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

In the Matter of:	)	
	)	
Saul Ortega	)	AA-EC-2017-44
Former Chief Financial Officer, Director,	)	
President, Chief Executive Officer, and	)	
Chairman of the Board	)	
	)	
David Rogers, Jr.	)	AA-EC-2017-45
Former Chairman of the Board	)	
	)	
First National Bank	)	
Edinburg, Texas	)	

ORDER GRANTING CROSS-MOTIONS FOR INTERLOCUTORY REVIEW AND VACATING AND REVERSING IN PART APRIL 9 ORDER

Before the Comptroller of the Currency ("Comptroller") are cross-motions[1] seeking interlocutory review of a ruling by Administrative Law Judge ("ALJ" or "Judge") Jennifer Whang disposing of certain causes of action in the case as untimely.[2] The *Cross-Motions for Interlocutory Review*—referred to the Comptroller on June 1, 2020—

[1] *Respondents' Motion for Interlocutory Review (Statute of Limitations)* and *Respondents' Response to OCC's Cross-Appeal Raised in its Response to Respondents' Motion for Interlocutory Review (Statute of Limitations)*, filed by Respondents Saul Ortega and David Rogers, Jr. ("Respondents"); and *OCC's Response to Respondents' Motion for Interlocutory Review (Statute of Limitations)* and *Supplemental Submission to OCC's Response to Respondents' Motion for Interlocutory Review (Statute of Limitations)* ("*Supplemental Submission*"), filed by Office of the Comptroller of the Currency ("OCC") Enforcement Counsel (collectively, "*Cross-Motions for Interlocutory Review*").

[2] On May 7, 2020, Judge Whang issued an *Order Regarding Enforcement Counsel's Response to Respondents' Motion for Interlocutory Review*, finding that Respondents' *Motion for Interlocutory Review (Statute of Limitations)* was timely filed and that Enforcement Counsel's response thereto constituted, in part, an untimely request for interlocutory review. *See Order Regarding Enforcement Counsel's Response to Respondents' Motion for Interlocutory Review*. Judge Whang *sua sponte* granted Enforcement Counsel leave to file out of time its request for interlocutory review and afforded Respondents an opportunity to respond to Enforcement Counsel's initial submission and supplemental submission. *See id.* Accordingly, the Comptroller treats the parties' *Cross-Motions for Interlocutory Review* as timely filed.

seek review of Judge Whang's April 9, 2020 *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* ("*April 9 Order*").[3] On June 18, 2020, the Comptroller granted Respondents' unopposed request to stay the proceedings below until such time as the Comptroller should decide whether to grant or deny interlocutory review. *See Notice of Submission of Parties' Cross-Motions for Interlocutory Review for Final Disposition and Order Granting Respondents' Unopposed Request to Stay Proceedings.*

For the reasons discussed below, the Comptroller hereby grants the Parties' *Cross-Motions for Interlocutory Review* of the *April 9 Order*; vacates and reverses the *April 9 Order* to the extent that it held that Enforcement Counsel must bring an action within five years of the date of the first occurrence of the same type of "effect" caused by an alleged activity that forms the basis for a proposed order of prohibition under 12 U.S.C. § 1818(e) or the assessment of a second-tier civil money penalty under Section 1818(i),[4] and to the extent that it held that the continuing-violations doctrine is unavailable in the

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[3] On April 13, 2020, Judge Whang referred to the Comptroller Respondents' *Motion for Interlocutory Review*, which requested that the Comptroller review two orders entered by Judge Whang on March 17 ("*March 17 Orders*"). On June 16, after careful consideration of the parties' briefing of the issues, the Comptroller denied Respondents' *Motion for Interlocutory Review* of the *March 17 Orders*. *See Order Denying Respondents' Motion for Interlocutory Review.*

[4] Here, "effect" is one of three elements that must be satisfied before Enforcement Counsel may bring an action seeking an order of prohibition under Section 1818(e). *See Proffitt v. Federal Deposit Insurance Corporation*, 200 F.3d 855, 862-63 (D.C. Cir. 2000) (discussing three elements of § 1818(e): misconduct, effect, and culpability). The assessment of civil money penalties under Section 1818(i) also contains an "effect" element, at least with respect to the imposition of a second-tier penalty, which is sought here. *See* 12 U.S.C. § 1818(i)(2)(B); *see also Notice of Charges for Orders of Prohibition and Notice of Assessments of a Civil Money Penalty* Art. VII.

instant action. The Comptroller hereby remands this matter so that the proceedings below may be resumed in a manner consistent with this order.

I. BACKGROUND

The *Notice of Charges for Orders of Prohibition and Notice of Assessments of a Civil Money Penalty* ("*Notice of Charges*") initiating this matter was filed on September 25, 2017. Respondents filed an *Answer and Affirmative Defenses to Notice of Charges* ("*Answer*"), asserting various affirmative defenses, including that the charges against them were time-barred. In January 2018, Respondents filed their *Motion for Summary Disposition on the Statute of Limitations and Brief in Support* ("*Motion for Summary Disposition*"), arguing that the charges against Respondents first accrued before September 25, 2012 (*i.e.*, more than five years before the instant proceedings were commenced) and that the charges were thus time-barred under the applicable statute of limitations and subject to dismissal. Enforcement Counsel thereafter filed a *Brief in Support of OCC's Motion for Partial Summary Disposition on Respondents' Seventh and Ninth Affirmative Defenses* ("*Motion for Partial Summary Disposition*") and a *Brief in Support of OCC's Opposition to Respondents' Motion for Summary Disposition on the Statute of Limitations* ("*Opposition to Respondents' Motion for Summary Disposition*"). Respondents then filed their *Response and Objections to OCC's Motion for Partial Summary Disposition* ("*Response and Objections*") and Judge Whang entered the *April 9 Order*, which is the subject of the *Cross-Motions for Interlocutory Review*.

A. *Notice of Charges*

Pursuant to Section 1818(e) and (i), the *Notice of Charges* seeks orders of prohibition and the imposition of first- and second-tier civil money penalties against Respondents,

institution-affiliated parties ("IAP") of First National Bank of Edinburg, Texas ("Bank"). The *Notice of Charges* asserts that Respondents engaged in unsafe or unsound practices, breached their fiduciary duties, violated 12 U.S.C. § 161, and violated final cease-and-desist orders "with regard to loans to fund sales of holding company stock and improperly including the loan proceeds as capital" ("Article III"); "with regard to loans to finance sales of OREO and the improper accounting for such sales" ("Article IV"); and "by causing the Bank to accrue interest on nonaccrual loans" ("Article V"). *Notice of Charges* Arts. III-V. The *Notice of Charges* also asserts that Respondent Rogers, separately, "breached his fiduciary duty of loyalty by providing preferential treatment to a member of his immediate family" ("Article VI"). *Id.* Art. VI. Respondents raised various affirmative defenses, including that the charges against them were time-barred. *Answer* at 9.

B. Parties' *Motions for Summary Disposition*

Throughout these proceedings, the parties have offered contrasting views as to when accrual of a claim first occurs under 28 U.S.C § 2462,[5] where orders of prohibition under Section 1818(e) and civil money penalties under Section 1818(i) are sought. Respondents' *Motion for Summary Disposition* relied on *Gabelli v. Securities and*

[5] The parties agree that the applicable statute of limitations is set forth in Section 2462, which provides:

> 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 if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462.

Exchange Commission, 568 U.S. 442 (2013) (holding that five-year period for Securities and Exchange Commission to commence civil penalty action for fraud begins to run when fraud occurred and not when it is discovered), to argue that the claims against them first accrued at the time of the alleged misconduct. Accordingly, Respondents asserted that the charges against them were time-barred because Respondent Rogers left the Bank in 2011, and each of the allegedly improper loans were made and accounted for before September 25, 2012 (*i.e.*, more than five years before the instant proceedings were commenced). *Motion for Summary Disposition* at 4-5.

Enforcement Counsel moved for partial summary disposition, asserting that there were no genuine issues of material fact and that the Agency was entitled to a ruling in its favor as a matter of law regarding, as relevant, Respondents' affirmative defense that the charges against them were barred by the statute of limitations. Enforcement Counsel distinguished between two general categories of misconduct alleged in the *Notice of Charges*: "lending-related misconduct" and "improper accounting practices." *Motion for Partial Summary Disposition* at 9. Citing *Proffitt v. Federal Deposit Insurance Corporation*, 200 F.3d 855, 863 (D.C. Cir. 2000) ("The same misconduct can produce different effects at different times, resulting in separate section 8(e) claims and separate accruals."), Enforcement Counsel argued that if actionable effects arising from the misconduct have occurred within five years prior to the filing of the *Notice of Charges*, the action is timely. *Id.* at 1, 8-16. Enforcement Counsel also argued that the first- and second-tier civil money penalty actions against Respondents based on improper accounting practices were timely because "the violations occurring before September 25, 2012 and after September 25, 2012 collectively constitute[d] a continuing violation." *Id.*

at 13-14. Relying on *InterAmericas Inv. v. Board of Governors of the Federal Reserve System*, 111 F.3d 376, 381-82 (5th Cir. 1997), which examined provisions of the Bank Holding Company Act ("BHCA") providing for per diem penalties for each day a violation continued, Enforcement Counsel argued that the continuing-violations doctrine was available because Section 1818(i) similarly provided for civil money penalties "for each day during which such violation continues." *Id.* at 14 (quoting § 1818(i)(2)(A)(iv), (B)(ii)(III)).

C. *April 9 Order*

Judge Whang's thorough and carefully considered *April 9 Order* denied Enforcement Counsel's *Motion for Partial Summary Disposition* and granted in part and denied in part Respondents' *Motion for Summary Disposition*. *April 9 Order* at 2. Judge Whang's *April 9 Order* can be summarized in this fashion:

Claims Recommended for Dismissal	**Retained Claims**
Lending-related allegations and associated first-tier civil money penalties to the extent that Enforcement Counsel alleged that the Bank first incurred losses on the loans prior to September 25, 2012	To the extent there exists ambiguity as to the date the Bank first incurred loan losses, lending-related allegations and associated first-tier civil money penalties; Respondents may raise the statute of limitations as an affirmative defense to such allegations
Accounting-related allegations and associated first-tier civil money penalties, except those against Respondent Ortega based on Call Reports issued after September 25, 2012	Accounting-related allegations against Respondent Ortega with respect to Call Reports issued after September 25, 2012 and associated first-tier civil money penalties
Second-tier civil money penalties, except to the extent that such penalties were warranted in connection with misconduct	Second-tier civil money penalties in connection with alleged misconduct first causing more than minimal loss to the

first causing more than minimal loss to the Bank on or after September 25, 2012, or allegations against Respondent Ortega that formed part of a pattern of misconduct extending beyond September 25, 2012	Bank on or after September 25, 2012, or allegations against Respondent Ortega that formed part of a pattern of misconduct extending beyond September 25, 2012

More specifically, Judge Whang granted summary disposition in favor of Respondents as to the following. First, summary disposition was granted in favor of Respondents as to the accounting-related allegations against them in Articles III, IV, and V, but summary disposition was denied as to the accounting-related allegations against Respondent Ortega with respect to Call Reports issued after September 25, 2012. Second, summary disposition was granted in favor of Respondents as to lending-related allegations against them in Articles III and IV, to the extent that Enforcement Counsel alleged that the Bank first incurred losses on the loans at issue prior to September 25, 2012. Third, summary disposition was granted in favor of Respondents as to the assessment of first-tier civil money penalties against them in connection with Articles III, IV, V, and VI, except to the extent that a civil money penalty was warranted in connection with either the accounting-related allegations against Respondent Ortega with respect to Call Reports issued after September 25, 2012 or any lending-related allegations against Respondent Ortega for misconduct occurring on or after September 25, 2012. Fourth, summary disposition was granted in favor of Respondents as to the assessment of second-tier civil money penalties against Respondents in connection with Articles III, IV, V, and VI, except to the extent that such penalty is warranted in connection with alleged misconduct by either Respondent that first caused the Bank more than minimal loss on or after September 25, 2012 or allegations against Respondent Ortega in Articles II, IV, or

V that formed part of a pattern of misconduct extending beyond September 25, 2012. *Id.* at 2-3.

Correspondingly, Judge Whang denied summary disposition in favor of Respondents as to the following. First, summary disposition was denied as to accounting-related allegations against Respondent Ortega in Articles III, IV, and V, with respect to Call Reports issued after September 25, 2012. Second, summary disposition was denied as to lending-related allegations against Respondents in Articles III and IV, except that Respondents may raise the statute of limitations as an affirmative defense as to alleged misconduct in connection with any loan with respect to which the Bank first incurred a loss prior to September 25, 2012. Third, summary disposition was denied as to lending-related allegations against Respondent Rogers in Article VI, except that Respondent Rogers would be permitted to raise the statute of limitations as an affirmative defense as to allegations regarding all loans at issue in Article VI to the extent that any of those loans first caused the Bank to incur loss prior to September 25, 2012. Fourth, summary disposition was denied as to any assessment of a first-tier civil money penalty in connection with allegations against Respondent Ortega in Articles III, IV, or V regarding the Call Reports issued after September 25, 2012 or any alleged lending-related misconduct by Respondent Ortega occurring on or after September 25, 2012. Fifth, any assessment of a second-tier civil money penalty in connection with alleged misconduct by either Respondent that first caused the Bank more than minimal loss on or after September 25, 2012, or allegations against Respondent Ortega in Articles III, IV, or V that formed part of a pattern of misconduct extending beyond September 25, 2012. *Id.* at 3.

Although the parties' arguments centered on their varying interpretations of *Gabelli* and *Proffitt*, Judge Whang reasoned that neither *Gabelli* nor *Proffitt* addressed the precise question that was before her: at what point does a claim "first accrue" for purposes of Section 2462 when, as the Judge noted, (1) "the underlying statute contains an 'effect' element separate from the violative conduct that must be satisfied before a claim can be brought"; (2) "that 'effect' prong contains multiple alternative conditions that independently could serve to complete a cause of action at different points in time"; and (3) "the agency does not clearly allege that the 'effect' on which it predicates the completion of each claim *first occurred* within the five-year period prior to institution of the enforcement action." *Id.* at 16-17 (emphasis original). She further reasoned that both Respondents' and Enforcement Counsel's arguments were flawed: Respondents paid "too little heed to the elements necessary for a claim to accrue under Sections 1818(e) and 1818(i)" and Enforcement Counsel gave "short shrift to Section 2462's clear direction that the clock begins to run when a claim 'first accrues,' not when the conditions necessary for accrual are fulfilled for a second time, or a third, or at some other convenient future point." *Id.* at 13. Accordingly, she concluded that, while different claims may "accrue at different times under Sections 1818(e) or (i) from the same alleged misconduct[,] it cannot be the case under the relevant caselaw that the *same* claim can accrue for the first time on multiple occasions." *Id.* at 13 (emphasis original).

Additionally, the Judge rejected Enforcement Counsel's argument that "the improper accounting practices described in the Notice . . . [that] occur[ed] before September 25, 2012 and after September 25, 2012 collectively constitute a continuing violation." *April 9 Order* at 41 (quoting *Motion for Partial Summary Disposition* at 14). Judge Whang

concluded that the "facts as alleged do not permit the agency to avail itself of the continuing violations doctrine" for the following reasons. *Id.* at 43.

First, Judge Whang concluded that the alleged violations could not have become apparent by means of the "cumulative effect of repeated conduct" sometime after September 25, 2012. *Id.* at 44. Second, distinguishing Section 1818(i) from the narrower statute at issue in *InterAmericas*, Judge Whang concluded that the per diem nature of the assessment of money penalties under Section 1818(i) did not necessarily mean that the actionable violations caused a new claim to continuously accrue each day that they went uncorrected; unlike the narrower statute at issue in *InterAmericas*, Section 1818(i) imposes potential liability of parties that violate *any* law or regulation. *Id.* at 43-44. Thus, the "nature of the potential violations" of Section 1818(i) and the BHCA are "very different"; in the Judge's view, "Enforcement Counsel's conception [that] any violation of law, if committed by [an IAP], arguably would be subject to assessment of a first-tier civil money penalty many years after the violation itself had occurred" as long as the conduct went uncorrected represents an impermissibly "expansive" interpretation of the continuing-violations doctrine. *Id.* at 45-46.

Accordingly, the *April 9 Order* found that "each issuance of an allegedly inaccurate Call Report is a discrete act on which action may be premised," and concluded that the first-tier civil money penalties against Respondent Rogers were untimely because they necessarily accrued more than five years before the action was commenced; that the first-tier money penalties against Respondent Ortega were timely insofar as they were warranted in connection with the Call Reports issued after September 25, 2012 or lending-related misconduct occurring on or after September 25, 2012; and that the

second-tier money penalty claims against Respondents were timely only to the extent warranted in connection with alleged misconduct that first caused more than minimal loss on or after September 25, 2012 or in connection with allegations against Respondent Ortega that formed part of a pattern of misconduct extending beyond September 25, 2012. *Id.* at 46-47.

D. *Cross-Motions for Interlocutory Review*

In their *Cross-Motions for Interlocutory Review*, the parties reiterate their prior arguments before Judge Whang and assert, each for their own purpose, that various factors supporting interlocutory review are satisfied. Respondents "challenge the ruling that lending-related claims in this case are not barred by limitations." *Respondents' Motion for Interlocutory Review (Statute of Limitations)* at 4. Respondents request that the Comptroller find that the lending-related allegations in Articles III, IV, and VI of the *Notice of Charges* are time-barred insofar as the underlying loans were made prior to September 25, 2012; and that the Comptroller find that, for purposes of an enforcement action under Section 1818(e), "a cause of action for unsafe and unsound loans first accrues at the time the loans were made." *Id.* at 6-7. Enforcement Counsel requests that the Comptroller deny Respondents' requested relief and instead urges the Comptroller to "reverse the portion of [the *April 9 Order*] that held that the OCC must bring an action within five years from the date of the first instance of loss," arguing that Judge Whang erred in holding that Enforcement Counsel were required to bring an action "within five years from the date of the first 'effect' and may not bring an action based on a subsequent occurrence of the same 'effect.'" *Response to Motion for Interlocutory Review* at 2, 13.

Additionally, Enforcement Counsel argues that Judge Whang "applied an overly restrictive definition of the continuing violations doctrine," but further states that Enforcement Counsel "does not challenge the Tribunal's application of the continuing violations doctrine to exclude Call Reports filed prior to September 25, 2012" because "raising a challenge at this juncture is unnecessary." *Id.* at 24-25 & n.9. In a subsequent filing, however, Enforcement Counsel contends that "the entirety of the April 9 Order" should be before the Comptroller on Interlocutory Review. *Supplemental Submission* at 2. Respondents thereafter argue that *United States v. Spectrum Brands*, 924 F.3d 337, 355 (7th Cir. 2019), a continuing-violations case cited by Enforcement Counsel, supports their position that limitations period should begin to run at the time of the alleged misconduct. *Response to OCC's Cross-Appeal* at 16.

On June 18, 2020, the Comptroller granted Respondents' unopposed request to stay the proceedings until such time as the Comptroller should decide to grant or deny interlocutory review. *See Notice of Submission of Parties' Cross-Motions for Interlocutory Review for Final Disposition and Order Granting Respondents' Unopposed Request to Stay Proceedings.*

II. DISCUSSION

The Comptroller may, at his discretion, exercise interlocutory review of an ALJ's ruling if the Comptroller finds that:

(1) The ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion;

(2) Immediate review of the ruling may materially advance the ultimate termination of the proceeding;

(3) Subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or

(4) Subsequent modification of the ruling would cause unusual delay or expense.

12 C.F.R. § 19.28.

Summary disposition is appropriate when the "undisputed pleaded facts" and other evidence demonstrate that "[t]here is no genuine issue as to any material fact," and "[t]he moving party is entitled to a decision in its favor as a matter of law." *See* 12 C.F.R. § 19.29(a). The summary disposition standard "is similar to that of the summary judgment standard under Rule 56 of the Federal Rules of Civil Procedure." *See In the Matter of William Blanton*, No. 2017-064, 2017 WL 4510840, at *6 (OCC July 10, 2017).

The Comptroller agrees with the parties that this matter raises important and close questions involving the interplay of *Gabelli* and *Proffitt*. The Comptroller thus finds that the criteria supporting interlocutory review are satisfied and grants the parties' requests to exercise interlocutory review.

Having carefully reviewed the *April 9 Order*, *see Condrey v. SunTrust Bank of Georgia*, 429 F.3d 556, 562 (5th Cir. 2005) (reviewing district court's grant of summary judgement *de novo*); *Blanton*, 2017 WL 4510840, at *6 (summary disposition standard is like summary judgment standard), and thoroughly considered the parties' arguments, the Comptroller agrees with Enforcement Counsel that a charge may accrue at the time of the first occurrence of an effect and then re-accrue based on a subsequent occurrence of the same type of effect. With respect to the applicability of *Proffitt* and *Gabelli* to the instant matter, the Comptroller is persuaded by the recent decisions of federal district courts and circuit courts of appeal concluding that *Gabelli* is inapposite where, as here and as in *Proffitt*, the fraud discovery rule is not at issue. *See, e.g., Spectrum Brands,* 924 F.3d at

349; *In re Enforcement of Philippine Forfeiture Judgment*, 442 F. Supp. 3d 756, 764–65 (S.D.N.Y. 2020); *see also In the Matter of Joseph Contorinis*, Release No. 3824, 2014 WL 1665995, at *3 & n.21 (SEC Apr. 25, 2014) (concluding that *Gabelli* "did not purport to address—let alone overturn—established precedent concerning [] applicable statute of limitations in Commission . . . proceedings"; reiterating *Proffitt's* holding that "Separate accrual for each alternative [statutory prerequisite] gives meaning to all of the statutory language.").[6] The Comptroller therefore disagrees with the *April 9 Order*'s conclusion that *Gabelli* "casts some doubt on *Proffitt*'s holding . . . that '[t]he same misconduct can . . . result[] in separate [Section 1818(e)] claims and separate accruals' for each of the potentially triggering effects that would complete that statute's cause of action." *April 9 Order* at 25 (quoting *Proffitt*, 200 F.3d at 863). *Proffitt* remains good law and, contrary to Respondents' arguments and the *April 9 Order*, the Comptroller concludes that it was not abrogated by *Gabelli*. *See Blanton*, 2017 WL 4510840, at *16-17.

That a new claim may accrue within the meaning of Section 2462 based on a subsequent occurrence of the same type of effect is consistent with *Proffitt* and with the legislative history of the Financial Institutions Reform, Recovery, and Enforcement Act

[6] It is also worth noting that the *April 9 Order* correctly explains that the instant matter is distinguishable from *Gabelli* because there, unlike here, the applicable statutory framework did not require that an "effects prong" be satisfied to establish a complete cause of action. *See April 9 Order* at 18. Indeed, Respondents' proffered interpretation of the relevant caselaw—that an action first accrues at the time of the alleged misconduct—would render meaningless the "effects prong" of Section 1818(e). *See Connecticut Dep't of Income Maintenance v. Heckler*, 471 U.S. 524, 530 n.15 (1985) ("It is a familiar principle of statutory construction that courts should give effect, if possible, to every word that Congress has used in a statute."). For this reason and the other reasons stated herein, Respondents' requests on interlocutory review—specifically, that the Comptroller find that the lending-related allegations are time-barred insofar as the underlying loans were made prior to September 25, 2012; and that for purposes of an enforcement action under Section 1818(e), a cause of action for unsafe and unsound loans first accrues at the time the loans were made—are denied and the *April 9 Order* is affirmed as to these issues.

("FIRREA"). In holding that "[t]he same misconduct can produce different effects at different times, resulting in separate section 8(e) claims and separate accruals," the *Proffitt* Court closely examined the legislative history of FIRREA and Congress's intent in lifting certain restrictions that had previously been imposed on banking regulators. *See Proffitt,* 200 F.3d at 863-865. The legislative history examined by the *Proffitt* court is equally apposite here. This history reflects that FIRREA was enacted, in part, to "expand, enhance and clarify enforcement powers of the financial institution regulatory agencies." *See* H.R. REP. 101-54, 311, 1989 U.S.C.C.A.N. 86, 107; *see also Proffitt*, 200 F.3d at 864.

Relatedly, to the extent that the interpretation proffered by Enforcement Counsel and adopted herein is in tension with or risks rendering meaningless the term "*first* accrued" as used in Section 2462, the Comptroller finds that strict application of this term would produce a result demonstrably at odds with the Congressional intent established by the legislative history discussed *supra.* The strict construction of Section 2462 set forth in the *April 9 Order* would incent gamesmanship of the statutory enforcement scheme by conferring immunity on—as one example—a party who can show that he has caused a single, small loss outside the limitations period when he has also caused a subsequent, much larger loss within the limitations period. *See Gov't of Virgin Islands v. Berry,* 604 F.2d 221, 225 (3d Cir.1979) ("Where the plain meaning of a statute would lead to an absurd result, we presume 'the legislature intended exceptions to its language [that] would avoid results of this character.'" (quoting *United States v. Kirby,* 74 U.S. (7 Wall.) 482, 487 (1868))); *cf. Sec. & Exch. Comm'n v. Kokesh*, 884 F.3d 979, 985 (10th Cir. 2018) ("To hold that Defendant's misappropriations constituted only one continuing

violation . . . would confer immunity for ongoing repeated misconduct. . . . Defendant could take $100 a year for five years and then misappropriate tens of thousands without fear of liability. We cannot countenance such a result, nor do we think that a proper interpretation of § 2462 requires us to." (internal citation omitted)); *Birkelbach v. Sec. & Exch. Comm'n*, 751 F.3d 472, 479 (7th Cir. 2014) (finding that it would be "absurd" to accept interpretation that failure to supervise is a single indivisible act which begins on first day of unethical supervision because "if an unethical supervisor were to avoid detection for five years, he could continue his unethical behavior *forever*"). The Comptroller concludes that the *April 9 Order*'s interpretation of Section 2462 produces unjust results, and further concludes that the interpretation proffered by Enforcement Counsel—that each separate occurrence of an effect may give rise to separate accrual, regardless of whether an effect of the same type had previously occurred—is more consistent with Congressional intent reflecting an ongoing duty to supervise financial institutions and affiliated parties. *See Douglass v. Convergent Outsourcing*, 765 F.3d 299, 302 (3d Cir. 2014) ("[I]f the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters, then we are obligated to construe statutes sensibly and avoid constructions which yield absurd or unjust results." (internal quotation marks omitted)).

Finally, because the parties have each addressed the continuing-violations doctrine in their *Cross-Motions for Interlocutory Review* and Respondents did so after Enforcement Counsel submitted that the entirety of the *April 9 Order* should be before the Comptroller should interlocutory review be granted, the Comptroller considers the applicability of the continuing-violations doctrine as properly before him. The Comptroller agrees with

Enforcement Counsel that the *April 9 Order*'s interpretation of the continuing-violations doctrine is overly restrictive. The Comptroller finds nothing in *InterAmericas* to support the *April 9 Order*'s interpretation that there is a meaningful distinction to be made between the "nature of potential violations" of Section 1818(i) and of the BHCA, which was at issue in that case. *April 9 Order* at 45. On the contrary, the provisions of Section 1818(i) contain language that is comparable to the continuing-violation language of the BHCA's penalty provisions quoted in *InterAmericas*. *Compare* 12 U.S.C. § 1818(i)(2)(A), (B) (insured depository institution or IAP "shall forfeit and pay a civil penalty . . . *for each day during which such violation[] continues*" (emphasis added)) *with InterAmericas*, 111 F.3d at 382 (any company or individual that violates the BCHA "shall forfeit and pay a civil penalty . . . *for each day during which such violation continues.*" (quoting 12 U.S.C. § 1847(b)(1)) (emphasis added)). The Comptroller therefore agrees with Enforcement Counsel that the language of Section 1818 supports the conclusion that the continuing-violations doctrine is available in the context of the instant action. *See, e.g.*, 12 U.S.C. § 1818(e)(1)(C)(ii) (contemplating "continuing disregard"), (i)(2)(B)(ii)(1) (contemplating "pattern of misconduct"); *see also Texas v. United States*, 891 F.3d 553, 563 (5th Cir. 2018) (*InterAmericas* "conclusion depended on the text of the statute as well as the relevant agency's interpretation, which we held to be entitled to deference"); *InterAmericas*, 111 F.3d at 382 ("Where the civil penalty provision at hand contemplates per diem penalties for violations, then continuing violations are cognizable under the general statute of limitations.").[7]

[7] As noted *supra*, the *April 9 Order* found it significant that potential violations under Section 1818(i) can be based on any violation of law or regulation. However, this is beside the point, as an underlying violation of law or regulation—here, a call report violation under 12 U.S.C. § 161—must be viewed in the context of the operative enforcement statute, Section 1818, which

Furthermore, *Spectrum Brands*—cited by Respondents in support of their misguided contention that the limitations period begins to run at the time of the alleged misconduct, *see supra* note 8—also supports the determination that the text of Section 1818 explicitly compels the conclusion that the continuing-violations doctrine is available here. *See Spectrum*, 924 F.3d at 351 ("We explained that a criminal offense is treated as continuing only if the substantive criminal statute explicitly compels that conclusion *or* if the nature of the crime involved is such that Congress must assuredly have intended it be treated as a continuing one." (internal citation and quotation marks omitted)). For these reasons, the *April 9 Order* erred in concluding that the continuing-violations doctrine is unavailable, and in further concluding that the civil money penalty claims arising from accounting-related allegations against Respondents were timely only as to Call Reports issued after September 25, 2012.

Accordingly, the Comptroller vacates and reverses the *April 9 Order* to the extent that it held that Enforcement Counsel must bring an action within five years of the date of the first of multiple occurrences of the same type of effect within the meaning of Section 1818, and that the continuing-violations doctrine is unavailable in the instant matter. The following allegations recommended for dismissal by the *April 9 Order* are therefore restored:

- Lending-related allegations, including those involving losses first incurred by the Bank prior to September 25, 2012, against Respondents and associated first-tier civil money penalties;
- Accounting-related allegations, including those involving Call Reports issued prior to September 25, 2012, against Respondents and associated first-tier civil money penalties; and

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plainly contains language contemplating continuing violations. *See Texas*, 891 F.3d at 563 (Fifth Circuit has invoked continuing-violations doctrine when "text of a particular statute, *understood in the appropriate context*, contemplates a continuing violation theory of claim accrual" (internal quotation marks omitted) (emphasis added)).

- Allegations supporting second-tier civil money penalties, to the extent dismissal was recommended.

III. CONCLUSION

For the reasons stated, the Comptroller hereby grants the Parties' *Cross-Motions for Interlocutory Review* of the *April 9 Order*; vacates and reverses the portions of the *April 9 Order* holding that the OCC must bring an action within five years from the date of the first instance of loss and that the continuing-violations doctrine is unavailable; and remands this matter so that the proceedings below be resumed in a manner consistent with this order.

It is so ordered.

Date: December 18, 2020

BRIAN P. BROOKS
ACTING COMPTROLLER OF THE CURRENCY