessary for a finding of willful disregard for the Bank's safety and soundness.[254] "Willful disregard refers to that conduct which is practiced deliberately with full knowledge of the facts and risks, and which potentially exposes a bank to abnormal risk of loss or harm."[255] Respondent knew that the Crowe Report was the central target of Ms. Omi's requests, *see supra* at 16-18, and yet imprudently chose to engage in conduct that exposed the Bank to the risk of liability or enforcement action rather than provide it to her, thus willfully disregarding the safety and soundness of the Bank.[256]

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[254] *Vickery*, 1997 WL 269105, at *8.

[255] *Watts*, 2002 WL 31259465, at *8 (finding culpability elements satisfied on summary disposition).

[256] Given the relatively short period of time during which Respondent contrived to conceal the Crowe Report, the undersigned cannot also conclude that Respondent acted with continuing disregard, a mental state that manifests over time through, for example, the "voluntary and repeated inattention to" unsafe and unsound practices, or the "knowledge of and failure to correct clearly imprudent and abnormal practices that have been ongoing." *In the Matter of Lawrence A. Swanson, Jr.*, No. AP-ATL-93-7, 1995 WL 329616, at *5 (Apr. 4, 1995) (OTS

D. Civil Money Penalty

As a result of the foregoing analysis, the undersigned has concluded that the applicable elements have been met for the imposition of a prohibition order under 12 U.S.C. § 1818(e) and the assessment of a second-tier civil money penalty under 12 U.S.C. § 1818(i). Before assessing a civil money penalty, however, the agency is bound to consider the appropriateness of the amount being assessed in light of five mitigating factors: (1) the size of the

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final decision on reconsideration); *see also Watts*, 2002 WL 31259465, at *8 (continuing disregard is "conduct which is voluntarily engaged in over time"); MSD Order at 62-63. Although there is no minimum length that an IAP must be heedlessly indifferent in order for their disregard to be "continuing" for purposes of culpability, the undersigned's review of previous matters in which that threshold has been met reveals periods of misconduct significantly longer than the two and a half weeks at issue here. *See*, *e.g.*, *Ellsworth*, 2016 WL 11597958, at *17 (continuing disregard where misconduct "involved repeated acts over more than a year"); *Watkins*, 2019 WL 6700075, at *9 (continuing disregard where misconduct took place "repeatedly . . . between July 2010 and November 2012"); *Watts*, 2002 WL 31259465, at *8 (continuing disregard where misconduct amounted to "at least 80 incidents occurring over a period of nearly two years"); *Vickery*, 1997 WL 269105, at *8 (finding that "conduct reflecting recklessness or indifference with respect to an institution's safety" was continuing disregard when "made over a period of some months"); *Dodge*, 744 F.3d at 161 (continuing disregard where conduct took place "on multiple occasions over six reporting periods"). The span of time in which Respondent engaged in her misconduct here is comparatively minuscule, and her misconduct itself substantially self-contained—as Enforcement Counsel observes, this is at heart "a narrow case about how an examiner for the [OCC] requested a document [from Respondent] multiple times." OCC Opp. at 1. The undersigned therefore declined to make a finding of continuing disregard at the summary disposition stage.

respondent's financial resources; (2) the respondent's good faith; (3) the gravity of the respondent's violation; (4) the history of any previous violations; and (5) "such other matters as justice may require."[257] With respect to the $50,000 civil money penalty sought by Enforcement Counsel in this matter, the Parties have made submissions adverting to these factors and to the thirteen interagency factors that financial institution regulatory agencies must also weigh in conjunction when determining a civil money penalty amount.[258] Considering the Parties' submissions, assessing the relevant factors, and for the reasons given below, this Tribunal recommends to the Comptroller that there is some cause for mitigation and that $30,000, rather than $50,000, is an appropriate monetary penalty for Respondent's misconduct in this case.

The purpose of a civil money penalty "is to deprive the violators of any financial benefit derived as a result of the violations, provide a sufficient degree of punishment, and [act as] an adequate deterrent to the respondents and others from future violations of banking laws and regulations."[259] The interagency

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[257] 12 U.S.C. § 1818(i)(2)(G).

[258] *See* Civil Money Penalties Interagency Statement, OCC Bulletin No. 98-32, 1998 WL 434432 at **2-3 (July 24, 1998) (adopting Federal Financial Institutions Examination Council's Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies, 63 Fed. Reg. 30226-02 (June 3, 1998)) ("Interagency CMP Policy").

[259] *In the Matter of Richard D. Donohoo and Craig R. Mathies*, Nos. 92-249c & b *et seq.*, 1995 WL 618673, at *27 (FDIC final decision); *see also Long v. Bd. of Gov. of the Fed. Res. Sys.*, 117 F.3d 1145, 1154 (10th Cir. 1997) (civil money penalties provide banking agencies with "the flexibility [they] need[] to secure compliance" with the relevant banking laws and to "serve as

guidance regarding the assessment of civil money penalties further states that "in cases where the violation, practice, or breach causes quantifiable, economic benefit or loss," a civil money penalty amount that merely recompenses the loss or strips the violator of their benefit will be insufficient "to promote compliance with statutory and regulatory requirements."[260] Rather, "[t]he penalty amount should reflect a remedial purpose and should provide a deterrent to future misconduct."[261] The undersigned will address each of the five mitigating factors in turn, bearing in mind the punitive, deterrent, and remedial goals that civil money penalties are intended to achieve.

1. Respondent's Financial Resources

The undersigned credits Respondent's representation that she has approximately $98,000 in net assets, not including any retirement fund that she asserts is unreachable by civil money penalty assessment.[262] For lack of contrary evidence, the undersigned also credits Respondent's statement that her average salary since leaving the banking industry has been around $50,000 per year.[263] Respondent also has assets that she claims are not reachable to pay the OCC's assessment, such as a $780,000 house, as well as the admitted ability to obtain funds via personal loan if necessary.[264] She is also married and has her

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deterrents to violations of laws, rules, regulations, and orders of the agencies") (internal quotation marks and citation omitted).

[260] Interagency CMP Policy at *2.

[261] *Id.*

[262] *See* Resp. CMP Reply at 1-3; R-CMP-8 (Akahoshi Decl.) ¶ 5.

[263] *See* R-CMP-8 (Akahoshi Decl.) ¶ 4.

[264] *See* Resp. CMP Reply at 1-2.

husband's assets for support.[265] In short, according to Respondent's own telling, it would be painful but possible to pay a $50,000 civil money penalty, and there is no indication that an assessment of that amount would pose a crushing burden to her future life prospects. At the same time, Respondent is not so well-off that a larger penalty is necessary for a sufficient punitive and deterrent effect.[266] The undersigned therefore finds that the size of Respondent's financial resources is not a basis for mitigating the amount of the assessed penalty under the statute.

2. Respondent's Good Faith

The mitigating factor of good faith, in the undersigned's view, encompasses both good faith shown (or not shown) in the course of a respondent's misconduct as well as any showing of good faith made by a respondent, for example through willing cooperation or genuinely expressed regret and responsibility for their actions, during the agency's investigation and the enforcement proceedings themselves. Such an interpretation provides an incentive

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[265] *See id.* at 2.

[266] Because she does not view a civil money penalty of larger than $50,000 to be appropriate in this action in any event, the undersigned takes no position on Enforcement Counsel's assertion that this Tribunal has the discretion to recommend that the Comptroller increase the amount of the penalty beyond that set forth in the Notice, if circumstances warrant. *See* OCC CMP Br. at 13 (contending that "this Tribunal has the authority to determine that a higher [civil money penalty] is appropriate"); Resp. CMP Response at 12 (stating that "Enforcement Counsel's invitation to this Tribunal to impose a greater penalty . . . invites this Tribunal to impose a penalty that was not contained in the written notice issued by the OCC").

for respondents to be forthcoming and cooperative through the investigative and enforcement process. That interpretation also lessens the duplicative effect that a finding of personal dishonesty or willfulness or a conscious engagement in misconduct might otherwise have on this mitigating factor— otherwise, no showing of good faith sufficient to mitigate an assessed penalty could ever be made in most cases before this Tribunal.[267]

Here, there is ample evidence that "Respondent sought, to the best of her ability, to conceal the existence of the Crowe Report and the conclusions contained therein from the OCC."[268] There is therefore no question of any good faith in the misconduct itself that might mitigate the assessed amount; the inherent nature of the misconduct is indicative of a "thoroughgoing lack of straightforwardness and an intent to deceive or mislead."[269] As for good faith during the enforcement process, neither party has offered information one way or the other regarding Respondent's level of cooperation or candor, and from the undersigned's perspective, Respondent has been neither candidly remorseful in the course of these proceedings nor actively obstructive. The undersigned accordingly finds that Respondent's good faith is also not a basis for mitigating the assessed penalty amount.

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[267] *See* EC CMP Br. at 10 ("There can [] be no mitigation here where a lack of good faith is inherent in [the] misconduct itself, concealment. Given the knowing and willful nature of Respondent's concealment of information from the OCC, . . . Respondent cannot credibly demonstrate her actions were done in good faith.").

[268] *Supra* at 42; *see generally* Part V.A *supra.*

[269] Part V.C *supra* at 59.

3. Gravity of the Violation

The undersigned agrees with Enforcement Counsel that this is fundamentally "a narrow case about how an examiner for the [OCC] requested a document [from Respondent] multiple times."[270] While Respondent's unwillingness to acknowledge the existence of the Crowe Report and her failure to provide it when asked did indeed have the propensity to influence the OCC's examination of the Bank's BSA/AML program and represented the actionable concealment of material facts,[271] it is also true that the concealment was brief and that the examination itself was to all appearances unaffected in the end by Respondent's actions. OCC examiners ultimately received the Crowe Report on the timeline established by ADC Jorn,[272] and there has been no indication that the Crowe Report or its associated materials contained meaningful new information, not already possessed by or known to examiners, that resulted in the agency wasting resources or pursuing dead ends in the time between it was first requested on March 21, 2013 and it was provided on April 18, 2013.

Other aspects of the violation's gravity weigh both for and against mitigation. It is significant that Respondent is herself a former OCC examiner; this speaks both to her knowledge that she was engaging

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[270] OCC Opp. at 1.

[271] *See* Part V.A.2 *supra* at 45-49.

[272] *See* OCC-MSD-66 at 1 (handwritten notes of ADC Jorn following telephone conversations with CEO Ryan on April 8, 2013 and April 10, 2013); R-MSD-11 (April 11, 2013 email from CEO Ryan to other Bank personnel); *see also* Part IV *supra.* at 22 n.90.

in misconduct and to the seriousness of her behavior. By the same token, there is some validity to Respondent's observation that compliance officers in general face special challenges in monitoring, regulating, and navigating potential misdeeds committed or encouraged by those higher up in their financial institution.[273] The undersigned also credits Respondent's uncontested representation that of the three Bank officers implicated in the concealment of the Crowe Report, the other two, CEO Ryan and GC Weiss, being "more senior bank officers with greater knowledge than she,"[274] she was the only one whose employment was terminated; the others were permitted to retire.[275]

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[273] *See* Resp. CMP Br. at 22 ("Compliance officers are being forced to make 'decisions in real time against the backdrop of heightened individual enforcement, increased regulatory responsibilities, limited resources, and limited guidance, in an ever-evolving statutory framework that 'largely prescribed common-law like standards of conduct susceptible to reasonable disagreement.'") (quoting New York City Bar Association Compliance Committee, *Report on Chief Compliance Officer Liability in the Financial Sector* (Feb. 4, 2020), *available at* https://s3.amazonaws.com/documents.nycbar.org/files/Report_CCO_Liability_vF.pdf; *see also* OCC-MSD-48 (email thread including March 21, 2013 email from GC Weiss to Respondent) ("They did produce a draft that was shared with management. . . . My guess is that copies of the draft are floating around although our intention was to not keep any draft documents. . . . [S]hould we say no 'final report was issued'? The obvious concern is they then ask for the draft from Crowe."); OCC-MSD-52 (email thread including March 24, 2013 email from CEO Ryan to Respondent) ("Ok then let's hope she did not provide a draft report. If she did then your approach with Shirley is a good one.").

[274] Resp. CMP Br. at 20.

[275] *See id.* at 11-12.

To be clear: Respondent's misconduct warrants a prohibition order and a monetary penalty. The undersigned finds only that the violation, when viewed in full context, counsels toward a smaller assessment. This is not a case where the respondent is alleged to have engaged in unsafe and unsound practices or other violative conduct for months or years, nor one where the misconduct was undertaken for the respondent's personal financial gain.[276] Rather, the misconduct spanned three weeks and half a dozen emails in temporarily obstructing the OCC's examination, and there is no evidence that Respondent ever personally profited. The undersigned therefore concludes that some mitigation is appropriate when considering the gravity of the violation, and she recommends an assessment of $30,000 for the civil money penalty in this case.

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[276] *See*, *e.g.*, *Ellsworth*, 2016 WL 11597958, at *21 (assessment of $100,000 individual civil money penalty where the misconduct "evidenc[ed] utter disregard for the Bank's interests over a significant period of time[,] . . . caused immediate and foreseeable losses to the Bank and the FDIC[,] and obtained financial benefit for [the respondents]") (internal quotation marks and citation omitted). By contrast, and recognizing that the appropriateness of a civil money penalty amount is necessarily fact- and case-specific, the Comptroller has previously assessed only $10,000 in a case where the misconduct took place over a substantially longer span of time and was arguably more egregious than Respondent's actions vis-à-vis the Crowe Report. *See Blanton*, 2017 WL 4510840, at *1 (assessment of $10,000 penalty where the respondent "permitted a series of large overdrafts by a significant customer of the Bank, without adequate controls in place, when capital levels were critically deficient," over a period of several months).

4. History of Violations

The Parties agree that Respondent has no known history of past violations either as a bank officer or an OCC examiner, another factor that suggests that mitigation may be appropriate.[277]

5. Such Other Matters as Justice May Require

In their submissions, the Parties advert to the thirteen interagency factors that the banking agencies "have identified . . . as relevant" to the consideration of the statutory mitigating factors and the assessment of an appropriate civil money penalty amount.[278] The undersigned finds that while certain of the interagency factors may weigh in Respondent's

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[277] *See* OCC CMP Br. at 12.

[278] Interagency CMP Policy at *2; *see* OCC CMP Br. at 4-7; Resp. CMP Response at 8-10. Respondent argues that "[t]he OCC has failed to promulgate any regulations adopting or setting forth how the Interagency Policy factors are to be applied by the Tribunal" and that they should therefore "be disregarded as extra-legal and contrary to Congress's express directives in Section 1818 and the Administrative Procedure Act." Resp. CMP Br. at 7. The undersigned disagrees, and Respondent's argument is preserved for appeal. *See* Interagency CMP Policy at *3 ("The agencies intend these [interagency] factors to provide guidance on the appropriateness of a civil money penalty, in a manner consistent with the statutes authorizing such an action. This policy does not preclude any agency from considering any other matter relevant to the civil money penalty assessment."); OCC CMP Response at 20-21 (noting that "[u]nder the Administrative Procedure Act, statements of policy 'are grouped with and treated as interpretive rules,'" which are non-binding and serve as "a helpful guide to ensure consistency and transparency") (quoting *Azar v. Allina Health Svcs.*, 139 S. Ct. 1804, 1811 (2019)).

favor—specifically, factors 2 (duration and frequency of misconduct), 7 (lack of financial gain to respondent), 9 (lack of history of previous misconduct), 10 (no previous criticism for similar actions), and 12 (lack of tendency to engage in violations)—the factors overall provide no additional basis for mitigation beyond what has already been discussed.[279]

Respondent also contends at length that "the OCC's own actions in prosecuting this matter"—including supposedly "inappropriate practices" over the course of document discovery and alleged agency violations of law[280]—are grounds to mitigate the civil money penalty, an argument that the undersigned rejects as variously an attempt to reraise arguments that have already been litigated to Respondent's detriment and a vehicle for untimely asserted discovery disputes.[281] The undersigned therefore concludes that there are no "other matters as justice may require," whether with respect to the interagency factors or otherwise, that should mitigate the amount of the agency's civil money penalty

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[279] Indeed, there are a greater number of interagency factors—specifically, factors 1 (evidence of disregard), 3 (continuation of misconduct after notification), 4 (failure to cooperate), 5 (evidence of concealment), 6 (loss to the institution), and 8 (lack of restitution)—that tend to weigh against Respondent when considering the appropriate penalty amount to be assessed. *See* Interagency CMP Policy at *2. The remaining two factors, numbers 11 (presence or absence of effective compliance program) and 13 (existence of written agreements intended to prevent violations), are not applicable here. *See id.*; *see also* OCC CMP Br. at 6-7.

[280] Resp. CMP Br. at 23, 24; *see generally id.* at 23-34.

[281] *See* EC CMP Response at 14-19.

assessment beyond the mitigation that the undersigned has already recommended.

E. Appointments Clause

In her motion for summary disposition, and again in her civil money penalty briefing, Respondent argues that these proceedings are defective because the individual who signed the Notice on behalf of the OCC, Deputy Comptroller for Special Supervision Michael Brickman, is an inferior constitutional officer who was unlawfully appointed in violation of 12 U.S.C. § 4 and in contravention of the Appointments Clause of the United States Constitution.[282] In rejecting this argument at the summary disposition stage, the undersigned noted that she had addressed a substantively identical argument in detail in a separate matter before this Tribunal that has now been administratively closed.[283]

The undersigned again incorporates the reasoning from the previous matter in full and holds that the OCC's practice of referring to a certain class of senior official as "Deputy Comptroller" or "Senior Deputy Comptroller" does not contravene either the Appointments Clause or the statutory requirement that "no more than four Deputy Comptrollers of the Currency," a constitutional office, be appointed by the Secretary of the Treasury.[284] As the undersigned has

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[282] *See* Resp. Mot. at 44-45; Resp. CMP Br. at 13 n.11, 34; Resp. CMP Response at 24 n.6.

[283] *See* MSD Order at 68; Order Denying Enforcement Counsel's Motion for Default and Respondent's Omnibus Motion to Dismiss, *In the Matter of Richard Usher*, OCC No. AA-EC-2017-3 (July 28, 2020), *available at* https://www.ofia.gov/decisions/2020-07-28-occ-aa-ec-2017-03.pdf, at 77-84.

[284] 12 U.S.C. § 4.

explained in depth, the Comptroller's authority to issue Notices of Charges is delegable to "mere employees" like Deputy Comptroller Brickman who are not subject to the Appointments Clause, are not appointed under 12 U.S.C. § 4, and do not wield the statutorily granted powers of a Deputy Comptroller of the Currency.[285] Respondent's constitutional challenge in that regard is therefore without foundation.

VI. Conclusion

For all of the reasons given above, the undersigned has concluded that the statutory elements of 12 U.S.C. §§ 1818(e) and 1818(i) have been met in this action. Specifically, the undersigned finds that Respondent's actions in connection with OCC examiner requests for the Crowe Report and related materials in March 2013 constituted violations of 12 U.S.C. § 481 and 18 U.S.C. § 1001(a)(1) and actionably unsafe or unsound banking practices; that Respondent's misconduct demonstrated personal dishonesty and willful disregard for the safety and soundness of the Bank; and that the Bank suffered loss as a result. The undersigned also concludes that some basis exists to mitigate the amount of the civil money penalty assessed against Respondent. In accordance with 12 C.F.R. § 19.38, the undersigned

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[285] *See* 12 U.S.C. § 4a (providing that the Comptroller "may delegate to *any duly authorized employee*, representative, or agent *any power* vested in the office by law") (emphases added); *see also Buckley v. Valeo*, 424 U.S. 1, 126 n.162 (1976) ("Employees are lesser functionaries subordinate to officers of the United States."); *id.* at 269 (White, J., concurrence in part) ("The appointment power provided in Art. II also applies only to officers, as distinguished from employees, of the United States."); *Lucia*, 138 S. Ct. at 2051 (distinguishing between constitutional officers and "mere employees").

therefore recommends that the Comptroller enter a prohibition order against Respondent and assess a second-tier civil money penalty in the amount of $30,000 in consequence of Respondent's misconduct. The record of this proceeding will be transmitted to the Comptroller in conjunction with this Recommended Decision, as well as a certified index of the administrative record and an index of exhibits.

SO ORDERED.

Dated: February 10, 2022

/s/ Jennifer Whang
Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication

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

Docket No.: AA-EC-2018-20

In the Matter of

LAURA AKAHOSHI,
former Chief Compliance Officer

RABOBANK, N.A.
Roseville, California

[EXCERPT]

ORDER REGARDING THE PARTIES' CROSS MOTIONS FOR SUMMARY DISPOSITION

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non-responsive, misleading, and less than fully accurate at every turn.[186] Particularly as a former examiner who has acknowledged that the refusal by bank officials to provide requested information is a "red flag" that could signal violations of law,[187] Respondent cannot credibly claim that her conduct here adhered to accepted standards. The undersigned therefore finds that Respondent engaged in unsafe and unsound practices within the meaning of Section 1818(e).[188]

One final note regarding this issue: the Comptroller has made it clear that the conclusions of OCC examiners regarding the extent to which "a particular practice poses a safety and soundness concern" are entitled to a significant measure of deference by the ALJ.[189] Examiner judgments and conclusions on unsafe or unsound practices that are based on "objectively verifiable facts" may not be rejected by the ALJ "unless there is a finding that they are a) without an objective factual basis, or b) outside the zone of reasonableness or arbitrary and

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[186] *See supra* at 12-19, 39-43.

[187] OCC-MSD-108 (Akahoshi Dep.) at 56:9-18.

[188] The fulfillment of this aspect of the corresponding prong of Section 1818(i) requires not only a conclusion that Respondent has engaged in unsafe or unsound practices, but that she has done so *recklessly*. *See* 12 U.S.C. § 1818(i)(2)(B)(i); *Patrick Adams*, 2014 WL 8735096, at *49 (articulating recklessness standard). The undersigned addresses whether Respondent's conduct meets this standard in Part IV.D.1 *infra*.

[189] *Ellsworth*, 2016 11597958, at *14; *see also Patrick Adams*, 2014 WL 8735096, at *36 (noting that "[t]he expression of expert judgment as to whether a given set of facts represents an unsafe or unsound practice is very much within the competence of the OCC's [examiners]").

capricious."[190] Here, Deputy Comptroller Karen Boehler, who served as Associate Deputy Comptroller with oversight responsibilities regarding the OCC's supervision of the Bank at the time of Respondent's misconduct, has opined that "Respondent's failure to provide the Crowe Report to the OCC when requested, her false and misleading statements to the OCC regarding the Crowe Report, and her collusion with others at the Bank to conceal the Crowe Report and its contents from the OCC exposed the Bank to abnormal risk" and constituted unsafe and unsound practices.[191] Ms. Boehler also concludes that these practices were reckless in that they "were done in disregard of, or evidenced a conscious indifference to, a known or obvious risk of substantial harm."[192]

Respondent objects to Ms. Boehler's declaration, arguing *inter alia* that her opinions are generally not entitled to deference because she "is in no better a position to assess the facts surrounding these issues or to draw legal conclusions than the Tribunal" and that her opinion on recklessness in particular should be disregarded because it bears on Respondent's state of mind and culpability rather than any consideration of the safety and soundness of her conduct. Resp. Opp. at 30. The first of these objections is unfounded, given the Comptroller's clear direction that the conclusions of examiners regarding unsafe or unsound practices should be given deference.[193] The

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[190] *Ellsworth*, 2016 11597958, at *14.

[191] OCC-MSD-114 (Declaration of Karen M. Boehler) ("Boehler Decl.") ¶ 39; *see also id.* ¶¶ 12, 38.

[192] *Id.* ¶ 43.

[193] *See Patrick Adams*, 2014 WL 8735096, at *36 (holding that "[t]he conclusion that given conduct is an unsafe or unsound practice is ultimately an application of a legal standard to

undersigned finds that Ms. Boehler's conclusion that Respondent's conduct exposed the Bank to abnormal risk is, while relatively conclusory in its framing, nevertheless based on objectively verifiable facts that are not "outside the zone of reasonableness or arbitrary and capricious"; the undersigned therefore defers to that conclusion (and has independently drawn the same conclusion in any event). As to Respondent's second objection, however, the undersigned finds that it has merit: examiners may well be best situated to adjudge whether a respondent meets the threshold of certain bank-related misconduct, given their experience and expertise, but there is no authority of which the undersigned is aware that prescribes that the legal conclusions of examiners regarding the "conscious indifference" or other state of mind of the subject of an administrative enforcement action are entitled to deference, and the undersigned therefore accords none.[194]

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evidence, including examiner judgment, and deference is due that judgment").

[194] *See id.* at *13 (characterizing recklessness as "a form of 'culpability' element" separate from misconduct); *see also*, *e.g.*, *Aya Healthcare Svcs. v. AMN Healthcare, Inc.*, ___ F. Supp. 3d ____, 2020 WL 2553181 (S.D. Cal. May 20, 2020) ("[T]he opinions of expert witnesses on the intent, motives, or states of mind of [third parties] have no basis in any relevant body of knowledge or expertise.") (internal quotation marks, bracketing, and citation omitted).

The parties are directed to confer and determine whether and to what extent a hearing remains necessary to resolve these outstanding issues, in light of the undersigned's conclusion that at least one aspect of each of the statutory elements for a Section 1818(e) prohibition order and Section 1818(i) first- and second-tier civil money penalty has been met. Should the parties conclude that the only remaining issue that requires resolution is the appropriateness of the civil money penalty amount, the parties should consider whether submissions on this topic should be made on paper or in the form of a hearing. The parties shall file a joint status report by August 16, 2021 reflecting the results of the parties' deliberations. Should one or both of the parties prefer to continue with the currently scheduled in-person hearing to resolve some or all of the remaining issues, the joint status report shall also include the parties' joint conclusions regarding the expected length and desired location of such hearing to facilitate securing a hearing venue.[241]

On August 3, 2021, Enforcement Counsel filed an unopposed Motion to Extend the Deadline For Prehearing Submissions. That motion is hereby GRANTED, and the parties' prehearing submissions are now due by September 6, 2021.

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[241] The parties also should come to an agreement regarding a prospective alternate location for the hearing (such as at an OCC field office, or in another judicial district) if facilities cannot be secured in the first instance, and should consider the prospect of a virtual hearing in the event that COVID restrictions tighten again in the coming months.

SO ORDERED.

Dated: August 5, 2021

/s/ Jennifer Whang
Jennifer Whang
Administrative Law Judge
Office of Financial Institution Adjudication

STATUTORY AND REGULATORY PROVISIONS

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5 U.S.C.A. § 702

§ 702 Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, § 1, Oct. 21, 1976, 90 Stat. 2721.)

5 U.S.C.A. § 704

§ 704 Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

5 U.S.C.A. § 706

§ 706 Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

12 U.S.C.A. § 481

§ 481 Appointment of examiners; examination of member banks, State banks, and trust companies; reports

The Comptroller of the Currency, with the approval of the Secretary of the Treasury, shall appoint examiners who shall examine every national bank as often as the Comptroller of the Currency shall deem necessary. The examiner making the examination of any national bank shall have power to make a

thorough examination of all the affairs of the bank and in doing so he shall have power to administer oaths and to examine any of the officers and agents thereof under oath and shall make a full and detailed report of the condition of said bank to the Comptroller of the Currency: Provided, That in making the examination of any national bank the examiners shall include such an examination of the affairs of all its affiliates other than member banks as shall be necessary to disclose fully the relations between such bank and such affiliates and the effect of such relations upon the affairs of such bank; and in the event of the refusal to give any information required in the course of the examination of any such affiliate, or in the event of the refusal to permit such examination, all the rights, privileges, and franchises of the bank shall be subject to forfeiture in accordance with section 2 of the Federal Reserve Act, as amended (U.S.C., title 12, secs. 141, 222–225, 281–286, and 502). The Comptroller of the Currency shall have power, and he is authorized, to publish the report of his examination of any national banking association or affiliate which shall not within one hundred and twenty days after notification of the recommendations or suggestions of the Comptroller, based on said examination, have complied with the same to his satisfaction. Ninety days' notice prior to such publicity shall be given to the bank or affiliate.

The examiner making the examination of any affiliate of a national bank shall have power to make a thorough examination of all the affairs of the affiliate, and in doing so he shall have power to administer oaths and to examine any of the officers, directors, employees, and agents thereof under oath and to make a report of his findings to the Comptroller of the Currency. If any affiliate of a

national bank refuses to pay any assessments, fees, or other charges imposed by the Comptroller of the Currency pursuant to this subchapter or fails to make such payment not later than 60 days after the date on which they are imposed, the Comptroller of the Currency may impose such assessments, fees, or charges against the affiliated national bank, and such assessments, fees, or charges shall be paid by such national bank. If the affiliation is with 2 or more national banks, such assessments, fees, or charges may be imposed on, and collected from, any or all of such national banks in such proportions as the Comptroller of the Currency may prescribe. The examiners and assistant examiners making the examinations of national banking associations and affiliates thereof herein provided for and the chief examiners, reviewing examiners and other persons whose services may be required in connection with such examinations or the reports thereof, shall be employed by the Comptroller of the Currency with the approval of the Secretary of the Treasury; the employment and compensation of examiners, chief examiners, reviewing examiners, assistant examiners, and of the other employees of the office of the Comptroller of the Currency whose compensation is and shall be paid from assessments on banks or affiliates thereof or from other fees or charges imposed pursuant to this subchapter shall be set and adjusted subject to chapter 71 of title 5 and without regard to the provisions of other laws applicable to officers or employees of the United States. The funds derived from such assessments, fees, or charges may be deposited by the Comptroller of the Currency in accordance with the provisions of section 192 of this title and shall not be construed to be Government funds or appropriated monies; and the Comptroller of

the Currency is authorized and empowered to prescribe regulations governing the computation and assessment of the expenses of examinations herein provided for and the collection of such assessments from the banks and/or affiliates examined or of other fees or charges imposed pursuant to this subchapter. Such funds shall not be subject to apportionment for the purpose of chapter 15 of title 31 or under any other authority. If any affiliate of a national bank shall refuse to permit an examiner to make an examination of the affiliate or shall refuse to give any information required in the course of any such examination, the national bank with which it is affiliated shall be subject to a penalty of not more than $5,000 for each day that any such refusal shall continue. Such penalty may be assessed by the Comptroller of the Currency and collected in the same manner as expenses of examinations. The Comptroller of the Currency, upon the request of the Board of Governors of the Federal Reserve System, is authorized to assign examiners appointed under this subchapter to examine foreign operations of State banks which are members of the Federal Reserve System.

(R.S. § 5240 (pars.); Feb. 19, 1875, ch. 89, 18 Stat. 329; Dec. 23, 1913, ch. 6, § 21, 38 Stat. 271; June 16, 1933, ch. 89, § 28, 48 Stat. 192; Aug. 23, 1935, ch. 614, title II, § 203(a), title III, § 343, 49 Stat. 704, 722; June 30, 1948, ch. 762, § 1, 62 Stat. 1163; Apr. 30, 1956, ch. 228, § 1, 70 Stat. 124; Pub. L. 96–221, title VII, § 709, Mar. 31, 1980, 94 Stat. 188; Pub. L. 100–86, title V, § 505(b), Aug. 10, 1987, 101 Stat. 633; Pub. L. 101–73, title IX, § 907(f), Aug. 9, 1989, 103 Stat. 470; Pub. L. 102–242, title I, § 114(b), Dec. 19, 1991, 105 Stat. 2248; Pub. L. 111–203, title III, § 318(a)(1), July 21, 2010, 124 Stat. 1526.)

12 U.S.C.A § 1818

§ 1818 Termination of status as insured depository institution

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(e) Removal and prohibition authority

(1) Authority to issue order.

Whenever the appropriate Federal banking agency determines that—

(A) any institution-affiliated party has, directly or indirectly—

(i) violated—

(I) any law or regulation;

(II) any cease-and-desist order which has become final;

(III) any condition imposed in writing by a Federal banking agency in connection with any action on any application, notice, or request by such depository institution or institution-affiliated party; or

(IV) any written agreement between such depository institution and such agency;

(ii) engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution; or

(iii) committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty;

(B) by reason of the violation, practice, or breach described in any clause of subparagraph (A)—

(i) such insured depository institution or business institution has suffered or will probably suffer financial loss or other damage;

(ii) the interests of the insured depository institution's depositors have been or could be prejudiced; or

(iii) such party has received financial gain or other benefit by reason of such violation, practice, or breach; and

(C) such violation, practice, or breach—

(i) involves personal dishonesty on the part of such party; or

(ii) demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution or business institution,

the appropriate Federal banking agency for the depository institution may serve upon such party a written notice of the agency's intention to remove such party from office or to prohibit any further participation by such party, in any manner, in the conduct of the affairs of any insured depository institution.

(2) Specific violations

(A) In general

Whenever the appropriate Federal banking agency determines that—

(i) an institution-affiliated party has committed a violation of any provision of subchapter II of chapter 53 of title 31 and such violation was not inadvertent or unintentional;

(ii) an officer or director of an insured depository institution has knowledge that an institution-affiliated party of the insured depository institution has violated any such provision or any provision of law referred to in subsection (g)(1)(A)(ii);

(iii) an officer or director of an insured depository institution has committed any violation of the Depository Institution Management Interlocks Act [12 U.S.C. 3201 et seq.]; or

(iv) an institution-affiliated party of a subsidiary (other than a bank) of a bank holding company or of a subsidiary (other than a savings association) of a savings and loan holding company has been convicted of any criminal offense involving dishonesty or a breach of trust or a criminal offense under section 1956, 1957, or 1960 of title 18 or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such an offense,

the agency may serve upon such party, officer, or director a written notice of the agency's intention to remove such party from office.

(B) Factors to be considered

In determining whether an officer or director should be removed as a result of the application

of subparagraph (A)(ii), the agency shall consider whether the officer or director took appropriate action to stop, or to prevent the recurrence of, a violation described in such subparagraph.

(3) Suspension order

(A) Suspension or prohibition authorized

If the appropriate Federal banking agency serves written notice under paragraph (1) or (2) to any institution-affiliated party of such agency's intention to issue an order under such paragraph, the appropriate Federal banking agency may suspend such party from office or prohibit such party from further participation in any manner in the conduct of the affairs of the depository institution, if the agency—

(i) determines that such action is necessary for the protection of the depository institution or the interests of the depository institution's depositors; and

(ii) serves such party with written notice of the suspension order.

(B) Effective period

Any suspension order issued under subparagraph (A)—

(i) shall become effective upon service; and

(ii) unless a court issues a stay of such order under subsection (f), shall remain in effect and enforceable until—

(I) the date the appropriate Federal banking agency dismisses the charges contained in the notice served under

paragraph (1) or (2) with respect to such party; or

(II) the effective date of an order issued by the agency to such party under paragraph (1) or (2).

(C) Copy of order

If an appropriate Federal banking agency issues a suspension order under subparagraph (A) to any institution-affiliated party, the agency shall serve a copy of such order on any insured depository institution with which such party is associated at the time such order is issued.

(4) A notice of intention to remove an institution-affiliated party from office or to prohibit such party from participating in the conduct of the affairs of an insured depository institution, shall contain a statement of the facts constituting grounds therefor, and shall fix a time and place at which a hearing will be held thereon. Such hearing shall be fixed for a date not earlier than thirty days nor later than sixty days after the date of service of such notice, unless an earlier or a later date is set by the agency at the request of (A) such party, and for good cause shown, or (B) the Attorney General of the United States. Unless such party shall appear at the hearing in person or by a duly authorized representative, such party shall be deemed to have consented to the issuance of an order of such removal or prohibition. In the event of such consent, or if upon the record made at any such hearing the agency shall find that any of the grounds specified in such notice have been established, the agency may issue such orders of suspension or removal from office, or prohibition

from participation in the conduct of the affairs of the depository institution, as it may deem appropriate. Any such order shall become effective at the expiration of thirty days after service upon such depository institution and such party concerned (except in the case of an order issued upon consent, which shall become effective at the time specified therein). Such order shall remain effective and enforceable except to such extent as it is stayed, modified, terminated, or set aside by action of the agency or a reviewing court.

(5) For the purpose of enforcing any law, rule, regulation, or cease-and-desist order in connection with an interlocking relationship, the term "officer" within the term "institution-affiliated party" as used in this subsection means an employee or officer with management functions, and the term "director" within the term "institution-affiliated party" as used in this subsection includes an advisory or honorary director, a trustee of a depository institution under the control of trustees, or any person who has a representative or nominee serving in any such capacity.

(6) Prohibition of certain specific activities

Any person subject to an order issued under this subsection shall not—

> **(A)** participate in any manner in the conduct of the affairs of any institution or agency specified in paragraph (7)(A);
>
> **(B)** solicit, procure, transfer, attempt to transfer, vote, or attempt to vote any proxy, consent, or authorization with respect to any voting rights in any institution described in subparagraph (A);

(C) violate any voting agreement previously approved by the appropriate Federal banking agency; or

(D) vote for a director, or serve or act as an institution-affiliated party.

(7) Industrywide Prohibition

(A) In general

Except as provided in subparagraph (B), any person who, pursuant to an order issued under this subsection or subsection (g), has been removed or suspended from office in an insured depository institution or prohibited from participating in the conduct of the affairs of an insured depository institution may not, while such order is in effect, continue or commence to hold any office in, or participate in any manner in the conduct of the affairs of—

(i) any insured depository institution;

(ii) any institution treated as an insured bank under subsection (b)(3) or (b)(4), or as a savings association under subsection (b)(9);

(iii) any insured credit union under the Federal Credit Union Act;

(iv) any institution chartered under the Farm Credit Act of 1971;

(v) any appropriate Federal depository institution regulatory agency; and

(vi) the Federal Housing Finance Agency and any Federal home loan bank.

(B) Exception if agency provides written consent

If, on or after the date an order is issued under this subsection which removes or suspends from office any institution-affiliated party or prohibits such party from participating in the conduct of the affairs of an insured depository institution, such party receives the written consent of—

(i) the agency that issued such order; and

(ii) the appropriate Federal financial institutions regulatory agency of the institution described in any clause of subparagraph (A) with respect to which such party proposes to become an institution-affiliated party,

subparagraph (A) shall, to the extent of such consent, cease to apply to such party with respect to the institution described in each written consent. Any agency that grants such a written consent shall report such action to the Corporation and publicly disclose such consent.

(C) Violation of paragraph treated as violation of order

Any violation of subparagraph (A) by any person who is subject to an order described in such subparagraph shall be treated as a violation of the order.

(D) "Appropriate federal financial institutions regulatory agency" defined

For purposes of this paragraph and subsection (j), the term "appropriate Federal financial institutions regulatory agency" means—

(i) the appropriate Federal banking agency, in the case of an insured depository institution;

(ii) the Farm Credit Administration, in the case of an institution chartered under the Farm Credit Act of 1971;

(iii) the National Credit Union Administration Board, in the case of an insured credit union (as defined in section 101(7) of the Federal Credit Union Act); and

(iv) the Secretary of the Treasury, in the case of the Federal Housing Finance Agency and any Federal home loan bank.

(E) Consultation between agencies

The agencies referred to in clauses (i) and (ii) of subparagraph (B) shall consult with each other before providing any written consent described in subparagraph (B).

(F) Applicability

This paragraph shall only apply to a person who is an individual, unless the appropriate Federal banking agency specifically finds that it should apply to a corporation, firm, or other business enterprise.

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(h) Hearings and judicial review

(1) Any hearing provided for in this section (other than the hearing provided for in subsection (g)(3) of this section) shall be held in the Federal judicial district or in the territory in which the home office of the depository institution is located unless the party afforded the hearing consents to another place, and shall be conducted in accordance with the provisions of chapter 5 of Title 5. After such hearing, and within ninety days after the appropriate Federal banking agency or Board of Governors of the Federal Reserve System has notified the parties that the case has been submitted to it for final decision, it shall render its decision (which shall include findings of fact upon which its decision is predicated) and shall issue and serve upon each party to the proceeding an order or orders consistent with the provisions of this section. Judicial review of any such order shall be exclusively as provided in this subsection (h). Unless a petition for review is timely filed in a court of appeals of the United States, as hereinafter provided in paragraph (2) of this subsection, and thereafter until the record in the proceeding has been filed as so provided, the issuing agency may at any time, upon such notice and in such manner as it shall deem proper, modify, terminate, or set aside any such order. Upon such filing of the record, the agency may modify, terminate, or set aside any such order with permission of the court.

(2) Any party to any proceeding under paragraph (1) may obtain a review of any order served pursuant to paragraph (1) of this subsection (other

than an order issued with the consent of the depository institution or the institution-affiliated party concerned, or an order issued under paragraph (1) of subsection (g) of this section) by the filing in the court of appeals of the United States for the circuit in which the home office of the depository institution is located, or in the United States Court of Appeals for the District of Columbia Circuit, within thirty days after the date of service of such order, a written petition praying that the order of the agency be modified, terminated, or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the agency, and thereupon the agency shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon the filing of such petition, such court shall have jurisdiction, which upon the filing of the record shall except as provided in the last sentence of said paragraph (1) be exclusive, to affirm, modify, terminate, or set aside, in whole or in part, the order of the agency. Review of such proceedings shall be had as provided in chapter 7 of Title 5. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

(3) The commencement of proceedings for judicial review under paragraph (2) of this subsection shall not, unless specifically ordered by the court, operate as a stay of any order issued by the agency.

(i) Jurisdiction and enforcement; penalty

(1) The appropriate Federal banking agency may in its discretion apply to the United States district court, or the United States court of any territory,

within the jurisdiction of which the home office of the depository institution is located, for the enforcement of any effective and outstanding notice or order issued under this section or under section 1831*o* or 1831p–1 of this title, and such courts shall have jurisdiction and power to order and require compliance herewith; but except as otherwise provided in this section or under section 1831*o* or 1831p–1 of this title no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate, or set aside any such notice or order.

(2) Civil money penalty

(A) First tier

Any insured depository institution which, and any institution-affiliated party who—

(i) violates any law or regulation;

(ii) violates any final order or temporary order issued pursuant to subsection (b), (c), (e), (g), or (s) or any final order under section 1831*o* or 1831p-1 of this title;

(iii) violates any condition imposed in writing by a Federal banking agency in connection with any action on any application, notice, or other request by the depository institution or institution-affiliated party; or

(iv) violates any written agreement between such depository institution and such agency,

shall forfeit and pay a civil penalty of not more than $5,000 for each day during which such violation continues.

(B) Second tier

Notwithstanding subparagraph (A), any insured depository institution which, and any institution-affiliated party who—

(i)(I) commits any violation described in any clause of subparagraph (A);

(II) recklessly engages in an unsafe or unsound practice in conducting the affairs of such insured depository institution; or

(III) breaches any fiduciary duty;

(ii) which violation, practice, or breach—

(I) is part of a pattern of misconduct;

(II) causes or is likely to cause more than a minimal loss to such depository institution; or

(III) results in pecuniary gain or other benefit to such party,

shall forfeit and pay a civil penalty of not more than $25,000 for each day during which such violation, practice, or breach continues.

(C) Third tier

Notwithstanding subparagraphs (A) and (B), any insured depository institution which, and any institution-affiliated party who—

(i) knowingly—

(I) commits any violation described in any clause of subparagraph (A);

(II) engages in any unsafe or unsound practice in conducting the affairs of such depository institution; or

(III) breaches any fiduciary duty; and

(ii) knowingly or recklessly causes a substantial loss to such depository institution or a substantial pecuniary gain or other benefit to such party by reason of such violation, practice, or breach,

shall forfeit and pay a civil penalty in an amount not to exceed the applicable maximum amount determined under subparagraph (D) for each day during which such violation, practice, or breach continues.

(D) Maximum amounts of penalties for any violation described in subparagraph (c)

The maximum daily amount of any civil penalty which may be assessed pursuant to subparagraph (C) for any violation, practice, or breach described in such subparagraph is—

(i) in the case of any person other than an insured depository institution, an amount to not exceed $1,000,000; and

(ii) in the case of any insured depository institution, an amount not to exceed the lesser of—

(I) $1,000,000; or

(II) 1 percent of the total assets of such institution.

(E) Assessment

(i) Written notice

Any penalty imposed under subparagraph (A), (B), or (C) may be assessed and collected by the appropriate Federal banking agency by written notice.

(ii) Finality of assessment

If, with respect to any assessment under clause (i), a hearing is not requested pursuant to subparagraph (H) within the period of time allowed under such subparagraph, the assessment shall constitute a final and unappealable order.

(F) Authority to modify or remit penalty

Any appropriate Federal banking agency may compromise, modify, or remit any penalty which such agency may assess or had already assessed under subparagraph (A), (B), or (C).

(G) Mitigating factors

In determining the amount of any penalty imposed under subparagraph (A), (B), or (C), the appropriate agency shall take into account the appropriateness of the penalty with respect to—

(i) the size of financial resources and good faith of the insured depository institution or other person charged;

(ii) the gravity of the violation;

(iii) the history of previous violations; and

(iv) such other matters as justice may require.

(H) Hearing

The insured depository institution or other person against whom any penalty is assessed under this paragraph shall be afforded an agency hearing if such institution or person submits a request for such hearing within 20 days after the issuance of the notice of assessment.

(I) Collection

(i) Referral

If any insured depository institution or other person fails to pay an assessment after any penalty assessed under this paragraph has become final, the agency that imposed the penalty shall recover the amount assessed by action in the appropriate United States district court.

(ii) Appropriateness of penalty not reviewable

In any civil action under clause (i), the validity and appropriateness of the penalty shall not be subject to review.

(J) Disbursement

All penalties collected under authority of this paragraph shall be deposited into the Treasury.

(K) Regulations

Each appropriate Federal banking agency shall prescribe regulations establishing such procedures as may be necessary to carry out this paragraph.

(3) Notice under this section after separation from service

The resignation, termination of employment or participation, or separation of a institution-affiliated party (including a separation caused by the closing of an insured depository institution) shall not affect the jurisdiction and authority of the appropriate Federal banking agency to issue any notice or order and proceed under this section against any such party, if such notice or order is served before the end of the 6-year period beginning on the date such party ceased to be such a party with respect to such depository institution (whether such date occurs before, on, or after August 9, 1989).

(4) Prejudgment attachment

(A) In general

In any action brought by an appropriate Federal banking agency (excluding the Corporation when acting in a manner described in section 1821(d)(18) of this title) pursuant to this section, or in actions brought in aid of, or to enforce an order in, any administrative or other civil action for money damages, restitution, or civil money penalties brought by such agency, the court may, upon application of the agency, issue a restraining order that—

(i) prohibits any person subject to the proceeding from withdrawing, transferring, removing, dissipating, or disposing of any funds, assets or other property; and

(ii) appoints a temporary receiver to administer the restraining order.

(B) Standard

(i) Showing

Rule 65 of the Federal Rules of Civil Procedure shall apply with respect to any proceeding under subparagraph (A) without regard to the requirement of such rule that the applicant show that the injury, loss, or damage is irreparable and immediate.

(ii) State proceeding

If, in the case of any proceeding in a State court, the court determines that rules of civil procedure available under the laws of such State provide substantially similar protections to a party's right to due process as Rule 65 (as modified with respect to such proceeding by clause (i)), the relief sought under subparagraph (A) may be requested under the laws of such State.

18 U.S.C.A. § 1001

§ 1001 Statements or entries generally

(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—

(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;

(2) makes any materially false, fictitious, or fraudulent statement or representation; or

(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry;

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. If the matter relates to an offense under chapter 109A, 109B, 110, or 117, or section 1591, then the term of imprisonment imposed under this section shall be not more than 8 years.

(b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding.

(c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to—

(1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or

(2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.

(June 25, 1948, ch. 645, 62 Stat. 749; Pub. L. 103–322, title XXXIII, § 330016(1)(L), Sept. 13, 1994, 108 Stat. 2147; Pub. L. 104–292, § 2, Oct. 11, 1996, 110

Stat. 3459; Pub. L. 108–458, title VI, § 6703(a), Dec. 17, 2004, 118 Stat. 3766; Pub. L. 109–248, title I, § 141(c), July 27, 2006, 120 Stat. 603.)

12 CFR § 19.5

§ 19.5 Authority of the administrative law judge (ALJ).

(a) General rule. All proceedings governed by this part must be conducted in accordance with the provisions of 5 U.S.C. chapter 5. The ALJ has all powers necessary to conduct a proceeding in a fair and impartial manner and to avoid unnecessary delay.