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

In the Matter of:

LAURA AKAHOSHI,
Former Chief Compliance Officer

RABOBANK, N.A.
Roseville, California

Docket No.:
AA-EC-2018-20

ORDER RECOMMENDING THE GRANT IN PART AND DENIAL IN PART OF RESPONDENT'S INITIAL DISPOSITIVE MOTION

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The Office of the Comptroller of the Currency ("OCC") commenced this action against Respondent Laura Akahoshi ("Respondent") 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 report ("the Crowe Report") regarding deficiencies in the Bank's Bank Secrecy Act and Anti-Money Laundering ("BSA/AML") compliance program, ultimately resulting in the Bank suffering criminal liability, financial loss, and "significant reputational harm." Notice ¶¶ 40, 46. The Notice further alleges that "Respondent's continuous concealment of the Crowe Report"—and her false statements and misrepresentations in furtherance thereof—occurred "throughout March 2013 until April 18, 2013," and 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. *Id.* ¶ 46; *see also id.* ¶ 48(a).

Respondent has now moved for dismissal of the Notice, arguing that it was not timely filed under the five-year statute of limitations that both parties agree governs OCC enforcement actions, 28 U.S.C. § 2462, to the extent that the complained-of conduct took place prior to April 17, 2013. Respondent also argues that the Notice fails to state any claim upon which relief can be granted by this tribunal and that the OCC's claims are barred by the doctrine of laches. Enforcement Counsel for the OCC ("Enforcement Counsel") contends in turn that Respondent conceded the timeliness of the Notice earlier in this action and that Respondent's other arguments for dismissal fail as a matter of law.[1] For the reasons set forth below, the undersigned will recommend that

[1] On June 25, 2020, Enforcement Counsel filed a motion to strike certain of Respondent's affirmative defenses, some of which pertain to the arguments for dismissal that Respondent raises in the instant motion, and some of which do

dismissal be granted as to the OCC's claim that Respondent violated 12 U.S.C. § 481 within the applicable limitations period, but that Respondent's May 28, 2020 Amended Initial Dispositive Motion ("Motion") be otherwise denied.

The undersigned notes at the outset that the OCC's Uniform Rules of Practice and Procedure ("Uniform Rules") contain no specific provision regarding the mechanics of this tribunal's consideration of dispositive motions other than motions for summary disposition.[2] Consequently, in addressing Respondent's motion, the undersigned will adopt and apply as appropriate the standards set forth with respect to motions to dismiss under Rule 12 of the Federal Rules of Civil Procedure. In particular, the undersigned "must accept all the well-pleaded factual allegations in the [Notice] as true" for the purpose of Respondent's motion, and "draw all reasonable inferences from those allegations in the [OCC's] favor."[3] *See* Motion at 1 (noting that Respondent's arguments for dismissal "assume[] the truth of all of the factual allegations in the Notice of Charges").

Moreover, the undersigned "may consider only the facts alleged in the [Notice], any documents either attached to or incorporated in the [Notice], and matters of which the court may take judicial notice."[4] Therefore, to the extent that Enforcement Counsel's response to Respondent's motion ("Response") relies on unpled factual allegations that are not properly the subject of official notice, as Respondent argues in her reply in support of her motion ("Reply"),

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not. *See* June 25, 2020 Motion to Strike Respondent's Affirmative Defenses at 1-2. Enforcement Counsel's motion to strike and Respondent's opposition thereto are addressed in a separate order being issued separately.

[2] *See* 12 C.F.R. § 19.23 (providing that "[d]ispositive motions are governed by §§ 19.29 and 19.30"); *see also id.* §§ 19.29 (summary disposition), 19.30 (partial summary disposition).

[3] *Hurd v. Dist. of Columbia*, 864 F.3d 671, 678 (D.C. Cir. 2017); *see also Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009) (allegations may not be purely conclusory or "[t]hreadbare recitals of the elements of a cause of action").

[4] *Hurd*, 864 F.3d at 678 (internal quotation marks and citation omitted); *see also Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 273 (D.C. Cir. 2018) ("Public records are subject to judicial notice on a motion to dismiss when referred to in the complaint and integral to the plaintiff's claim.").

the undersigned will not consider such allegations or assume their truth when determining whether the Notice has been adequately pled.[5]

I. Background

The Notice sets forth, in pertinent part, the following allegations that both Respondent and the undersigned take as true for the purpose of Respondent's motion. Respondent is a former OCC examiner with significant experience in BSA/AML compliance matters. *See* Notice ¶ 5. Following her participation in a 2007 OCC examination of the Bank's BSA/AML compliance program, Respondent assumed the position of Chief Compliance Officer for the Bank, in which capacity she served until she transferred overseas in July 2012 and was replaced by an individual who the Notice terms Executive A.[6] *See id.* ¶¶ 6-10.

After replacing Respondent as Chief Compliance Officer, Executive A "identified serious deficiencies in the Bank's BSA/AML program and communicated her findings to Bank management," who allegedly did not find her assertions credible. *Id.* ¶ 13. On November 10, 2012, the OCC began "an on-site examination of the Bank's BSA/AML compliance program." *Id.* ¶ 14. In December 2012, the Bank contracted with audit firm Crowe Horwath LLP ("Crowe") "to

[5] Specifically, of the seven exhibits appended to the OCC's Response, Respondent contends that only Exhibits 3 through 6 have been fully incorporated by reference and that the portions of Exhibits 1, 2, and 7 that are not quoted in the Notice "should be disregarded and the motion determined based on the allegations of the Notice." Reply at 6; *see also id.* at 7-8 (enumerating "the new factual allegations relied upon in the Response but not set forth in the Notice"). The D.C. Circuit has held that "[a] district court may consider a document that a complaint specifically references without converting the motion into one for summary judgment," even if the complaint only quotes the document in part, as long as the document in question "forms the basis for a claim or part of a claim." *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1133 (D.C. Cir. 2015) (internal quotation marks and citation omitted); *see id.* ("A pleading's reference *to even part of* a fully integrated and authentic contract thus incorporates the contract as a whole into the complaint.") (emphasis added). Each of the exhibits at issue is specifically referenced in the Notice and may thus be considered incorporated by reference in its entirety to the extent that it forms the basis for at least part of the OCC's claims, which both Exhibit 2 (March 15, 2013 letter from the Bank to the OCC) and Exhibit 7 (April 18, 2013 letter from the Bank to the OCC) arguably do. *See* Notice ¶¶ 19 (referencing Exhibit 1, a February 8, 2013 letter from the OCC to the Bank), 27 (referencing Exhibit 2), 39 (referencing Exhibit 7). Nevertheless, in order to evaluate Respondent's motion, the undersigned finds that it is unnecessary to consider any factual allegations related to the referenced exhibits (1, 2, and 7) that are not set forth in the Notice, and accordingly she does not do so.

[6] The Notice alleges that Respondent transferred, in July 2012, to a position as "Compliance Manager for Rabobank International in the Netherlands." Notice ¶ 10.

provide the Bank with an independent, written assessment" of potential deficiencies in its BSA/AML program. *Id.* ¶ 15. This independent review, which resulted in written findings that the Notice terms the Crowe Report, "was intended to provide some resolution to the disputed views of the program deficiencies as between the Bank and Executive A." *Id.*

On January 29, 2013, a Bank officer who the Notice terms Senior Executive Officer 1 received an electronic copy of version 0.1 of the Crowe Report from Executive A. *See id.* ¶ 16. This report allegedly corroborated Executive A's findings that there were multiple serious deficiencies in the Bank's BSA/AML compliance program. *See id.* ¶¶ 16-17. On February 8, 2013, the OCC completed its on-site examination and likewise informed the Bank, by letter and in person, of its preliminary findings that the Bank's BSA/AML program was deficient and ineffective. *See id.* ¶¶ 18-19. Also in early February 2013, Respondent returned to the United States to assist the Bank with its written response to the OCC's preliminary findings. *See id.* ¶ 20.

By February 13, 2013, Respondent had obtained an updated electronic copy of version 0.8 of the Crowe Report, which she transmitted to Senior Executive Officer 1 on that date. *See id.* ¶ 22. The Notice alleges that, throughout all of its iterations, the Crowe Report maintained "its conclusion that the Bank violated the law as a result of its ineffective BSA/AML compliance program." *Id.* ¶ 21.

On March 9, 2013, at the direction of Senior Executive Officer 1, Respondent received an updated electronic copy of version 0.9 of the Crowe Report from a Bank officer who the Notice terms "a Bank Vice President." *See id.* ¶¶ 25-26. The Notice also alleges that various additional Bank personnel received copies of versions 0.8 or 0.9 of the Crowe Report in February 2013, namely "three members of the Board's BSA Executive Oversight Committee" and "four other

Bank employees." *Id.* ¶¶ 23-24. The Notice does not allege, however, whether Respondent was aware that the Crowe Report had been circulated to these individuals at that time.

On March 15, 2013, the Bank responded to the OCC's preliminary findings in a letter drafted by Respondent and Senior Executive Officer 1 ("March 15, 2013 Letter"). *See id.* ¶ 27. This letter "did not disclose the existence of the Crowe Report[] or acknowledge its findings, which corroborated the OCC's examination findings." *Id.* Rather, the letter disputed that any BSA/AML deficiencies existed and "asserted that the OCC's preliminary conclusions were based on incomplete and in some instances inaccurate information." *Id.*

Also in March 2013, Executive A was placed on forced leave by the Bank after continuing "to elevate concerns about the BSA/AML program to Bank management." *Id.* ¶ 28. Respondent reassumed her position as the Bank's Acting Chief Compliance Officer, replacing Executive A. *See id.* Executive A then became a whistleblower on or around March 18, 2013, "alerting the OCC to the findings of the Crowe Report." *Id.*

On March 18, 2013, an OCC examiner emailed Respondent to request "a copy of the assessment report of the Bank's BSA program that Crowe Horwath LLC was engaged to perform in January 2013." *Id.* ¶ 29. After consulting with Senior Executive Officer 1 and determining not to tell the OCC about the drafts of the Crowe Report that Bank officials had received,[7] Respondent replied to the OCC examiner on March 22, 2013 ("March 22, 2013 email"). *See id.* ¶¶ 30-33. In this email, Respondent stated: "Crowe did not complete an assessment. While they were engaged

[7] *See* Notice ¶¶ 30 ("I think the right answer is that Crowe did not perform an assessment. That . . . the project was shelved before any report could be issued.") (quoting March 21, 2013 email from Respondent to Senior Executive 1), 31 ("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. 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.*") (quoting March 21, 2013 email from Senior Executive Officer 1 to Respondent) (emphasis added).

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."[8] *Id.* ¶ 33.

On March 25, 2013, the OCC examiner again emailed Respondent, this time asking directly for the draft Crowe Report: "In going through the information that we have, it was our understanding that Crowe Horwath provided management with a report or documents of some kind related to BSA. ***We would like a copy of what bank management received from Crowe, even if it was only preliminary or partial***." *Id.* ¶ 34 (emphasis added). Respondent forwarded this email to Senior Executive Officer 1 and an individual who the Notice terms Senior Executive Officer 2, commenting that the OCC "may have the early assessment even though it was never issued" and asking to meet and discuss.[9] *Id.* ¶ 35.

Respondent replied to the OCC examiner by email later on March 25, 2013 ("March 25, 2013 email"). In her reply, Respondent effectively denied any knowledge of "a draft report coming out of the January BSA Program Review by Crowe Horwath." *Id.* ¶ 36. She stated that she had inquired with Senior Executive 1 and Senior Executive 2 regarding the report's existence and was told that Crowe had utilized a PowerPoint presentation during a February 4th meeting with Bank board members and executive management but had not included the text of the presentation in the

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[8] Among other things, Respondent also asserted that the Bank had "recently asked Crowe to assist us on several projects, including the BSA/AML risk assessment" and that she would "be happy to send [the OCC] a copy of the draft report," which she anticipated would be ready "in time for the next board meeting in early May." *Id.* ¶ 33 (quoting March 22, 2013 email). The Notice makes no allegations regarding whether or when the initial Crowe review was indeed suspended—other than that Respondent states internally that "the project was shelved" and that no final version of the Crowe Report was ever provided to the Bank—or whether Crowe had, in fact, begun a new BSA/AML risk assessment for which a draft report was anticipated by May. As discussed further in Part III.D.1 *infra*, however, the Notice's allegations regarding the content of the March 22, 2013 email, in conjunction with the prior colloquy between Respondent and Senior Executive 1, *see* Notice ¶¶ 30-31 and note 7 *supra*, are sufficient for the undersigned to conclude that the Notice plausibly alleges that through this email Respondent sought to conceal the existence of the various drafts of the Crowe Report from the OCC.

[9] The Notice alleges that in this internal email, Respondent went on to state to the other Bank officers that to her knowledge, the Bank had not made "any statement to the OCC that management received a 'report or document of some type.'" Notice ¶ 35. As above, the undersigned finds that this allegation provides support for the OCC's claim that Respondent consciously endeavored, as the Bank's Chief Compliance Officer, to keep the agency from learning that the Crowe Report existed.

packet provided to the Bank. *See id.* She then indicated that she had attached "a copy of a proposal Crowe submitted to the Executive Oversight Committee on March 1, 2013," *id.*, and concluded by reiterating that the Bank would provide the OCC with a draft risk assessment from Crowe as soon as one was complete, which would be "near the end of April or early May." Response, Ex. 5 (March 25, 2013 email) at 1.[10]

On April 8, 2013, an Assistant Deputy Comptroller for the OCC's San Francisco Field Office contacted Senior Executive Officer 2 by telephone and informed them "that the OCC was aware the Bank possessed a written report from Crowe Horwath." Notice ¶ 37. The Assistant Deputy Comptroller then "directed Senior Executive Officer 2 to produce the Crowe materials in the Bank's possession." *Id.* The Notice makes no allegation regarding whether Senior Executive Officer 2 acknowledged the existence of the Crowe Report at this time.

On April 18, 2013, ten days after the Assistant Deputy Comptroller's direct request, Respondent produced the Crowe Report to the OCC. *See id.* ¶ 38. The cover letter attached to the production ("April 18, 2013 letter") was drafted by Respondent and Senior Executive Officer 1 and signed by Senior Executive Officer 2. *See id.* ¶ 39. This 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 [Crowe Report], dated January 31, 2013, was provided only to [Executive A] with a copy to [Senior Executive Officer 1]. It was left with [Executive A] who continued to work with Crowe Horwath to develop an execution plan. Management now understands from correspondence sent to the OCC by [Manager A] that [Executive A] shared the document with [Manager A]. We are not aware of further distribution.

[10] As discussed *supra* at note 5, Respondent concedes, and the undersigned agrees, that Exhibits 3 through 6 appended to the OCC's Response have been incorporated in full in the Notice and may thus be considered when evaluating the instant motion. *See* Reply at 6.

Id. (bracketing in Notice). The Notice does not allege which draft version of the Crowe Report is referenced in this letter or provided to the OCC, other than that it is represented to be dated January 31, 2013.

Taking the Notice's allegations as true, then, and making the reasonable presumption that the representations in the April 18, 2013 letter regarding the Crowe Report were intended to be read by the OCC to be comprehensive with respect to all draft versions of that report, not only one, it is evident that the letter contains multiple alleged misstatements of fact.

That is, Respondent, who drafted this letter, knew of the existence and findings of the Crowe Report no later than February 13, 2013, when she transmitted an updated electronic copy to Senior Executive Officer 1.[11] *See id.* ¶¶ 21-22. Respondent also was allegedly aware that progressively updated versions of the Crowe Report had been circulated to Senior Executive Officer 1 and at least one Bank Vice President in February 2013 and March 2013.[12] *See id.* ¶¶ 22, 26. Yet the letter represents that the report was provided only to Executive A and Senior Executive 1 and circulated beyond them only to an individual who the Notice terms Manager A. *See id.* ¶ 39. In short, despite alleged exchanges among Respondent, Senior Executive Officer 1, and Senior Executive Officer 2 on multiple occasions regarding how to respond to the OCC's March 21, 2013 and March 25, 2013 requests for the Crowe Report, *see id.* ¶¶ 30-32, 35, the April 18, 2013 letter denied that anyone other than Executive A, Manager A, and Senior Executive Officer 1 had even seen a copy of the report prior to March 25, 2013, *see id.* ¶ 39. Moreover, in response to the OCC's

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[11] It may be that Respondent was aware of the Crowe Report's findings as early as January 29, 2013, but the Notice is not clear on this point and it is, in any event, ultimately immaterial to the issues at hand. *Compare* Notice ¶ 16 (alleging that Senior Executive Officer 1 received a copy of version 0.1 of the Crowe Report on January 29, 2013) *with id.* ¶ 17 (alleging that "[t]he findings of the Crowe Report . . . were received by Respondent and Senior Executive Officer 1" but not specifying when).

[12] As noted above, the Crowe Report also was allegedly distributed to several Bank board members and other Bank employees in February 2013, *see id.* ¶¶ 23-24, but there is no allegation that Respondent herself was aware of that distribution.

March 25, 2013 request for all BSA-related documents that Bank management had received from Crowe, "even if . . . only preliminary or partial," Respondent strongly implied that same day that no draft report existed and attached a different document as putatively representing the sum total of Crowe materials in the Bank's possession. *Id.* ¶¶ 34, 36.

Following the production of the Crowe Report, and based on information in the report and otherwise provided by Executive A, the OCC returned to the Bank to conduct a further examination in May 2013.[13] *See id.* ¶ 41. This examination "found deficiencies in all four pillars of the Bank's BSA/AML program" and led to the issuance of "a comprehensive BSA Consent Order against the Bank on December 5, 2013." *Id.* ¶ 42. Respondent was subsequently terminated from her position at the Bank in September 2015 due to the alleged misconduct described in the Notice. *See id.* ¶ 45. The Notice alleges that "Respondent's continuous concealment of the Crowe Report from the OCC and false statements to the OCC throughout March 2013 until April 18, 2013, resulted in the Bank's guilty plea to conspiracy to obstruct an OCC examination" on February 7, 2018, which in turn caused the Bank to forfeit $368,701,259 and be assessed a $50 million civil money penalty by the OCC. *Id.* ¶ 46. The Notice also alleges that the Bank "suffered significant reputational harm as a result of Respondent's conduct that led to the Bank's guilty plea." *Id.*

There is one final piece of procedural background relevant to the instant motion. This action was filed on April 17, 2018. On August 21, 2018, Administrative Law Judge ("ALJ") C. Richard Miserendino replaced Judge Christopher B. McNeil as presiding judge in this matter by order of the Comptroller of the Currency ("Comptroller"). The Comptroller's order included certain instructions, including that the newly assigned ALJ was to allow the parties to object to any of the prior judge's orders and adopt or revise the orders as deemed appropriate. Respondent

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[13] The Notice alleges that "the OCC returned to the Bank in May 2012," *id.* ¶ 41, but the undersigned concludes based on context that this date is a clear scrivener's error.

filed such objections on October 5, 2018, including an objection that the action should have been voided and restarted entirely before a new, constitutionally appointed ALJ in light of the Supreme Court's decision in *Lucia v. Securities & Exchange Commission*,[14] rather than simply reassigned. *See* Respondent's Objection to Notice of Case Reassignment and Prior Orders ("First Objection") at 14-16. Among other things, Respondent took the position that any constitutionally valid proceeding would need to begin with a refiled Notice of Charges, but that any such Notice would be time-barred because "Enforcement Counsel waited until the day before the expiration of the five-year statute of limitations period to bring its constitutionally invalid action." *Id.* at 16.

Judge Miserendino retired and the case was reassigned to the undersigned in January 2020. As before, the Comptroller directed that the parties be permitted to file objections to the undersigned's assignment to this case or to any of the previous actions taken by the prior ALJs. On March 6, 2020, Respondent filed an objection in accordance with this order, which objected to the undersigned's reassignment ("Second Objection") as well as incorporated by reference all prior objections filed on October 5, 2018. On April 24, 2020, the undersigned issued an Order ("April 24, 2020 Order") addressing Respondent's objections and reviewing all of the prior ALJs' prehearing actions. In the course of this Order, the undersigned rejected Respondent's argument that a new Notice of Charges would have to be filed, holding that "it is both unnecessary and inappropriate for the OCC to void the entire action and start again in order to correct whatever Appointments Clause deficiencies may have existed previously; it is enough for the case to be heard anew by an ALJ who has been properly appointed." April 24, 2020 Order at 5-6. Addressing Respondent's contention that any newly filed Notice of Charges would necessarily be time-barred, the undersigned concluded by noting in dicta that because the action did not need to be refiled,

[14] 585 U.S. ___, 138 S. Ct. 2044 (2018).

"the OCC's claims against Respondent are not time-barred, because they were brought within the applicable limitations period in the first instance and need not be reasserted." *Id.* at 6.

Respondent filed the instant motion on May 28, 2020, arguing in part that the OCC's claims are barred by the five-year limitations period in 28 U.S.C. § 2462 to the extent that the alleged misconduct occurred prior to April 17, 2013. *See* Motion at 4-5. Enforcement Counsel contends that Respondent is foreclosed from making this argument because she is bound by her prior admission to this tribunal that the agency initiated the action one day prior to the expiration of the five-year statutory period. Response at 17-19; *see* First Objection at 16.[15] In the alternative, Enforcement Counsel asserts that Respondent is not entitled to "disregard the ruling of the Tribunal" in the April 24, 2020 Order that the action was timely filed. Response at 19.

The undersigned disagrees with Enforcement Counsel and finds that Respondent is not precluded from invoking the statute of limitations as a basis for dismissal in the instant motion. First, to the extent that Enforcement Counsel is suggesting that the doctrine of judicial estoppel prevents Respondent from arguing that the Notice was not timely filed under Section 2462, the undersigned agrees with Respondent that the prerequisites of that doctrine have not been met. *See* Reply at 1-5. Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase."[16] Even presuming that Respondent's earlier statement that the Notice was filed one day before expiration of the limitations period constitutes a "contradictory argument," Respondent did not prevail in that

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[15] In addition to the statement in the First Objection quoted above, Respondent also averred in her June 13, 2018 opposition to the OCC's Motion to Stay Proceeding that the action commenced "[o]n the day before the statute of limitations on this matter was due to expire." Respondent's June 13, 2018 Memorandum of Points and Authorities in Opposition to the Office of the Comptroller of the Currency's Motion to Stay Proceeding at 1. The previous ALJ ultimately rejected Respondent's arguments and granted the Motion to Stay. *See* June 20, 2018 Order Regarding Enforcement Counsel's Motion to Stay Proceedings.

[16] *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (internal quotation marks and citation omitted).

phase of the case—her argument that the action should be initiated anew was rejected—and therefore gains no "inconsistent advantage" by now arguing that the Notice was untimely.[17] Moreover, while it may indeed be within this tribunal's discretion to consider Respondent's prior statement regarding timeliness to be "a judicial admission to which she is bound," Response at 18, the undersigned declines to do so. No purpose is served by holding Respondent to an offhand rhetorical point rather than deciding the limitations issue on the merits.[18] Finally, the undersigned likewise finds that this tribunal's adoption of Respondent's premise regarding timeliness in rejecting her constitutional argument that the action should be reinitiated does not now foreclose Respondent from asserting that the action, having commenced on April 17, 2018, is time-barred in certain respects by operation of Section 2462.

<u>II. Applicable Statutes</u>

Any evaluation of Respondent's motion must begin with the statutory elements that undergird the OCC's claims. The OCC brings this action against Respondent as an institution-affiliated party ("IAP") of the Bank for a prohibition order under 12 U.S.C. § 1818(e) and first- and second-tier civil money penalties under 12 U.S.C. § 1818(i). *See* Notice ¶¶ 2, 48-50. To merit a prohibition order against an IAP under Section 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) "directly or indirectly 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." 12 U.S.C.

[17] *Id.* (internal quotation marks and citation omitted).

[18] *Cf. Comcast Corp. v. FCC*, 600 F.3d 642, 647 (D.C. Cir. 2010) (doubts about whether prerequisites for judicial estoppel are met should be resolved in favor of deciding second issue on its merits).

§ 1818(e)(1)(A). 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." *Id.* § 1818(e)(1)(B). And the culpability element may be satisfied that the alleged violation, practice, or breach either "involves personal dishonesty" by the IAP or "demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution." *Id.* § 1818(e)(1)(C).

The assessment of civil money penalties under Section 1818(i) also contains an "effect" element of a sort, at least with respect to the criteria necessary for the imposition of the second-tier penalty sought by the OCC.[19] The statute authorizes different levels of money penalties contingent on an increasingly stringent showing by the agency regarding the nature and consequences of the alleged misconduct. The lowest level, a first-tier penalty, may be assessed solely upon a showing of misconduct: specifically, that an IAP has violated some law, regulation, order, or written condition or agreement with a federal banking agency.[20] For a second-tier penalty to be assessed, by contrast, the agency must show not only misconduct,[21] but also some external consequence or characteristic of the misconduct: (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."[22] As with Section 1818(e),

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[19] *See* 12 U.S.C. § 1818(i)(2)(B). The assessment of a third-tier civil money penalty similarly requires a showing of "effect," but the OCC does not seek such a penalty here, and it is accordingly unnecessary for the undersigned to discuss. *See id.* § 1818(i)(2)(C); Notice ¶¶ 49-50 (seeking first- and second-tier civil money penalties).

[20] 12 U.S.C. § 1818(i)(2)(A).

[21] In addition to the violations described in Section 1818(i)(2)(A), a second-tier showing of misconduct can be made as to a breach of a fiduciary duty or the reckless engagement in unsafe or unsound practices while conducting the institution's affairs. *Id.* § 1818(i)(2)(B)(i). Here Enforcement Counsel does not allege that Respondent breached any fiduciary duty, but does allege that she violated certain laws and "recklessly engaged in unsafe or unsound practices in conducting the affairs of the Bank." Notice ¶ 50(a).

[22] 12 U.S.C. § 1818(i)(2)(B)(ii).

fulfillment of this prong for the assessment of a second-tier money penalty does not require satisfaction of all three conditions; a second-tier penalty may be assessed (assuming misconduct has been shown) if the misconduct is part of a pattern even if it has not caused more than a minimal loss to the institution, and so forth.

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 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."[23] This so-called Horne Standard has long guided federal banking agencies, including the OCC, in bringing and resolving enforcement actions.[24] It has also been recognized as "the authoritative definition of an unsafe or unsound practice" by federal appellate courts.[25] The undersigned accordingly adopts the Horne Standard, both for purposes of Respondent's instant motion and going forward in this proceeding, when evaluating allegations of unsafe or unsound practices under the relevant statutes.

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[23] *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).

[24] *See*, *e.g.*, *In the Matter of Patrick Adams*, Final Decision, No. AA-EC-11-50, 2015 WL 8735096 (OCC Sep. 30, 2014) (discussing Horne Standard in detail).

[25] *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).

Here, with respect to the misconduct element of Section 1818(e) and as applicable for Section 1818(i), the OCC alleges in the Notice that Respondent violated 12 U.S.C. § 481 and 18 U.S.C. § 1001 while also engaging in unsafe or unsound practices in conducting the affairs of the Bank.[26] Notice ¶¶ 48-50. With respect to the effect element of Section 1818(e), the OCC alleges that as a result of Respondent's conduct, "the Bank suffered financial loss or other damage and Respondent received financial gain or other benefit."[27] *Id.* ¶ 48(b). And with respect to the remaining element required for the assessment of a second-tier civil money penalty under Section 1818(i), the OCC alleges that "Respondent's violations and/or practices were part of a pattern of misconduct, resulted in pecuniary gain or other benefit to [] Respondent, and/or caused more than minimal loss to the Bank."[28] *Id.* ¶ 50(b).

<u>III. Analysis</u>

Respondent contends that dismissal of this matter is warranted for several reasons. First, she argues that the misconduct elements of Section 1818(e) and Section 1818(i) cannot be satisfied by an alleged violation of 12 U.S.C. § 481, because it is not possible for an individual bank officer such as Respondent to violate that statute. *See* Motion at 2-4. Second, she argues that any allegations based on conduct that occurred prior to April 17, 2013 are barred by the five-year limitations period, because (1) the limitations clock began running at the point of the alleged

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[26] As discussed further *infra*, 12 U.S.C. § 481 addresses the power of OCC examiners to conduct bank examinations, while 18 U.S.C. § 1001 governs the willful concealment or misstatement of material facts in the course of a federal investigation or other proceeding.

[27] In other words, the OCC does *not* allege that the effect element of Section 1818(e) is met by any of the other statutory triggers: probable (as opposed to actual) financial loss or other damage to the Bank and either probable or actual prejudice to the Bank's depositors. *See* 12 U.S.C. § 1818(e)(1)(B). For purposes of the statute of limitations, the undersigned therefore does not consider whether, when, and to what extent these effects may have occurred as a result of Respondent's alleged misconduct.

[28] The sufficiency of the OCC's allegations with respect to the culpability element of Section 1818(e) are not at issue in the instant motion. Nevertheless, for completeness's sake, the undersigned notes that with respect to culpability, the OCC alleges that Respondent's conduct "involved personal dishonesty and/or demonstrated a willful or continuing disregard for the safety and soundness of the Bank." Notice ¶ 48(c).

misconduct rather than at some later date, *see id.* at 12-17, and (2) none of the alleged misconduct "is a continuing offense capable of transforming [] discrete emails into one prolonged act for statute of limitations purposes," *id.* at 5. Third, she argues that "the Notice fails to state a claim because the communications alleged are not material as a matter of law and could not have caused risk of loss or damage to the [B]ank." *Id.* at 20. And finally, she argues that this action is barred by the doctrine of laches. *See id.* at 24. The undersigned will address Respondent's arguments relating to each of the OCC's claims in turn. To begin with, however, it is necessary to determine when, in fact, the statutory limitations period for those claims began to run.

A. Claims Accrual Under Section 2462

This action was filed on April 17, 2018. Under 28 U.S.C. § 2462, the statute of limitations that both parties agree governs OCC enforcement actions,[29] the agency has "five years from the date when the claim first accrued" in which to commence proceedings. Therefore, any claim in the Notice that "first accrued" prior to April 17, 2013—five years before filing—is untimely, and this tribunal cannot entertain it.[30] Conversely, any claim that first accrued on or after April 17, 2013 is timely if filed on April 17, 2018, and Respondents are accordingly precluded from contesting the claim on that basis.

The parties offer contrasting views as to when the first accrual of a claim occurs for the purposes of enforcement actions for orders of prohibition under 12 U.S.C. § 1818(e) and civil money penalties under 12 U.S.C. § 1818(i). Respondent argues that the Supreme Court's decision in *Gabelli v. Securities and Exchange Commission*[31] "established a bright-line rule that the clock

[29] *See* Motion at 4 (acknowledging application of Section 2462 in this case); Response at 19-20 (same).

[30] The full relevant text of Section 2462 is as follows: "Except as otherwise provided by Act of Congress, an action, suit, or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued." 28 U.S.C. § 2462.

[31] 568 U.S. 442, 448 (2013).

starts running in civil enforcement actions when the alleged misconduct occurs." Motion at 14. Enforcement Counsel, by contrast, asserts that Section 2462's five-year limitations period only begins to run once an agency is capable of bringing an enforcement action against a given respondent—which, in the case of statutes with "effect" elements or other multi-pronged prerequisites, such as Sections 1818(e) and 1818(i), may well be later than the date of the alleged misconduct. *See* Response at 19-21. For the reasons set forth below, the undersigned agrees with Enforcement Counsel.[32]

1. The Statutory Limitations Period Does Not Begin to Run Until All Elements of the OCC's Cause of Action Are Complete, Including Some Alleged Effect

The Supreme Court has long made it clear, including in *Gabelli*, that "the 'standard rule' is that a claim accrues when the plaintiff has a complete and present cause of action"—in other words, when all of the elements of an actionable claim have been met and can be pled.[33] It likewise follows that if not all of the elements of a cause of action have been met, then a claim has not yet accrued and Section 2462's five-year limitations period has not yet begun to run. As the Fourth Circuit recently put it in *Federal Energy Regulatory Commission v. Powhatan Energy Fund*, the

[32] The undersigned previously has addressed in depth the question of claim accrual under 12 U.S.C. § 1818 in a separate enforcement action pending before this tribunal, and will furnish that order to the parties for informational purposes upon request. *See* Order Denying Enforcement Counsel's Motion for Partial Summary Disposition and Granting In Part and Denying In Part Respondents' Motion for Summary Disposition on the Statute of Limitations, *In the Matter of Saul Ortega and David Rogers, Jr.*, OCC Nos. AA-EC-2017-44 and -45 (OFIA Apr. 9, 2020) ("Ortega and Rogers SD Order") at 11-31. That matter is currently stayed as the Comptroller decides whether to grant or deny the parties' requests for interlocutory review on the issue of when Section 1818 claims first accrue for the purpose of the statute of limitations. *See* Notice of Submission of Parties' Cross-Motions for Interlocutory Review and Order Granting Respondents' Unopposed Request to Stay Proceedings, *In the Matter of Saul Ortega and David Rogers, Jr.*, OCC Nos. AA-EC-2017-44 and -45 (OCC June 18, 2020). The undersigned will revisit her instant conclusions regarding the statute of limitations in a future order in this case if and when it becomes appropriate to do so in light of further guidance from the Comptroller.

[33] *Gabelli*, 568 U.S. at 448 (internal quotation marks and citation omitted); *see also*, *e.g.*, *FERC v. Powhatan Energy Fund*, 949 F.3d 891, 898 (4th Cir. 2020) (claim accrues "when the plaintiff can file suit and obtain relief") (quoting *Wallace v. Kato*, 549 U.S. 384, 388 (2007)); *Savory v. Cannon*, 947 F.3d 409, 427 (7th Cir. 2020) (all "essential element[s] of [a] claim" are necessary for accrual); *Blanton v. OCC*, 909 F.3d 1161, 1171 (D.C. Cir. 2018) ("A claim normally accrues when the factual and legal prerequisites for filing suit are in place.").

application of Section 2462 to the timeliness of a particular cause of action must take into account "any substantive prerequisites that Congress has placed on the right to file the underlying lawsuit," and "until a prospective plaintiff satisfies any such prerequisites and has a legal right to initiate an action to enforce a claim, that claim has not 'accrued.'"[34]

Gabelli concerned the potential application of the fraud "discovery rule" to Section 2462 in the context of a Securities and Exchange Commission ("SEC") enforcement action.[35] The agency in that case argued that "because the underlying violations sounded in fraud," its claim should "first accrue," and the five-year limitations period should begin to run, not from the date of the allegedly fraudulent misconduct, but from the point at which the agency first became aware of the violations.[36] The Supreme Court unanimously rejected this argument, holding that it was inappropriate to apply the discovery rule to government enforcement actions for civil penalties given the wealth of investigative tools at the agency's disposal and the public policy considerations inherent in "set[ting] a fixed date when exposure to . . . [g]overnment enforcement efforts ends."[37] In so doing, the Court emphasized that "the basic objective of repose underlying the very notion of a limitations period" would be thwarted if parties were left "exposed to [g]overnment enforcement action not only for five years *after their misdeeds*, but for an additional uncertain period into the future."[38]

According to Respondent, *Gabelli* should be construed to stand for the broad proposition that Section 2462's five-year limitations period on agency enforcement actions begins to run at the time of the alleged misconduct, regardless of any other considerations. *See* Motion at 16-17. While

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[34] *Powhatan Energy Fund*, 949 F.3d at 897-98.

[35] *See Gabelli*, 568 U.S. at 447-48.

[36] *Id.* at 447.

[37] *Id.* at 448; *see id.* at 449-52.

[38] *Id.* at 452 (internal quotation marks and citation omitted) (emphasis added).

Respondent acknowledges, as she must, that federal banking agencies are precluded from bringing actions under Sections 1818(e) and 1818(i) unless and until some "impermissible effect" of the alleged misconduct has taken place, *id.* at 12, she contends that *Gabelli* and two other cases—specifically, the Ninth Circuit's 2003 *De la Fuente* decision and the D.C. Circuit's 2018 *Blanton* decision[39]—nevertheless tie the concept of "first accrual" of an agency's claims "to the date of misconduct" even for statutes with distinct "acts, effects, and culpability 'elements'" that must be met for a cause of action to be completed, *id.* at 13. This argument fails in multiple respects.

To begin with, Respondent cannot escape the fact that the essential elements of a cause of action under the statutory provisions under which the SEC had brought its claims in *Gabelli*, 15 U.S.C. §§ 80b-6 and 80b-9, were "complete and present" at the point of the violative misconduct.[40] Thus, absent application of the discovery rule to toll the beginning of the limitations period, there was no apparent dispute in *Gabelli* that the agency's claim would have "first accrued" upon the violation rather than some later date.[41]

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[39] *See Blanton*, 909 F.3d 1161; *De la Fuente v. FDIC*, 332 F.3d 1208 (9th Cir. 2003). Where the Supreme Court has 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").

[40] *See Gabelli*, 568 U.S. at 445 (discussing Investment Advisers Act of 1940 and noting that SEC "is authorized to bring enforcement actions against investment advisers who violate the Act, or individuals who aid and abet such violations").

[41] *See id.* at 448 (alternative to application of discovery rule would be that agency's claim accrues "when a defendant's allegedly fraudulent conduct occurs"). It is true that the provision under which the SEC sought civil money penalties in *Gabelli*, 15 U.S.C. § 80b-9(e), contains a three-tier penalty structure contingent on increased showings by the agency, similar to 12 U.S.C. § 1818(i), and furthermore that one of the required conditions for an assessment of a third-tier penalty under that statute is that the violative conduct "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." 15 U.S.C. § 80b-9(e)(2)(C)(II). However, there is no indication from the Supreme Court's decision in *Gabelli* that the agency in fact sought a third-tier money penalty in that case, and the Court did not discuss the possible ramifications of this quasi-"effect" element to its analysis in any event. Contrary to Respondent's assertion, then, the *Gabelli* Court did not "analyze a statute with an effects prong" in any meaningful fashion, Motion at 17, because the question of Section 2462's interplay with such a statutory scheme simply was not before it. *See Powhatan Energy Fund*, 949 F.3d at 899 (noting that in *Gabelli*, "the SEC had a complete and present cause of action at the time of the disputed conduct").

By contrast, "effect" is indisputably one of three necessary elements that must be satisfied before an agency may bring an action seeking an order of prohibition under Section 1818(e). This means that an individual (1) who engaged in actionable misconduct under Section 1818(e)(1)(A) by, for example, engaging in unsafe or unsound practices in connection with a bank, and (2) who showed the requisite culpability under Section 1818(e)(1)(C) through, for example, demonstrating willful disregard of that bank's safety or soundness, nevertheless could not be the subject of an OCC prohibition action unless and until (3) the OCC also had determined that the individual's misconduct had caused some impermissible effect under Section 1818(e)(1)(B).[42] In a case where an alleged effect does not manifest itself immediately, the OCC's cause of action might not become "complete and present," and its claim thus not yet accrued, until some time after the misconduct has occurred.[43] That is, the "effect" prong of Section 1818(e) is not merely "penalty-enhancing," as Respondent terms it (Motion at 12), but rather a threshold condition *that must be met* before any enforcement action can commence.[44] If this condition is not met until some later point, and the agency has no complete cause of action prior to that point, then Section 2462's limitations period

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[42] *See Proffitt v. FDIC*, 200 F.3d 855, 863 (D.C. Cir. 2000).

[43] *See id.* (noting that "the question of accrual becomes complex when considerable time intervenes between the underlying conduct and the harmful effect"). The undersigned disagrees with Respondent that *Proffitt* "is no longer good law" following *Gabelli*, Motion at 16, for reasons elaborated upon at length elsewhere. *See* Ortega and Rogers SD Order at 20-31. Rather, the undersigned concludes that "the respective holdings of *Gabelli* and *Proffitt* largely can be reconciled when assessing the accrual of claims under Section 1818(e) and . . . Section 1818(i)," *id.* at 22, and that the D.C. Circuit's post-*Gabelli* decision in *Blanton* "does not treat *Proffitt* as having been significantly limited by *Gabelli*," *id.* at 28.

[44] There is greater force to the notion that the "effect" prong of Section 1818(i) necessary for the assessment of second- and third-tier civil money penalties is "penalty-enhancing" rather than a formal prerequisite for suit, given that a first-tier penalty may be assessed upon a showing of misconduct and nothing more. *See* 12 U.S.C. § 1818(i)(2)(A). Nevertheless, both the Comptroller and the D.C. Circuit have held that effect is an essential element of a Section 1818(i) cause of action for a second-tier civil money penalty, and such a result forecloses any contrary interpretation. *See Blanton*, 909 F.3d at 1171 ("two elements" to cause of action); *In the Matter of William R. Blanton*, No. AA-EC-2015-24, 2017 WL 4510840, at *16 (OCC July 10, 2017) ("[T]here are two prongs required for a Second Tier [penalty under Section 1818(i)]: misconduct and effect.").

likewise should not begin to run until that point is reached.[45] To hold otherwise as "a bright-line rule" (*id.* at 14) is to risk the absurd situation where an agency's time to bring its action has expired before its ability to do so has even reached the starting gate.[46]

The Fourth Circuit's *Powhatan Energy Fund* decision illustrates this point well. There, the Federal Energy Regulatory Commission ("FERC") initiated an action in federal district court against several entities for alleged illicit energy trading, seeking substantial civil monetary penalties.[47] The statute authorizing FERC's suit provides "two procedural pathways by which such civil penalties may be assessed and imposed," the choice between which is made by the alleged violators.[48] In this instance, the alleged violators and eventual appellants elected a process by which FERC is obliged to wait upon "the occurrence of a number of statutorily-mandated events," including the expiration of a 60-day period following its assessment of the monetary penalty, before it has the right to file its suit.[49] Consequently, although the "[a]ppellants conducted their last purportedly manipulative trade on August 3, 2010," and FERC issued its show-cause order offering a choice of pathways on December 7, 2014, the agency "did not file its complaint until July 31, 2015."[50] The appellants therefore argued that all but four days of the alleged violations "giving rise to FERC's claim [were] no longer actionable under [Section] 2462's five-year statute

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[45] *See Powhatan Energy Fund*, 949 F.3d at 898 ("That the[] circumstances [according a party the right to bring action] often occur at the moment of the violation does not imply that they invariably will or that every claim must accrue at that time.").

[46] *See id.* at 897 (claim accrual under Section 2462 should be determined "with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought") (quoting *Crown Coat Front Co. v. United States*, 386 U.S. 503, 517 (1967)).

[47] *See generally id.* at 893-96.

[48] *Id.* at 894.

[49] *Id.* at 899.

[50] *Id.* at 896.

of limitations," because that claim had first accrued, and the clock begun to tick, on the dates when the alleged misconduct had occurred.[51]

The panel unanimously rejected this argument, interpreting *Gabelli* to find that when Congress has "plainly conditioned" an agency's right to action on the satisfaction of certain statutory prerequisites, Section 2462's five-year limitations period does not commence until those prerequisites have been satisfied.[52] To hold otherwise, it indicated, would mean that the limitations period would start to run before "the factual and legal prerequisites for filing suit are in place," which would contravene the "settled principles" articulated in *Gabelli*.[53]

Respondent nonetheless contends that the accrual of claims has been applied differently in the context of Section 1818 enforcement actions, with "courts often look[ing] to the acts themselves (rather than later effects) as the first accrual date." Motion at 12. The cases she cites for this proposition, however, do not persuade the undersigned to veer from the straightforward formulation supported by *Gabelli* and *Powhatan Energy Fund,* in which "first accrual" of a claim for limitations purposes occurs when the agency can bring its action, and not before.

In *De la Fuente v. Federal Deposit Insurance Corporation ("FDIC")*, for example, the Ninth Circuit indeed tied the beginning of the limitations period to the date of the allegedly violative transactions at issue, *see id.* at 12-13, but it is unclear whether the asserted impermissible effects also first occurred more than five years before the action was brought, and the question of claim accrual and the effects prong was, again, not before that panel.[54] And in *Blanton v. OCC*, which the undersigned has discussed extensively elsewhere,[55] the D.C. Circuit expressly did *not*

[51] *Id.*
[52] *Id.* at 898.
[53] *Id.*
[54] *See De la Fuente*, 332 F.3d at 1219, 1223.
[55] *See* Ortega and Rogers SD Order at 26-31.

decide whether misconduct that occurred prior to a certain date was time-barred for purposes of the agency's second-tier civil money penalty assessment, because the respondent had caused the bank to honor overdrafts without adequate risk controls "at least ten [times]" within the five-year limitations period, and each of those instances "caus[ed] a new claim to accrue . . . [and] constituted an actionable banking practice as part of a pattern of misconduct."[56] The undersigned therefore holds that some alleged impermissible effect (or, in the case of Section 1818(i), some allegation of an established, completed pattern of misconduct)[57] is necessary in Section 1818 enforcement actions before the statutory limitations clock begins to run.

2. Where a Notice of Charges Alleges Multiple Effects of the Same Alleged Misconduct, the Statutory Limitations Period Begins to Run Upon Occurrence of the Earliest Alleged Effect

Unlike the statute at issue in *Powhatan Energy Fund*, which sets out a defined and uniform set of prerequisite steps to an agency's right to action,[58] Sections 1818(e) and 1818(i) both contain multiple alternative triggers of each provision's "effect" element, any one of which independently is sufficient to cause a claim to accrue and permit the agency to institute prohibition proceedings or impose a money penalty. To assess the timeliness of the OCC's claims in the instant action, then, the undersigned must first determine when a "complete and present cause of action" first manifested with respect to the triggering effects that the agency has alleged.

Counting the multiple options within each subclause, there are six circumstances in which the condition for Section 1818(e)'s "effect" element can separately be met: probable loss or other

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[56] *Blanton*, 909 F.3d at 1172. Similarly, in the Final Decision affirmed by the *Blanton* panel, the Comptroller concluded that it was unnecessary to determine whether alleged misconduct taking place prior to the five-year limitations period was time-barred, because "the events [within the limitations window] constitute a pattern of misconduct . . . that independently supports" the assessment of a second-tier civil money penalty under Section 1818(i). *In the Matter of William R. Blanton*, OCC No. AA-EC-2015-24, 2017 WL 4510840, at *17 (July 10, 2017).

[57] *See* the latter half of Part III.A.2 *infra* for further discussion of Section 1818(i)(2)(B)(ii)'s "pattern of misconduct" element in the context of claim accrual.

[58] *See Powhatan Energy Fund*, 949 F.3d at 898-99.

damage to the institution, actual loss or other damage to the institution, potential prejudice to depositors, actual prejudice to depositors, financial gain to the party in question, and other benefit to that party.[59] Section 1818(i) likewise provides five independent "effect" triggers for a second-tier penalty: a pattern of misconduct, the likelihood of more than minimal loss to the institution, actual loss to the institution that is more than minimal, and either pecuniary gain or other benefit to the party in question.[60] Thus, an agency can bring a cause of action under Section 1818(e), for instance, once it determines that an institution has suffered financial loss as the result of actionable and culpable misconduct, even if there has been no actual or potential prejudice to the depositors. Likewise, a second-tier money penalty under Section 1818(i) may be assessed (assuming misconduct has been shown) if the misconduct is part of a pattern even if it has not caused more than a minimal loss to the institution, and so forth. In that respect, the question of when a Section 1818 cause of action is "complete and present" for limitations purposes may yield different answers depending on which of the triggering conditions of the statute the agency has chosen to base its claims.

Here, the Notice alleges three discrete claims arising from Respondent's conduct—the violation of 12 U.S.C. § 481, the violation of 18 U.S.C. § 1001, and the engagement in unsafe or unsound practices in conducting the affairs of the Bank. *See* Notice ¶¶ 48-50. Each of these claims satisfies the "misconduct" element of a distinct cause of action for (1) a prohibition order under Section 1818(e) and (2) first- and second-tier money penalties under Section 1818(i). With regard to each cause of action, the Notice also alleges multiple "effects" of the alleged misconduct, any

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[59] *See* 12 U.S.C. § 1818(e)(1)(B). To the extent that "other damage" encompasses harms such as probable or actual reputational harm distinct from financial loss, there arguably are eight effects that would be sufficient to complete an agency's claim and allow it to commence proceedings. *See Proffitt*, 200 F.3d at 865 (Silberman, J., dissenting) (qualifying effects for Section 1818(e) "would certainly include reputational harm"); *see also* Notice ¶ 46 (alleging reputational harm to the Bank as a result of Respondent's conduct).

[60] *See* 1818(i)(2)(B)(ii); *see also* Part II *supra*.

of which alone would satisfy the "effect" element of that cause of action and permit the agency to institute enforcement proceedings. *See id.*

Specifically, the OCC alleges that Respondent benefited, financially and otherwise, "through her continued employment at the Bank . . . in the form of salary and bonuses for over two years" between the time of her alleged misconduct and her termination in September 2015, thus fulfilling that prong of Sections 1818(e) and 1818(i)'s respective "effect" elements.[61] *Id.* ¶ 45. The OCC further alleges that Respondent's conduct caused the Bank to suffer financial loss and other damage in the form of its February 7, 2018 "guilty plea to conspiracy to obstruct an OCC examination" and the attendant $418 million in forfeiture and penalties, which is also an actionable effect under Sections 1818(e) and 1818(i).[62] *Id.* ¶ 46. Respondent's conduct also allegedly caused the Bank to suffer "significant reputational harm," although the Notice does not allege when such harm was first incurred. *Id.* Finally, the OCC alleges that Respondent's violations and practices "were part of a pattern of misconduct," which is sufficient in itself to complete a cause of action for a second-tier civil money penalty.[63] *Id.* ¶ 50(b).

The Comptroller and the D.C. Circuit both have held, in the context of statutes of limitation, that "a government agency is not required to take enforcement action at the first moment it could take the action."[64] It follows from this that an enforcement action under Section 1818 need not be premised on the earliest possible triggering "effect," or else every case would be an exercise in guessing at the applicable limitations period for when the agency theoretically first *could have* instituted its action, rather than the clock beginning to run based on the completed cause of action

[61] *See* 12 U.S.C. §§ 1818(e)(1)(B)(iii), 1818(i)(2)(B)(ii)(III).

[62] *See id.* §§ 1818(e)(1)(B)(i), 1818(i)(2)(B)(ii)(II).

[63] *See id.* § 1818(i)(2)(B)(ii)(I).

[64] *In the Matter of William R. Blanton*, OCC No. AA-EC-2015-24, 2017 WL 4510840, at *17; *see Proffitt*, 200 F.3d at 864 (noting that Section 1818(e) "expressly authorizes [an agency] to take action 'whenever' it determines that the statutory prongs are satisfied").

(misconduct, culpability, effect) that the agency actually is alleging.[65] In *Proffitt v. FDIC*, a two-judge majority applied this maxim to find that a Section 1818(e) cause of action predicated on a "later occurring" statutory trigger effect—there, actual financial loss to the institution—was timely under Section 2462 if that effect had first occurred within five years of the action being filed, even if a different trigger effect, *probable* loss to the institution, could have served as the basis for an enforcement action much earlier.[66] In so holding, the panel thus concluded that "[t]he same misconduct can produce different effects at different times, resulting in separate [Section 1818] claims and separate accruals."[67]

Proffitt preceded the Supreme Court's decision in *Gabelli* by thirteen years, and its holding should be viewed through that lens.[68] In particular, it is important to give weight to *Gabelli*'s emphasis on, as this tribunal has previously characterized it, "predictability and certainty in the determination of when a limitations period begins and ends, insofar as that goal can be achieved within the bounds of the statutory elements."[69] At least when an agency's cause of action is complete at the moment of the violative conduct, "*Gabelli* expressly disfavors any interpretation of Section 2462 that would expose prospective respondents to the potential for enforcement proceedings 'not only for five years after their misdeeds, but for an uncertain point into the

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[65] Such an interpretation also gives full effect to the Supreme Court's standard rule that a cause of action be both "complete *and present*" before a claim can accrue and the Section 2462 limitations period can commence. *Gabelli*, 568 U.S. at 448 (internal quotation marks and citation omitted) (emphasis added). A limitations clock retrospectively predicated on identifying the moment that a bank's depositors first *could have been* prejudiced by the alleged misconduct, for example, when an agency is alleging neither potential nor actual depositor prejudice as part of the cause of action that it is required to prove, would predictably transform the initial proceedings before this tribunal into a vehicle for litigating difficult and speculative questions of fact wholly ancillary to the agency's enforcement claims and its statutory burden. Better by far to anchor the applicable limitations period, to the extent possible, to the claims that the agency has actually chosen to assert. *Cf. id.* at 452 (rejecting claim accrual rule that "would hinge on speculation about what the Government knew, when it knew it, and when it should have known it").

[66] *Proffitt*, 200 F.3d at 864-65.

[67] *Id.* at 863.

[68] *See* Ortega and Rogers SD Order at 20-26 (describing the points of alignment and tension between the cases).

[69] *Id.* at 20; *see Gabelli*, 568 U.S. at 448-49.

future.'"[70] But there is nothing in *Gabelli*—or in *Blanton*, which was decided after *Gabelli* and which cites *Proffitt* with approval—that contravenes *Proffitt's* basic conclusion: namely, that when distinct events or conditions can satisfy a statutory "effect" element and serve to complete a prospective cause of action at different times, as with Sections 1818(e) and 1818(i), an agency is not bound to stake its enforcement action on the earliest-manifesting of those effects or initiate the action within five years of when that earliest effect first occurred.[71] To that end, and balancing this premise against "the concern expressed in *Gabelli* for a fixed and certain endpoint to limitations periods where one is feasible,"[72] the undersigned sets forth two conclusions that will guide her analysis of the timeliness of the claims alleged in the Notice.

First, as this tribunal previously has held,[73] a cause of action will be deemed complete with respect to a given claim, and the limitations period will begin to run, upon the *first instance* of a specific alleged triggering "effect" of a specific piece of actionable misconduct—for example, if the OCC alleges, as they do here, that Respondent's violation of 12 U.S.C. § 481 (misconduct) caused her to receive financial and other benefits (effect),[74] then that cause of action is complete once Respondent has benefited from the alleged conduct. Further instances of the same effect of the same alleged misconduct later in time—in this case, additional benefits to Respondent—do not cause the limitations period to run anew, because that claim has already accrued.

Second, although (as discussed above) an agency is not required to premise its enforcement action on the earliest possible occurring effect, the statute of limitations clock with respect to a

[70] Ortega and Rogers SD Order at 20 (quoting *Gabelli*, 568 U.S. at 452).

[71] *See Blanton*, 909 F.3d at 1172 ("[E]ven though the OCC might well have brought an action earlier, its failure to do so does not make the claims it elected to bring untimely.") (internal quotation marks and citation omitted).

[72] Ortega and Rogers SD Order at 24-25.

[73] *See id.* at 31-32.

[74] *See* Notice ¶ 45.

specific cause of action will start based upon the earliest-occurring effect *that is alleged as part of that cause of action*. That is, while agencies have the flexibility to decide which statutory triggers to plead in their notice of charges based on their determination of the appropriate enforcement strategy in a given case, an agency that pleads multiple qualifying "effects" for the same cause of action cannot pick and choose among them to create for itself the most favorable limitations period; rather, the first of the alleged effects to manifest for a particular claim will cause that claim to accrue and the limitations period to commence, regardless whether another of the alleged effects happened far later. The choice to plead multiple alleged effects for a cause of action benefits an agency, because (assuming it can prove misconduct and, as applicable, culpability) it need only carry its burden on one of the effects in order to raise an actionable claim.[75] That being the case, enforcement agencies should not be given free rein to allege effects that will extend the limitations period but that ultimately they might not be required to prove. Tying the accrual of a claim to the manifestation of the first alleged effect for a particular cause of action addresses this concern.

In the instant action, these two conclusions clarify the appropriate starting point for determining whether the causes of action alleged in the Notice have been timely asserted. In support of its Section 1818(e) claims for a prohibition order, the OCC alleges that "[b]y reason of Respondent's misconduct, the Bank suffered financial loss or other damage and Respondent received financial gain or other benefit." Notice ¶ 48(b). Of these alleged effects, Respondent is alleged to have "received financial gain and other benefit from her misconduct in the form of salary and bonuses for over two years" as a result of her continued employment from the time of her alleged misconduct through her termination in September 2015. *Id.* ¶ 45. The first manifestation

[75] *See Pharaon v. Bd. of Governors of Fed. Reserve Sys.*, 135 F.3d 148, 157 (D.C. Cir. 1998) (noting that "[t]he plain language of the statute" permits the imposition of a Section 1818(e) prohibition order if any one of the triggering effects has been proven).

of this alleged benefit predates any alleged financial loss or other damage suffered by the Bank.[76] *See id.* ¶ 46. The undersigned therefore holds that the effect element of the OCC's Section 1818(e) claims was satisfied, and those claims accrued, as soon as Respondent allegedly received a benefit as the result of each alleged piece of misconduct. And by the OCC's own allegation, this benefit inhered nearly simultaneously with the misconduct itself—that is, "throughout March 2013 until April 18, 2013"—because Respondent allegedly benefited at the point that she continued to be employed and receive salary despite having lied and concealed requested materials from OCC examiners.[77] *Id.* ¶ 45.

Likewise, with respect to the OCC's claims for a second-tier civil money penalty under Section 1818(i), the OCC alleges that Respondent's conduct was "part of a pattern of misconduct, resulted in pecuniary gain or other benefit to [] Respondent, and/or caused more than minimal loss to the Bank."[78] *Id.* ¶ 50(b). Here, again, the alleged benefits to Respondent predate the loss

[76] To the extent that Respondent wishes to show that the Bank first suffered loss as a result of her alleged misconduct at some point prior to April 17, 2013, she may endeavor to do so at a later stage. *See* Motion at 19 (arguing that the agency has "cherry-picked" the Bank's alleged $418 million loss in February 2018). Respondent should be aware, however, that the expenditure of "more than minimal resources[] immediately upon receiving the OCC's adverse draft findings in February 2013," or anything similar, does not constitute loss suffered by reason of Respondent's conduct. *Id.* Moreover, any argument that this action is untimely because the Bank first suffered loss prior to April 17, 2013 will be considered in the context of the undersigned's findings with respect to the OCC's allegations of continuing violations, as discussed in Parts III.B.3 and III.C.2 *infra*.

[77] *See* Notice ¶ 45 (alleging that Respondent benefited "through her continued employment at the Bank until the Bank became aware of the extent of Respondent's concealment from, and false statements to, the OCC in August of 2015"); Motion at 18 (arguing that Respondent "incurred that benefit immediately at the moment that her alleged misconduct did not cause her to be terminated"). The undersigned notes that if the agency wishes to carry its burden with respect to this allegation at the appropriate stage of the proceeding, it will have to show that absent Respondent's misconduct, she would have been terminated earlier than 2015; it will not be enough to demonstrate that her allegedly false statements and concealment of the Crowe Report led to her termination two years later once the Bank understood the scope of what she had done. Put another way, if Respondent would have remained employed by the Bank simply by not engaging in the alleged misconduct to begin with, then it cannot be said that the alleged misconduct resulted in her continuing to receive salary and bonuses for two years. *See* 12 U.S.C. § 1818(e)(1)(B)(iii) (requisite effect when IAP "has received financial gain or other benefit *by reason of* such [alleged] violation, practice, or breach") (emphasis added). For now, however, the OCC's allegations on this topic are sufficient to state a claim, drawing "all reasonable inferences from those allegations in the [agency's] favor." *Hurd*, 864 F.3d at 678.

[78] Because the assessment of a first-tier civil money penalty requires no effect element, *see* 12 U.S.C. § 1818(i)(2)(A) (agency may assess first-tier penalty against any IAP who engages in applicable violative conduct), the OCC's claims under that provision accrued for limitations purposes at the point of the alleged misconduct and are resolved

allegedly suffered by the Bank. *See id.* ¶¶ 45-46. As for the pattern of misconduct, the D.C. Circuit has held that "each instance of an unsafe and unsound practice triggers a new claim if part of a pattern of misconduct," and that logic naturally extends to the individual instances of misconduct that make up the pattern itself.[79] Therefore, whether by reason of Respondent's alleged financial benefits or the continuation of an alleged pattern, the effect element of the OCC's second-tier Section 1818(i) claims was similarly satisfied, and those claims accrued, at or near the time of the alleged violations or practices. Given that, the undersigned must now determine the timeliness of the OCC's various causes of action under Sections 1818(e) and 1818(i)—to wit, Respondent's alleged violation of 12 U.S.C. § 481, her alleged violation of 18 U.S.C. § 1001, and her alleged engagement in unsafe or unsound bank practices, all of which are alleged to have "occurred continuously and repeatedly throughout March 2013 until April 18, 2013"[80]—based on these manifested effects.

B. The OCC's Section 481 Claims

The undersigned now turns to the merits of Respondent's arguments as to each of the OCC's claims, beginning with those claims predicated on 12 U.S.C. § 481. The undersigned finds that, although the Notice does make out a cognizable cause of action for Respondent's alleged violation of Section 481, any such claim first accrued prior to April 17, 2013 and consequently has not been timely asserted within the applicable five-year limitations period.

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commensurately—that is, claims for first-tier civil money penalty survive as to alleged violations of 18 U.S.C. § 1001 and alleged unsafe and unsound practices, because violative conduct occurred on or after April 17, 2013, *see* Parts III.C.3 and III.D.3 *infra*, but are untimely with respect to alleged violations of Section 481, as no such violations occurred within the limitations period, *see* Part III.B.2 *infra*.

[79] *Blanton*, 909 F.3d at 1171.

[80] Notice ¶ 45.

1. The Notice States a Claim for Violation of Section 481

The OCC alleges that Respondent violated 12 U.S.C. § 481 by concealing and lying about the existence of a third-party auditor report that was materially relevant to the subject of the OCC's examination, "despite unambiguous, repeated, and direct requests by the OCC" that the report be provided. Notice ¶ 40. Respondent asserts in response that even if the OCC's allegations were true, such conduct would not constitute a violation of the statute in question for the purposes of an agency enforcement action under 12 U.S.C. § 1818. *See* Motion at 2-4. The undersigned disagrees with Respondent.

Among other things, Section 481 authorizes OCC examiners to conduct 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."[81] Both Respondent and Enforcement Counsel appear to agree that the 2013 examination of the Bank's BSA/AML compliance program alleged in the Notice was conducted pursuant to the OCC's powers under this statute. *See* Motion at 2-3; Response at 7-8. According to Enforcement Counsel, and as a matter of common sense, these powers necessitate that examiners be given "prompt and unrestricted access to a bank's officers, directors, and employees as well as to a bank's books, records, and documents of any type." Response at 7. While Respondent does not dispute that OCC examiners are entitled to such access, she contends that "Section 481 does not regulate the conduct of individual bank officers or executives." Motion at 3 (emphasis omitted). Specifically, she argues that the statute does not impose any particular duty on such individuals, as distinct from the bank

[81] In addition to describing the scope of OCC authority to examine banks, the statute addresses the Comptroller's appointment of examiners, the publication of examination reports, the consequences of a bank's refusal to pay assessments or fees arising as a result of an examination, the manner by which OCC examiners are to be employed and compensated, and the promulgation of regulations for the computation, assessment, and collection of examination expenses. *See* 12 U.S.C. § 481.

itself, to provide documents when requested or to facilitate the OCC's examination. *See id.* at 3-4. Respondent therefore maintains that the OCC is not entitled to premise an enforcement action on any individual's alleged violation of 12 U.S.C. § 481. *See id.*

Respondent is correct that Section 481 prescribes no specific penalties for bank officers who conceal the existence of requested documents from the OCC. Indeed, the only parts of the statute that discuss the eventuality of a "refusal to give [] information in the course of [an] examination" appear to do so solely in the context of the examination of a bank's *affiliate* and are thus doubly inapposite here.[82] Yet this does not mean that bank officers may freely withhold information from OCC examiners without consequence. As Enforcement Counsel observes, "[t]he only way an institution can comply with the requirement to provide prompt and complete access to information is through individuals." Response at 9 (internal quotation marks omitted). To the extent that examiners are entitled to see a bank's documents in the course of their "thorough examination of all [its] affairs," then, it follows that such documents must be provided upon request, and the statute imposes a duty on the bank to comply with these requests that is necessarily effectuated by its individual officers and employees.[83] If Section 481 itself does not offer an

[82] *Id.* Congress defines "affiliate" to encompass "any corporation, business trust, association, or other similar organization" with a given relationship to a national bank, which undeniably excludes individuals such as Respondent. 12 U.S.C. § 221a(b). Enforcement Counsel is right to note that that Respondent incompletely quotes only the second paragraph of Section 481, which addresses what happens 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." 12 U.S.C. § 481; *see* Response at 11. Yet the only other reference in that statute to the obstruction of an examination *also* concerns the examination of a bank's affiliate rather than the bank itself: "[I]n 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 . . . 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." *Id.* (emphasis added). At least on its face, then, Section 481 does not impose penalties on *anyone* for refusal to provide information during the examination of a national bank, whether the bank or its constituent executives, officers, and employees.

[83] It is worth noting that Respondent nowhere disputes that the Bank, as an institution, was statutorily required to cooperate with the OCC's examination and to promptly and fully provide access to any bank documents requested by the examiners, including the Crowe Report. *See also* Notice ¶ 44 (alleging that the Bank acknowledged to the

explicit mechanism to enforce this duty and deter its violation, then this is all the more reason to conclude that the initiation of an agency enforcement action under Section 1818 may serve to operate as such a mechanism, assuming the other statutory criteria are met.

This is confirmed by a closer look at Section 1818's misconduct prongs. Section 1818(e) authorizes the OCC to seek a prohibition order against any IAP who has "directly or indirectly violated any law or regulation" and otherwise satisfies the criteria enumerated in Part II *supra*.[84] Section 1818(i) in turn permits the assessment of a civil money penalty when, among other things, an IAP "violates any law or regulation."[85] In both cases, 12 U.S.C. § 1813(v) prescribes that the class of conduct constituting an actionable "violation" is 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 or abetting a violation."[86] The undersigned agrees with Enforcement Counsel that if Respondent caused the Bank not to comply with its statutory duty to provide prompt access to documents requested by OCC examiners under Section 481, then she has violated Section 481 within the meaning of 12 U.S.C. § 1813(v), and an enforcement action may be premised on that alleged violation. Respondent's argument to the contrary must therefore fail.

2. Any Section 481 Claim Based on Respondent's Alleged Refusal to Provide the Crowe Report First Accrued Prior to April 17, 2013

The Notice makes two broad allegations regarding Respondent's conduct during the relevant period in March and April 2013. First, the Notice alleges that Respondent "continuously concealed the Crowe Report from the OCC . . . despite [the agency's] unambiguous, repeated, and

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OCC in March 2013 that "it is the Bank's responsibility to provide complete, accurate, and timely information to the OCC in the examination process").

[84] 12 U.S.C. § 1818(e)(1)(A)(i)(I).

[85] *Id.* § 1818(i)(2)(A)(i).

[86] 12 U.S.C. § 1813(v).

direct requests" for that document. Notice ¶ 40. Second, the Notice alleges that Respondent "made continuous and repeated false statements to the OCC" regarding the existence of the Crowe Report. *Id.* ¶ 45. In support of these allegations, the OCC adduces both internal communications among Respondent and other Bank officers and external communications between the Bank and the OCC that Respondent either received or had a hand in drafting, whether partially or fully. *See id.* ¶¶ 17, 22, 26-39. The specific communications from the Bank to the OCC are alleged to have taken place on (1) ***March 15, 2013***, responding to the OCC's preliminary examination findings; (2) ***March 22, 2013***, denying that any report from Crowe had been provided to the Bank; (3) ***March 25, 2013***, reiterating a lack of knowledge of any draft Crowe Report; and (4) ***April 18, 2013***, attaching the Crowe Report and making representations as to why it had not been provided earlier. *See id.* ¶¶ 27, 33, 36, 38-39.

Respondent observes that of the four Bank communications to the OCC alleged in the Notice, only one—the April 18, 2013 email providing the Crowe Report—occurred within five years of the agency instituting the instant action on April 17, 2018. Motion at 4-5. Respondent therefore argues that any causes of action predicated on an alleged violation of 12 U.S.C. § 481 have not been timely asserted, because Respondent's alleged refusal to provide the agency with requested documents, as evinced through the March 2013 emails, occurred prior to the relevant limitations period. *See id.* at 11. Respondent contends that Section 481 "targets discrete acts" of refusal and that consequently each communication from the Bank to the OCC should be viewed independently, rather than as a continuing violation of that statute, for the purpose of determining when the agency's Section 481 claims first accrued. *Id.*

In response, Enforcement Counsel argues that because the OCC examiner "did not have unfettered access to all of the Bank's books and records" until the Crowe Report was produced on

April 18, 2013, the misconduct element of an alleged violation of Section 481 was not satisfied before that point, and the limitations period for the Section 481 claims alleged in the Notice did not begin to run until then. Response at 22. The undersigned disagrees with Enforcement Counsel and concludes that any actionable violation of Section 481 set forth in the Notice is alleged to have taken place prior to April 17, 2013 and is therefore time-barred.

As noted above, Section 481 confers an obligation upon each bank that is the subject of an examination, and all employees and officers thereof, to permit the examination to take place and provide access to "any information required in the course of [that] examination."[87] There is no question that Respondent allegedly refused to produce the Crowe Report when directly asked to do so by an OCC examiner; indeed, the Notice alleges that Respondent consciously and repeatedly contrived to give the examiner the impression that such a report did not exist. *See* Notice ¶¶ 29-36. Assuming, as the undersigned has done, that this conduct (if proven) would constitute a violation of Section 481, the timeliness of such a claim depends upon a determination of two factors: first, whether any part of this alleged conduct—that is, Respondent's refusal to provide the Crowe Report upon request—*affirmatively* occurred on or after April 17, 2013; and second, if it did not, whether there is some reason that a claim arising from that conduct would not have immediately accrued upon the point of refusal.

The undersigned finds that Respondent's alleged conduct after April 17, 2013 does not amount to a Section 481 violation. While Enforcement Counsel suggests that Respondent continued to withhold access to the Crowe Report into the limitations period, *see* Response at 22, the undersigned cannot conclude that the ten-day delay between an OCC official directing Senior Executive 2 to produce the Crowe Report on April 8 and Respondent providing that report to the

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[87] 12 U.S.C. § 481; *see* Part III.B.1 *supra*.

OCC on April 18, standing alone, is enough to sustain a Section 481 cause of action against Respondent.[88] *See* Notice ¶¶ 37-38. As Respondent notes, the refusal to produce a document upon request is most naturally characterized as a discrete act rather than an ongoing circumstance,[89] and Respondent is not alleged to have refused to produce anything within the limitations period. Nor does the Notice even allege how soon Respondent was told of the agency's April 8 request prior to her producing the Crowe Report on April 18. Certainly, Respondent allegedly refused to provide the Crowe Report on other occasions prior to the April 8 request, but the undersigned will not presume that this refusal extended into the limitations period if the only allegation within that period concerns Respondent producing the report as requested.

Neither can it be said, as Enforcement Counsel would have it, that the agency's causes of action on the alleged Section 481 violations were not complete until April 17, 2013 or later.[90] The undersigned has concluded that all elements of such a claim with respect to both a Section 1818(e) prohibition order and a Section 1818(i) second-tier civil money penalty were met as soon as Respondent was alleged to have benefited from her obstruction of the OCC examiner, which occurred—by the OCC's own reckoning—nearly contemporaneously with each act of refusal to provide the Crowe Report.[91] *See* Part III.A.2 *supra*.

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[88] This same conclusion does not necessarily hold for an alleged violation of 18 U.S.C. § 1001 or for the alleged engagement in unsafe or unsound practices relating to the affairs of the Bank, as explained in Parts III.C.1 and III.D.1 *infra*.

[89] *See* Motion at 12; *cf. Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) (holding that "discrete discriminatory acts are not actionable if time-barred, even when they are related to acts alleged in timely filed charges"); *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1061 (9th Cir. 2002) (applying *Morgan* to find that 42 U.S.C. § 1983 claim challenging abatement action was untimely based on when the action was initiated even though abatement proceedings continued into limitations period); *Long v. Howard Univ.*, 512 F. Supp. 1, 17 (D.D.C. 2007) (refusal to provide requested accommodation is "discrete act" rather than continuing state of affairs).

[90] *See* Response at 22 (arguing that "the documentary evidence and context demonstrates that the misconduct prong [for the agency's Section 481 claims] was not met until April 18, 2013").

[91] The OCC's assessment of a first-tier civil money penalty for the alleged violation of Section 481 likewise accrued at the moment of the alleged misconduct, given the lack of any effect element to potentially delay completion of that cause of action. *See* 12 U.S.C. § 1818(i)(2)(A).

3. Section 481 Cannot Be Construed So That Respondent's Alleged Conduct Constitutes a Continuing Violation

The Notice's Section 481 claims are only timely, then, if Respondent's alleged conduct that occurred prior to April 17, 2013 constituted a continuing violation of that statute up until the point that the Crowe Report was finally provided to the OCC.[92] Continuing violations (or "continuing offenses") as an exception to the general rule of claim accrual is a doctrine that "should be applied in only limited circumstances," given that "for all practical purposes," it extends a statute of limitations "beyond its stated term."[93] In its most common form, the doctrine is germane when the nature of the violation "is one that could not reasonably have been expected to be made the subject of a lawsuit when it first occurred because its character . . . did not become clear *until it was repeated during the limitations period*, typically because it is only its cumulative impact . . . that reveals its illegality."[94] This form of the doctrine does not "make actionable either a discrete unlawful act or the lingering effect of an unlawful act," and "the mere failure to right a wrong cannot be a continuing wrong."[95] Rather, the doctrine applies in this way "if the fact of the violation becomes apparent only by dint of the cumulative effect of repeated conduct."[96]

It is evident here that Respondent's alleged conduct cannot be considered a "continuing violation" in this way, because the Notice alleges discrete acts of refusal and obstruction that each were known to be violative by the OCC at the time they occurred, given the contemporaneous knowledge the agency had regarding the contents and existence of the Crowe Report. *See* Notice ¶ 28. And, as discussed above, the statute likewise contemplates discrete acts of violation, rather

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[92] *See United States v. McGoff*, 831 F.2d 1071, 1079 (D.C. Cir. 1987) ("[T]he statute of limitations . . . for continuing offenses runs from the last day of the continuing offense.") (emphasis omitted).

[93] *United States v. Toussie*, 397 U.S. 112, 115 (1970) (internal quotation marks and citation omitted).

[94] *Taylor v. FDIC*, 132 F.3d 753, 765 (D.C. Cir. 1997) (internal quotation marks and citations omitted) (emphasis added).

[95] *Earle v. Dist. of Colum.*, 707 F.3d 299, 306 (D.C. Cir. 2012) (internal quotation marks and citation omitted).

[96] *Id.*

than a violation that is continuous and ongoing. In other words, it was not the "cumulative impact" of Respondent's conduct extending into the limitations period that revealed "its illegality" under Section 481 but each violative act individually, and this form of the doctrine therefore cannot be utilized to toll the accrual of the agency's Section 481 claims.

The second version of the doctrine, which courts have "occasionally applied,"[97] is relevant "if the text of the pertinent law imposes a continuing obligation to act or refrain from acting."[98] In such a circumstance, "a new claim accrues each day the violation of the statute is extant[,] and. . . the statute of limitations is appropriately calculated from the latest violation."[99] Courts have found, for example, that this form of the continuing violations doctrine applies when a statute requires the proper disposal of toxic waste and the waste remains undisposed of into the limitations period.[100] Likewise, where a company fails to receive the Federal Reserve Board's approval as required by statute before taking control of a bank, the agency's action against that company has been deemed timely when the unapproved control began more than five years prior to the action but persisted into the limitations period.[101]

However conceptualized, the applicability of the continuing violations doctrine depends heavily on the relevant statutory text.[102] In *United States v. Toussie*, the Supreme Court determined that the failure to register for the Selective Service within a prescribed statutory period did not give rise to a new violation of that statute for every day past the period that the offender remained

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[97] *Texas v. United States*, 891 F.3d 553, 563 (5th Cir. 2018).

[98] *Earle*, 707 F.3d at 307.

[99] *Texas*, 891 F.3d at 563; *see also Earle*, 707 F.3d at 307 ("Where a statute imposes a continuing obligation to act, a party can continue to violate it until the obligation is satisfied and the statute of limitations will not begin to run until it does.") (internal quotation marks and citation omitted).

[100] *See Newell Recycling Co. v. EPA*, 231 F.3d 204, 206-07 (5th Cir. 2000).

[101] *See Interamericas Investments, Ltd. v. Bd. of Governors of Fed. Reserve Sys.*, 111 F.3d 376, 382 (5th Cir. 1997).

[102] *See Texas*, 891 F.3d at 563; *Earle*, 707 F.3d at 307.

unregistered.[103] In so holding, the Court stated that an offense should not be susceptible to being construed as "continuing" past its commission "unless the *explicit language* of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one."[104] With respect to the particular statute at issue in that case, the *Toussie* Court concluded that there was "no language in [the] Act that clearly contemplates a prolonged course of conduct," and "nothing inherent in the act of registration itself which makes failure to do so a continuing crime."[105]

In the present instance, the undersigned finds that Section 481 cannot fairly be read to construe the refusal to comply with an OCC examiner's request for documents to be a continuing offense. As with the statute in *Toussie*, there is nothing in the text of Section 481 to compel the conclusion that the continued failure to produce a document after it has been requested should constitute a renewed or ongoing violation of the statute, unless or until a new request is made and the opportunity to comply with the statute again arises.[106] Nor, as discussed above, is there anything inherent in the act of refusing a request for a document that naturally makes that refusal

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[103] *See Toussie*, 397 U.S. at 119 ("[W]e do not think the Act intended to treat continued failure to register as a renewal of the original crime or the repeated commission of new offenses.").

[104] *Id.* at 115 (emphasis added). Although *Toussie* concerned criminal offenses, the continuing violations doctrine has been applied or examined more broadly in numerous non-criminal contexts, including agency enforcement actions. *See*, *e.g.*, *Morgan*, 536 U.S. at 117 (hostile work environment claim); *Texas*, 891 F.3d at 561 (Nuclear Waste Policy Act violation); *Interamericas Investments*, 111 F.3d at 382 (assessment of civil money penalty).

[105] *Toussie*, 397 U.S. at 121-22.

[106] To the extent that Section 481 also imposes a duty on individual bank officers "to permit an examiner to make an examination," there is no allegation that Respondent denied such permission or had the authority to do so, and accordingly the undersigned need not determine whether the refusal to permit an examination, as distinct from the refusal to provide prompt access to requested information, could constitute a continuing offense for limitations purposes. *See* 12 U.S.C. § 481. While the Notice does allege that "the findings of the Crowe Report and information from the whistleblower were critical" to the OCC's reexamination in the Spring of 2013, Notice ¶ 41, it nowhere charges that Respondent's alleged obstruction and concealment with respect to the Report in fact prevented the examination from taking place—nor could it have done so, given that (as Respondent observes) the OCC allegedly was in possession of the relevant facts and findings of the Crowe Report through its communications with the whistleblower, and the delay in receiving corroboration of those findings in the Crowe Report itself is not alleged to have impacted the examination in any concrete or significant way. *See* Motion at 23 (Notice does not allege that withholding of Crowe Report prevented examination from taking place); Notice ¶¶ 27-28 (Crowe Report "corroborated the OCC's examination findings").

into a continuing state of affairs. *See* Part III.B.2 *supra*. While it may reasonably be imputed from the Notice's allegations that Respondent followed a conscious course of conduct designed to give OCC examiners the impression that the Crowe Report did not exist and could not be produced, *see* Notice ¶¶ 29-36, such a course could only be effectuated, for purposes of violating Section 481, when the OCC made requests of Respondent that she could then choose to accommodate or demur. Since the agency is not alleged to have made any such requests during the limitations period, any claim arising from Respondent's refusal to produce the Crowe Report necessarily accrued prior to April 17, 2013, and as a result the OCC's Section 481 claims have been untimely asserted.

C. The OCC's Section 1001 Claims

Respondent argues that any claims predicated on a violation of 18 U.S.C. § 1001 also are untimely because her alleged misstatements constituted "affirmative act[s] of concealment" that each occurred prior to the applicable limitations period, Motion at 9, rather than a continuing scheme to conceal that extended past April 17, 2013. Alternatively, Respondent asserts that the Notice's allegations cannot constitute Section 1001 violations because those alleged misstatements are either immaterial or not clearly false on their face. *See id.* at 20-23. The undersigned disagrees with Respondent and finds that the OCC's Section 1001 claims have been both timely asserted and adequately pled.

1. Respondent's Concealment of the Crowe Report is Alleged to Have Violated the "Scheme" Provision of Section 1001

18 U.S.C. § 1001, which broadly prohibits "deceptive practices aimed at frustrating or impeding the legitimate functions of government departments or agencies,"[107] encompasses both the making of materially false statements and the concealment of material facts from government

[107] *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).

officials in the course of their duties.[108] 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."[109] 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."[110] 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.[111]

Respondent contends as a threshold matter that the Notice pleads only a violation of the false statement prong of Section 1001 and not the concealment prong—that is, subsection (a)(2), but not (a)(1). *See* Motion at 9; Reply at 10-11. Drawing all reasonable inferences from the Notice's allegations in the agency's favor, the undersigned disagrees.[112] The Notice asserts at multiple points that Respondent's alleged violations of 18 U.S.C. § 1001 "occurred continuously and repeatedly throughout March 2013 until April 18, 2013," Notice ¶ 45; *see also id.* ¶¶ 43, 46, and the alleged conduct includes not only false statements but a conscious scheme to conceal the existence of the Crowe Report from the OCC examiners, *see id.* ¶¶ 30-35.[113] Because false statements and concealment are, as noted, merely different ways in which a Section 1001 violation may be proven,[114] and because the Notice unambiguously alleges that Respondent both made false statements and took steps to conceal the existence of the Crowe Report during the relevant period,

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[108] *See United States v. Craig*, 401 F. Supp. 3d 49, 62 (D.D.C. 2019) (describing elements of Section 1001).

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

[110] 18 U.S.C. § 1001(a)(1).

[111] *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), but the undersigned finds that it is unnecessary to determine whether this subsection applies or has been pled in concluding that the OCC's Section 1001 claims have been timely asserted.

[112] *See Hurd*, 864 F.3d at 678.

[113] *See also* notes 7-9 *supra*.

[114] *See Stewart*, 433 F.3d at 319.

the undersigned finds that the Notice adequately pleads concealment as well as false statements as a component of its Section 1001 claims.[115]

2. The Notice Alleges Continuing Violations of Section 1001 Extending Into a Timely Limitations Period

Respondent argues that neither false statements nor the concealment of material facts under Section 1001 can constitute a continuing offense sufficient to toll the limitations period for alleged conduct occurring prior to April 17, 2013. *See* Motion at 6-9. Alternately, Respondent contends that the agency's Section 1001 claims are untimely because any "scheme" concerning the concealment of the Crowe Report necessarily ended on April 8, 2013, when the OCC's Assistant Deputy Comptroller informed Senior Executive Officer 2 that the agency knew of the Report and was therefore "aware of the very thing that was allegedly concealed." *Id.* at 10.

In response, Enforcement Counsel maintains that the District of Columbia Circuit's decision in *Bramblett v. United States*,[116] which held that Section 1001 scheme violations are continuing offenses for the purpose of calculating a statutory limitations period, is binding on this tribunal. *See* Response at 13. Enforcement Counsel also argues that Respondent's alleged scheme of concealment, of which her multiple misrepresentations to the OCC and her internal discussions with other senior Bank officers were a constituent part, did not end until April 18, 2013, "when the Crowe Report was finally produced." *Id.* at 14. The undersigned agrees with Enforcement Counsel in both respects and finds that *Bramblett* compels the conclusion that a violation of Section 1001's concealment prong constitutes a continuing offense.

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[115] *See Iqbal*, 556 U.S. at 679 ("When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."); *cf. Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) ("Federal pleading rules . . . do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted.").

[116] 231 F.2d 489 (D.C. Cir. 1956).

In *Bramblett*, a member of Congress was alleged to have violated 18 U.S.C. § 1001 by falsely representing that he had hired a new clerk in order to draw extra paychecks over the course of a number of months.[117] The defendant argued that the action was time-barred because the false representation itself had occurred prior to the applicable limitations period.[118] The Court of Appeals rejected this argument, holding that the defendant was not only charged with making a false statement, but with knowingly benefiting from that false statement over a span of time in "[a] continuing crime of falsification by a scheme."[119] Consequently, "the period of limitations did not begin to run until the scheme ended"—that is, until "the conduct of the defendant which constituted the scheme" had terminated—and the action was deemed timely brought.[120]

According to Enforcement Counsel, Respondent's alleged conduct in the instant case constituted "a single scheme to conceal" that did not end until the Crowe Report was produced, and *Bramblett* is therefore binding as to when the limitations period for the agency's Section 1001 scheme claim began to run. Response at 13. Respondent, on the other hand, argues that *Bramblett* was rendered obsolete by the Supreme Court's decision in *Toussie* fourteen years later, and that under *Toussie*'s criteria, there is no justification for construing Section 1001 as giving rise to continuing offenses. *See* Motion at 6-9.

The question of whether *Toussie* significantly abrogated *Bramblett*'s holding with respect to scheme offenses under Section 1001 has been examined in three recent district court decisions,

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[117] *See id.* at 490

[118] *See id.* at 490-91.

[119] *Id.* at 491. The undersigned makes no determination whether the making of false statements under subsection (a)(2) of 18 U.S.C. § 1001 can ever constitute continuing offenses standing alone, outside the context of an alleged scheme violation, because *Bramblett* did not decide that question and its disposition is unnecessary for purposes of the instant motion. *See United States v. Dunne*, 324 F.3d 1158, 1164 (10th Cir. 2003) (false statements under Section 1001 "do not typically involve a prolonged course of conduct, and thus do not fall within the continuing offense doctrine").

[120] *Bramblett*, 231 F.2d at 491, 492.

all of which concluded that *Bramblett* is still dispositive.[121] Moreover, as two of those decisions note, the D.C. Circuit's 1999 decision in *United States v. Hubbell* treats *Bramblett* approvingly and "clarifie[s] that the D.C. Circuit continues to interpret Section 1001 as encompassing continuing crimes of falsification by scheme."[122] The undersigned therefore finds that *Bramblett* remains good law and is applicable here.

Finally, Respondent argues that even if *Bramblett* applies, the agency's Section 1001 claims are nevertheless untimely because any scheme of concealment ended on April 8, 2013, ostensibly "the date that the concealment terminated." Reply at 12. This is incorrect. Respondent's alleged concealment of the Crowe Report did not end on April 8, 2013 merely because the OCC told a Bank official that it knew of the Report's existence. Neither the Notice nor Respondent make any assertion that anyone at the Bank other than the whistleblower—let alone Respondent herself—acknowledged to the OCC that the Crowe Report existed until it was produced on April 18, 2013. Therefore, the concealment scheme, to the extent there was one, must be said to extend until that later date. If a child has taken a wrapped present from under the Christmas tree, hidden it from his mother, and is now denying it exists, the fact that the present is being hidden does not change merely because the mother tells the child that she knows that the present is missing and demands its return. Rather, the child's scheme to conceal the present by hiding it and denying knowledge of it continues until the point that the present is actually produced—or, at the very least, until the child admits that the present is in his possession. The undersigned finds, based on

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[121] *See United States v. Saffarinia*, 424 F. Supp. 3d 46, 59 (D.D.C. 2020) (finding that a scheme to conceal "is a continuing offense for purposes of the statute of limitations" in the D.C. Circuit); *Craig*, 401 F. Supp. 3d at 75 (question of limitations period for Section 1001 scheme offenses "is squarely governed by [*Bramblett*]"); *United States v. Michel*, Crim. No. 19-148-1, 2019 WL 5797669, at *6 (D.D.C. Nov. 6, 2019) (analyzing the cases in detail and concluding that "the D.C. Circuit's focus on the language of Section 1001 in *Bramblett* is consistent with the second prong of *Toussie*").

[122] *Michel*, 2019 WL 5797669, at *7 (internal quotation marks, citation, and bracketing omitted) (discussing *United States v. Hubbell*, 177 F.3d 11 (D.C. Cir. 1999)); *see also Craig*, 401 F. Supp. 3d at 76 (noting that *Hubbell* "relied on *Bramblett*" and "reaffirmed" its holding "that a scheme offense is not complete until the scheme ends").

Bramblett and in the context of Respondent's earlier internal communications in which she allegedly repeatedly contrived to keep the agency from learning about the Crowe Report, *see* Notice ¶¶ 30-32, 35, that the period between the OCC demanding the report on April 8 and the Bank producing the report on April 18 constituted a continuing concealment of the report by Respondent for statute of limitations purposes.

3. The April 18, 2013 Communication with the OCC Contains Alleged Material Misstatements That Render the Agency's Section 1001 Claims Timely in Any Event

Even if the OCC's claims predicated on Section 1001 did not constitute continuing violations, those claims would nevertheless be timely asserted as to the alleged misstatements in the Bank's April 18, 2013 communication with the agency, which Respondent allegedly had a hand in drafting. S*ee* Notice ¶ 39; *see also* Part I *supra*. That is, taking the allegations in the Notice as true, as the undersigned is bound to do at this stage,[123] the April 18, 2013 letter falsely represents to the OCC the extent to which the Crowe Report was distributed within the Bank in February and March 2013 and the number of Bank officials (including Respondent) who knew of the report and its findings while claiming otherwise to the OCC during the course of the agency's examination over that time. *Compare*, *e.g.*, Notice ¶ 39 (Respondent representing that Crowe Report was only distributed to Senior Executive Officer 1, Executive A, and Manager A) *with id.* ¶¶ 21-22, 26 (distribution of Crowe Report to Respondent and a Bank Vice President, among others). These allegations alone are sufficient to state a *prima facie* case that Respondent made materially false representations to the agency within five years of the commencement of this action, and as such the OCC's Section 1001 claims have been timely brought regardless whether Respondent's

[123] *See Iqbal*, 556 U.S. at 679.

scheme of concealment extended into the limitations period—which, again, the undersigned concludes that it did.

4. The Notice's Allegations Warrant the Inference of Materiality, Which Is an Element To Be Proven at a Later Stage of the Proceedings

Finally, Respondent argues that all of the instant causes of action predicated on an alleged violation of 18 U.S.C. § 1001 are deficient because the OCC does not sufficiently allege, and cannot prove, that Respondent's alleged misrepresentations and concealment of facts are actually material as a matter of law. *See* Motion at 20-24. This argument is misplaced.

While Respondent is correct that materiality is an "essential element" of the agency's Section 1001 claims that ultimately must be proven,[124] she offers no authority for the proposition that the determination of whether a particular misstatement is material is a matter of law to be resolved at this stage in the proceedings. To the contrary, far from being a purely legal question, the Supreme Court has made it clear that "the materiality inquiry" under Section 1001 "is peculiarly one of the trier of fact,"[125] and as such it cannot be determined on the pleadings alone. The undersigned therefore agrees with Enforcement Counsel that deciding the issue of materiality at this juncture would be premature. *See* Response at 15.

Further, it is not incumbent upon the OCC to plead materiality with the specificity necessary to make such a determination possible from the Notice's allegations. As the Ninth Circuit has held, "an indictment need not allege the materiality of a false representation if the facts advanced by the pleader warrant the inference of materiality."[126] A material misrepresentation or concealment, in turn, is one that "has a natural tendency to influence, or is capable of influencing,

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[124] *United States v. Taylor*, 66 F.3d 254, 255 (9th Cir. 1995); *see* 18 U.S.C. § 1001 (relating to the concealment of "a material fact" and the making of a "materially false, fictitious, or fraudulent statement or representation").

[125] *United States v. Gaudin*, 515 U.S. 506, 512 (1995) (internal quotation marks, citation, and bracketing omitted); *accord Taylor*, 66 F.3d at 254-55 (materiality as element of Section 1001 "requires a factual finding").

[126] *United States v. Berger*, 473 F.3d 1080, 1103 (9th Cir. 2010) (internal quotation marks and citation omitted).

either a discrete decision or any other function of the agency to which it was addressed."[127] Here, the Notice amply alleges sufficient facts for such an inference of materiality to be warranted, describing as it does repeated alleged efforts by Respondent 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 concluding that numerous such deficiencies existed. *See* Notice ¶¶ 15-17. It takes no great imagination to surmise that the information that Respondent allegedly sought to occlude—namely, the existence and contents of the Crowe Report, as well as the scope of its distribution within the Bank—was capable of influencing the direction and performance of the agency's examination or decisions made in the service thereof.

Despite what Respondent may say, moreover, it is not dispositive of materiality if she can show that the alleged misrepresentations and concealment could not *in fact* have influenced the examination because the agency already possessed the information being withheld by Respondent. *See* Motion at 22-23. As Respondent herself notes (*id.* at 8), "a misstatement need not actually influence the agency decision in order to be material; propensity to influence is enough."[128] Nor does it matter to a statement's materiality that the OCC may have known that Respondent was not being forthcoming at the time of the alleged communications: "A false statement can be material even if the agent to whom it is made knows that it is false."[129] 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

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[127] *United States v. Moore*, 612 F.3d 698, 701 (D.C. Cir. 2010); *see also*, *e.g.*, *United States v. Kungys*, 485 U.S. 759, 770 (1988) (describing criteria for materiality of "a concealment or misrepresentation" under Section 1001).

[128] *United States v. King*, 735 F.3d 1098, 1108 (9th Cir. 2013); *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").

[129] *United States v. LeMaster*, 54 F.3d 1224, 1230-31 (6th Cir. 1995) (internal quotation marks and citation omitted).

the incriminating statements were false when [the defendant] uttered them."[130] Respondent will have the opportunity to argue at a later point in the proceeding, if she wishes to do so, that her alleged misrepresentations and concealment of the Crowe Report do not meet the necessary threshold of materiality. For now, however, the inferences drawn from the Notice's allegations are more than sufficient to sustain the agency's Section 1001 claims in this respect.

D. Unsafe or Unsound Practices

Respondent argues that the OCC's claims of unsafe or unsound practices under 12 U.S.C. §§ 1818(e) and 1818(i) are time-barred as to any alleged conduct occurring prior to April 17, 2013, because it is not possible for such claims to be continuing offenses and thereby toll the limitations period. *See* Motion at 11. In addition, Respondent contends that the Notice's allegations preclude any finding that Respondent's conduct was unsafe or unsound within the meaning of the applicable standard. *See id.* at 20-23. The undersigned disagrees with Respondent as to whether unsafe or unsound practices can ever constitute continuing violations but concludes in any event that the Notice states self-contained claims for unsafe or unsound practices based on Respondent's alleged conduct within the limitations period. Furthermore, and first, the undersigned finds that the OCC has sufficiently alleged that Respondent engaged in conduct that 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.[131]

[130] *United States v. Safavian*, 649 F.3d 688, 691 (D.C. Cir. 2011).

[131] The undersigned notes that the ready determination of the instant issues was not aided by Enforcement Counsel's failure to address with specificity any of Respondent's arguments regarding either the timeliness or legal sufficiency of the OCC's unsafe or unsound practices claims. *See generally* Response at 6-17 (not addressing unsafe or unsound practices in context of whether Notice states a claim), 17-22 (not addressing whether unsafe or unsound practices claims are timely brought). The undersigned directs that Enforcement Counsel be more mindful in the future, given the importance of a robust adversarial process to the effective functioning of proceedings before this tribunal.

1. The Notice's Allegations State a Claim for Unsafe or Unsound Practices Under the Relevant Standard

According to Respondent, the OCC's unsafe or unsound practices claims under Sections 1818(e) and 1818(i) should be dismissed because the Notice fails to allege conduct that is unsafe or unsound even if all of its allegations are taken as true. *See* Motion at 20. As Respondent states, the applicable standard to determine the safety and soundness of an IAP's practices is whether such practices are "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."[132] The undersigned finds 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 meet this threshold.

Respondent paints a picture of her conduct during the relevant period in which the OCC is only mildly inconvenienced by the persistent refusal of the Bank to provide the Crowe Report to examiners upon request or acknowledge the report's existence. *See id.* at 22 (the failure to "provide the OCC the information it desired . . . merely prompted a follow-up request"), 23 (the agency "received the Crowe Report . . . less than a month after its first inquiry" and "already knew the Report's findings" before receiving it). Thus, she says, even if her conduct could be considered "imprudent or even misleading or evasive," it did not have "the potential to cause risk of loss or damage to the [B]ank" and therefore cannot be considered unsafe or unsound within the meaning of the Horne Standard. *Id.* at 22-23.

[132] *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); *see also* Motion at 21 (quoting Horne Standard).

The question of whether Respondent's conduct was in fact "contrary to generally accepted standards of prudent operation" to the requisite degree is, of course, one that cannot be answered at this stage of the proceedings. Yet there can be no doubt that the conduct described in the Notice exposed the Bank to "a reasonably foreseeable undue risk" of loss or damage[133]—namely, the risk that lying to the OCC about 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.[134] The Notice does not simply allege that Respondent, a former OCC examiner herself, dithered and dallied in providing the agency with the materials it had requested; rather, it describes multiple internal discussions in which Respondent is plausibly alleged to have contrived ways to keep the Crowe Report out of the agency's hands and off its radar.[135] That the OCC is alleged to have known about the report all along has no bearing on the imprudence of Respondent's decision to conceal it, except to the extent that it made it more likely that Respondent's falsehoods and machinations would be detected.

The prudent course of action, as Chief Compliance Officer, would have been to provide the OCC with the Crowe Report on March 21st, when the agency first requested "a copy of the assessment report of the Bank's BSA program that Crowe Horwath LLC was engaged to perform in January 2013."[136] Failing that, Respondent could have provided the report on March 25th, when the OCC evinced its understanding that Crowe "provided management with a report or documents

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[133] *Blanton*, 909 F.3d at 1172 (internal quotation marks and citation omitted).

[134] Among the reasonably foreseeable consequences of such conduct is surely that the Bank would face criminal liability for obstructing the OCC's examination and be forced to incur significant monetary losses as a result, as in fact allegedly occurred. *See* Notice ¶ 46 (alleging guilty plea in criminal case resulting in $368 million in forfeiture and a $50 million civil money penalty).

[135] *See id.* ¶¶ 30-31, 35; *see also* notes 7-9 *supra*.

[136] Notice ¶ 29 (quoting March 21, 2013 email from agency to Respondent).

of some type related to BSA" and asked Respondent for "a copy of what bank management received from Crowe, even if it was only preliminary or partial."[137] Instead, Respondent allegedly dissembled on each occasion, evading the requests and denying knowledge of the specific document that internal emails reveal she understood the agency to have been asking for.[138] In the face of these allegations, Respondent cannot credibly claim that the ultimate provision of the Crowe Report on April 18, 2013, in a communication that itself contained multiple misstatements and misrepresentations of fact,[139] sufficed to insulate the Bank from any risk of loss or damage to which her prior conduct in misleading and obstructing the OCC had unmistakably exposed it. The undersigned therefore finds that the Notice states a claim for unsafe or unsound practices.

2. Unsafe or Unsound Practices Under Section 1818 Conceivably Can Constitute Continuing Violations, But Such a Conclusion Is Unjustified Here at This Juncture

In a separate matter pending before this tribunal, the undersigned has concluded that the assessment of a second-tier civil money penalty under 12 U.S.C. § 1818(i)(2) does not operate to transform discrete instances of allegedly improper accounting practices into a continuing violation for the purpose of calculating the statutory limitations period.[140] In so concluding, however, the undersigned did not decide whether unsafe or unsound practices can *ever* be construed as continuing violations under Section 1818(i)—as, for example, in an allegedly ongoing scheme of concealment—nor did she address in any way the nature or scope of potential continuing violations in claims pertaining to a 12 U.S.C. § 1818(e) prohibition action. To the extent that these questions are now before this tribunal, the undersigned finds that the statute may be susceptible of such a

[137] *Id.* ¶ 34 (quoting March 25, 2013 email from OCC to Respondent).

[138] *See id.* ¶¶ 33, 36 (quoting Respondent's responses to OCC); *see also id.* ¶¶ 30 ("I think the right answer is that Crowe did not perform an assessment."), 35 ("It sounds as though [the OCC] may have the early assessment.").

[139] *See* Part I *supra*.

[140] *See* Ortega and Rogers SD Order at 40-47; *see also* note 32 *supra*.

construction but that there is insufficient basis to conclude, from the present record, that the OCC's instant claims are, in fact, continuing offenses.

Respondent maintains as a blanket matter that Section 1818 can never be construed to give rise to unsafe or unsound practices claims that are continuing violations, arguing that the statute "lacks the clear Congressional intent necessary to make [such a] claim a continuing offense." Motion at 11. This proposition likely goes too far. There are indicia in the statutory text to suggest that Section 1818 "clearly contemplates a prolonged course of conduct" with respect to actionably unsafe or unsound practices, as the Supreme Court has required for continuing violations.[141] Section 1818(e), for example, distinguishes between a "practice" and an "act" or "omission" in a way that would be redundant if all actionable practices were necessarily discrete acts or omissions rather than, in some circumstances, an ongoing state of affairs.[142] The statute also adverts to the "continuing disregard . . . for the safety and soundness of [an] insured depository institution" as a qualifying condition of Section 1818(e)'s culpability prong, an acknowledgment of the relevance of a prolonged mindset that is consistent with some unsafe or unsound practices being continuous rather than singular events.[143] And the purpose of the broad enforcement powers granted to the OCC and other agencies under Section 1818 to protect the safety and soundness of the national banking system supports an interpretation of the statute that would make actionable the full scope

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[141] *Toussie*, 397 U.S. at 121.

[142] *See* 12 U.S.C. § 1818(e)(1)(A)(iii) (effect prong satisfied if IAP commits or engages "in any act, omission, or practice" that breaches the IAP's fiduciary duty); *see also Liu v. SEC*, ___ U.S. ____, 140 S. Ct. 1936, 1948 (2020) ("[C]ourts must give effect, if possible, to every clause or word of a statute."). *Contra Morgan*, 536 U.S. at 111 (noting that the Supreme Court has "repeatedly interpreted the term 'practice' to apply to a discrete act or single 'occurrence,' even when it has a connection to other acts"). While the undersigned does not at this point undertake to determine when, in fact, an unsafe or unsound practice may be considered a continuing violation, she observes that *Morgan*'s holding does not necessarily foreclose such an interpretation, given Section 1818(e)'s specific set-off of "acts" and "practices" and the emphasis placed by *Toussie* on examining statutory language in the context of the precise statute at issue. *See Toussie*, 397 U.S. at 115; *see also*, *e.g.*, *Texas*, 891 F.3d at 563; *Earle*, 707 F.3d at 307 (continuing violations doctrine to be applied by reference to language and purpose of applicable statute).

[143] 12 U.S.C. § 1818(e)(1)(C)(ii).

of unsafe or unsound practices that extended into the limitations period from some point before it.[144] Even recognizing, as Respondent notes, that continuing violations are a rare exception rather than the rule,[145] the undersigned finds it plausible that a thorough examination of the issue would prompt the conclusion that Congress clearly intended for unsafe and unsound practices to be capable of continuing offense for limitations purposes.

Nevertheless, the undersigned does not decide that issue now. In light of Enforcement Counsel's failure to brief the agency's position regarding whether, why, and to what extent unsafe or unsound practices under Section 1818 may be deemed continuing violations,[146] the undersigned will not presume to render judgment on the legal question except to find that no basis has been shown, on the present record, to treat Respondent's alleged unsafe or unsound practices as a continuing offense. Accordingly, unless and until Section 1818 is determined to permit claims of continuing violations, Respondent's alleged conduct prior to April 17, 2013 may not form the predicate for any unsafe or unsound practices claim asserted by the OCC. Should the parties together wish to revisit the issue of continuing violations as applied to unsafe or unsound practices and brief the matter fully so that it may be decided on the merits,[147] they may do so upon joint application within ten days from the issuance of this Order, at which point a briefing schedule will be set.[148] The parties are well-advised, however, to consider the efficient expenditure of this tribunal's, and their own, time and resources before making any such application, and may instead

[144] *See Proffitt*, 200 F.3d at 864-65 (describing legislative purpose of "enhance[d]" and "expand[ed]" agency enforcement powers under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989).

[145] *See* Motion at 11 (citing *Cherosky v. Henderson*, 330 F.3d 1243, 1248 (9th Cir. 2003)).

[146] *See* note 131 *supra*.

[147] The undersigned notes that Respondent herself devotes only half a page of her brief to the argument that unsafe or unsound practices cannot constitute continuing violations, nearly the entirety of which consists of conclusory assertion. *See* Motion at 11.

[148] Should only one party seek to revisit the issue, the undersigned will not entertain a request for further briefing.

choose to seek to resolve the issue more definitively when the matter is on appeal to the Comptroller at the appropriate time.

3. The Notice Alleges Unsafe or Unsound Practices Within the Applicable Limitations Period That Render Such Claims Timely in Any Event

Notwithstanding the above, the undersigned finds that the OCC has timely asserted claims for a Section 1818(e) prohibition order and the assessment of a Section 1818(i) civil money penalty based on Respondent's alleged unsafe or unsound practices. Respondent's alleged misstatements in the April 18, 2013 communication with the OCC are alone sufficient to state a claim for unsafe or unsound practices, given the potential risk to the institution inherent in its Chief Compliance Officer misrepresenting to the examining agency how, when, and to whom a third-party auditor's report on the subject of the examination was first distributed internally.[149]

Moreover, Respondent is alleged to have concealed the Crowe Report from the OCC for a span of time extending into the limitations period.[150] In contrast to the OCC's Section 481 claim, the violation of which requires a discrete act of refusal that happened prior to April 17, 2013,[151] the undersigned concludes that Respondent's alleged continued concealment of the report as of April 17th, in the face of multiple previous requests for that document from the OCC, is enough to trigger a timely unsafe or unsound practices claim. That is, irrespective of any actionable unsafe or unsound practices claims first accruing prior to the limitations period, which are time-barred based on the present record, the elements of an unsafe or unsound practices claim are independently satisfied on April 17, 2013, based on the allegations that Respondent had been asked for the report in her official capacity and was knowingly withholding it.

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[149] *See* Part I *supra* (nature of April 18, 2013 misrepresentations); Part II *supra* (application of Horne Standard to Respondent's alleged misstatements).

[150] *See* Notice ¶¶ 37-40.

[151] *See* Part III.B.3 *supra*.

Finally, and similarly, the D.C. Circuit has held with respect to second-tier civil money penalties under Section 1818(i) that "each instance of an unsafe or unsound practice triggers a new claim if part of a pattern of misconduct."[152] The Notice unquestionably alleges facts regarding Respondent's unsafe or unsound practices sufficient to satisfy the "pattern of misconduct" element of Section 1818(i), spanning as those practices do the breadth of several weeks of alleged misrepresentations and concealment. Consequently, the OCC makes out a timely claim for unsafe or unsound practices for the purpose of its assessment of a second-tier civil money penalty in this way as well.

E. The Doctrine of Laches

Respondent makes one more argument, contending that the OCC's claims are barred by the doctrine of laches given the agency's ostensibly unreasonable delay in prosecuting this matter. *See* Motion at 24-25. The undersigned agrees with Enforcement Counsel that "the United States and its agencies are not subject to the defense of laches when enforcing a public right."[153] *See* Response at 23 (citing cases). Courts have been clear that banking agency enforcement actions "clearly implicate public rights."[154] Therefore, even assuming there has been any undue delay in the agency's pursuit of its claims against Respondent, which Respondent has not demonstrated,[155] Respondent's argument that the action is barred by laches must fail.

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[152] *Blanton*, 909 F.3d at 1171; *see also id.* ("[A] claim accrues each time a bank official recklessly engages in an unsafe or unsound banking practice as part of a pattern of misconduct.").

[153] *Entergy Miss., Inc. v. NLRB*, 810 F.3d 287, 298 (5th Cir. 2015); *accord*, *e.g.*, *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) ("[L]aches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest.").

[154] *Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995); *see also*, *Simpson v. OTS*, 29 F.3d 1418, 1423 (9th Cir. 1994) (stating that "[b]y instituting the cease-and-desist proceedings, the [Office of Thrift Supervision] served a public purpose of the sort Congress envisioned in providing for administrative adjudication").

[155] The undersigned concurs with Enforcement Counsel that—at the very least—any delay of this enforcement proceeding following ALJ Miserendino's retirement was not attributable to dilatory behavior on the part of the agency. *See* Response at 24; *see also* Order Denying Respondent's Motion to Dismiss the Notice of Charges for Prohibition and Assessment of Civil Money Penalty, *In the Matter of Rohan Ramchandani*, OCC No. AA-EC-

IV. Conclusion

For the reasons set forth above, the undersigned hereby recommends that dismissal be granted as to the OCC's claim that Respondent violated 12 U.S.C. § 481 within the applicable limitations period, and concludes that Respondent's May 28, 2020 Amended Initial Dispositive Motion should be otherwise denied.

SO ORDERED.

Dated: October 16, 2020

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Jennifer Whang
Administrative Law Judge
Office of Financial Institution Adjudication

2017-2 (OFIA Mar. 16, 2020) at 2-10 (addressing issue of asserted agency delay in appointment of OFIA ALJ). To the extent that this order is not readily accessible to the parties, this tribunal will furnish copies upon request.