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 REGARDING THE PARTIES' CROSS MOTIONS FOR SUMMARY DISPOSITION

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The Office of the Comptroller of the Currency ("OCC") commenced this action against Respondent Laura Akahoshi ("Respondent"), a former OCC examiner, on April 17, 2018, filing a Notice of Charges ("Notice") that seeks an order of prohibition and the imposition of a $50,000 civil money penalty against Respondent pursuant to Section 8 of the Federal Deposit Insurance ("FDI") Act, 12 U.S.C. §§ 1818(e) and (i). The Notice alleges that Respondent, in her capacity as Chief Compliance Officer for Rabobank, N.A. ("the Bank"), "continuously concealed" from OCC examiners the existence of a third-party auditor's draft report (hereinafter "the Crowe Report") regarding deficiencies in the Bank's Bank Secrecy Act and Anti-Money Laundering ("BSA/AML") compliance program, despite the agency's "unambiguous, repeated, and direct requests" for that document, which was in Respondent's possession at the time. Notice ¶ 40. The Notice further alleges that Respondent's concealment of the Crowe Report during March and April 2013—and her false statements and misrepresentations in furtherance thereof—constituted continuing violations of 12 U.S.C. § 481 and 18 U.S.C. § 1001 as well as actionably unsafe or unsound practices in conducting the Bank's affairs. *See id.* ¶ 48(a). Finally, the Notice alleges that Respondent's misconduct ultimately resulted in the Bank suffering financial loss and "significant reputational harm" as the result of its 2018 entry of a guilty plea to conspiracy to obstruct an OCC examination. *Id.* ¶ 46.

Following discovery, Enforcement Counsel for the OCC ("Enforcement Counsel") and Respondent have now filed cross-motions for summary disposition, each contending that there are no material facts in dispute that would preclude a resolution of this motion in their favor as a matter of law. Specifically, Enforcement Counsel contends that according to the undisputed facts, "Respondent colluded with other members of Bank management to withhold and conceal the [Crowe Report] and its contents from the OCC" in a manner, and with a result, that satisfies the

statutory elements for the issuance of a prohibition order and assessment of a civil money penalty. Brief in Support of Enforcement Counsel's Motion for Summary Disposition ("OCC Mot.") at 1. Respondent, in turn, maintains that "facts not in dispute show there was no misconduct," Respondent's Amended Motion for Summary Disposition and Memorandum of Law in Support ("Resp. Mot.") at 1,[1] that the agency cannot prove the requisite culpability and effect elements of its prohibition and civil money penalty actions, *see id.* at 26-42, and that Respondent is entitled to summary disposition for various additional reasons as well, *see id.* at 42-45.

For the reasons set forth below, the undersigned denies Respondent's motion for summary disposition and recommends the grant of Enforcement Counsel's motion with respect to certain aspects of the statutory elements of misconduct, culpability, and effect and its denial in all other respects. Specifically, the undersigned concludes, based on the undisputed material facts, that (1) Respondent violated 12 U.S.C. § 481 and 18 U.S.C. § 1001(a)(1) by contriving to conceal the existence of the Crowe Report and related materials from OCC examiners; (2) Respondent engaged in unsafe or unsound practices in conducting the affairs of the Bank; (3) the Bank suffered loss as a result of Respondent's conduct by virtue of its February 2018 guilty plea for obstructing an OCC examination and attendant $500,000 fine; and (4) Respondent exhibited personal dishonesty and willful disregard for the Bank's safety and soundness.

I. Summary Disposition Standard

The OCC's Uniform Rules of Practice and Procedure ("Uniform Rules") provide that summary disposition on a given claim is appropriate when the "undisputed pleaded facts" and other evidence properly before this tribunal demonstrates that (1) "[t]here is no genuine issue as to

[1] Respondent's motion for summary disposition and supporting materials were originally and timely filed on June 1, 2021. On June 23, 2021, the undersigned directed Respondent to refile her summary disposition briefing and her opposition to Enforcement Counsel's summary disposition briefing in amended form to address readability issues with the numbering and organization of Respondent's exhibits, which Respondent duly did on June 28, 2021.

any material fact," and (2) "[t]he moving party is entitled to a decision in its favor as a matter of law."[2] A genuine issue of material fact is one that, if the subject of dispute, "might affect the outcome of the suit under the governing law."[3] The summary disposition standard "is similar to that of the summary judgment standard under Rule 56 of the Federal Rules of Civil Procedure."[4] Thus, when determining the existence of a genuine factual dispute, all evidence must be evaluated "in the light most favorable to the non-moving party."[5] That means that this tribunal must "draw 'all justifiable inferences' in the non-moving party's favor and accept the non-moving party's evidence as true," although "mere allegations or denials" will not suffice.[6]

Any party moving for summary disposition of all or part of the proceeding must submit, along with such motion, "a statement of the material facts as to which the moving party contends there is no genuine issue."[7] A party that opposes summary disposition, moreover, must likewise "file a statement setting forth those material facts as to which he or she contends a genuine dispute exists."[8] In both cases, the enumeration of material facts "must be supported by documentary evidence [in] the form of admissions in pleadings, stipulations, depositions, transcripts, affidavits, [or] any other evidentiary materials that the . . . party contends support [its] position."[9] Where, as here, the parties have filed cross-motions for summary disposition, "the underlying facts and inferences in each party's motion" are to be considered in the light most favorable to the opposing

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[2] 12 C.F.R. § 1929(a).

[3] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

[4] *In the Matter of William R. Blanton*, No. OCC AA-EC-2015-24, 2017 WL 4510840, at *6 (July 10, 2017) (OCC final decision), *aff'd on other grounds*, *Blanton v. OCC*, 909 F.3d 1162 (D.C. Cir. 2018).

[5] *Scott v. Harris*, 550 U.S. 372, 380 (2007).

[6] *Heffernan v. Azar*, 417 F. Supp. 3d 1, 7 (D.D.C. 2019) (quoting *Anderson*, 477 U.S. at 248, 255).

[7] 12 C.F.R. § 1929(b)(2).

[8] *Id.*

[9] *Id.*

party,[10] and summary disposition will be granted "only if one of the moving parties is entitled to judgment as a matter of law upon material facts that are not genuinely disputed."[11] Furthermore, "in granting a motion for summary of disposition, a trier of fact is not obliged to credit the non-moving party's factual assertions when they are not supported on the record," and the Tribunal "is not required to move a case past the summary [disposition] stage when inferences drawn from the evidence and upon which the non-moving party relies are implausible."[12]

II. Background and Summary of Facts

The following is drawn from the parties' pleadings, their respective statements of material fact,[13] and the exhibits submitted in support thereof.[14] Where the parties appear to be in some genuine factual dispute, both accounts are noted as well as the evidence that each side has marshaled in support. The undersigned will then address where appropriate in this Order the extent to which these disputes implicate facts that are material to the resolution of some aspect of the instant action.

Respondent is a former OCC examiner with significant experience in BSA/AML compliance matters. *See* Notice ¶ 5; OCC SOF ¶¶ 4-8.[15] Following her participation in a 2007

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[10] *Schaerr v. Dep't of Justice*, 435 F. Supp. 3d 99, 107 (D.D.C. 2020).

[11] *Heffernan*, 417 F. Supp. 3d at 7 (internal quotation marks and citation omitted).

[12] *Blanton*, 2017 WL 4510840, at *6.

[13] In addition to her Statement of Material Facts filed in support of her instant Motion ("Resp. SOF"), Respondent also filed an Opposition to Enforcement Counsel's Statement of Undisputed Material Facts ("Resp. Opp. SOF"). Enforcement Counsel submitted a Statement of Undisputed Material Facts in support of its own Motion ("OCC SOF"), but no specific statement in response to Respondent's Statement of Material Facts. Neither approach is precluded under the Uniform Rules, although Respondent is cautioned in the future not to utilize an opposition to the other side's statement of material facts as a vehicle to insert legal argumentation and thereby sidestep the page limitations imposed on responsive briefs by this Tribunal.

[14] Exhibits submitted by Enforcement Counsel in support of its Motion and in opposition to Respondent's Motion are styled "OCC-MSD" and "OCC-OPP," respectively. Exhibits submitted by Respondent in support of her Motion and in opposition to Enforcement Counsel's Motion are styled "R-MSD" and "R-OPP," respectively.

[15] Except where noted, a citation to the Notice in this section indicates that the corresponding portion of Respondent's Answer does not dispute the substance of the facts as stated. *See*, *e.g.*, Answer ¶ 5 (admitting that Respondent "was a commissioned national bank examiner with the OCC from on or about June 8, 1998 to on or about February 16,

OCC examination of the Bank's BSA/AML compliance program, Respondent assumed the position of Chief Compliance Officer ("CCO") for the Bank, in which capacity she served until she transferred overseas in July 2012 and was replaced by Lynn Sullivan, an individual who the Notice terms Executive A.[16] *See* Notice ¶¶ 6-10; OCC SOF ¶¶ 10-11, 17-18.

The OCC commenced a full-scope, on-site examination of the Bank's BSA/AML compliance program in November 2012, after deficiencies in that program had been identified and brought to the Bank's attention by then-CCO Sullivan and others. *See* OCC SOF ¶¶ 19-20; Resp. Opp. SOF at 18-20. In December 2012, the Bank contracted with audit firm Crowe Horwath LLP ("Crowe") to perform a BSA/AML program assessment "designed to measure the maturity of the Bank's BSA program and provide a strategic and tactical roadmap for the remediation of those areas management identifies as needing improvement."[17] As part of this assessment, Crowe provided the Bank with two major pieces of written work product—a Program Assessment & Roadmap ("PAR") Executive Report, referred to in this action as *the Crowe Report*, and a PAR PowerPoint deck (*"the PAR PowerPoint"*) synthesizing the report's conclusions.[18]

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

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2008," including as "Compliance Lead Expert for the OCC Western District" beginning in September 2007, and that part of her duties entailed providing expertise and advice on "BSA/AML compliance-related matters").

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

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

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

Committee.[19] Although the Crowe Report itself was seemingly never presented to the Bank in "final" form—*i.e.*, without being denoted as a draft—the PAR PowerPoint was used as the basis of a February 5, 2013 presentation to the Compliance Committee regarding Crowe's preliminary findings and observations.[20] Both the Crowe Report and the PAR PowerPoint concluded that multiple, significant deficiencies existed in the Bank's BSA/AML compliance program.[21]

At the same time, the OCC was conducting its own examination. On February 8, 2013, OCC examination staff presented to the Bank, at an exit meeting and in the form of a draft Supervisory Letter, their preliminary conclusions regarding "deficiencies in three out of four

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[19] *See* OCC SOF ¶¶ 23-26, 32-35; Resp. SOF ¶ 62. Respondent generally challenges the provenance of "the exhibits used by Enforcement Counsel as purportedly constituting cover emails and their attached documents," arguing that they were produced during discovery "as stand-alone emails with no attachments[] and separate stand-alone documents with no cover emails." Resp. Opp. SOF at 24 (unnecessarily combative emphasis omitted). Respondent further observes that documents represented as being cover emails and their attachments were sometimes "produced in reverse order and separated by" hundreds of pages of document production. *Id.* As a result, Respondent argues that "Enforcement Counsel's claims about which documents were attached to which emails are unsupported by evidence, and are in direct contravention of the Tribunal's order regarding production methodologies and Enforcement Counsel's representations." *Id.* at 25. Respondent's objections are noted. To the extent that Respondent wishes to contest the authenticity of specific documents proffered by Enforcement Counsel or argue that specific materials were not attached to specific emails, this may be done at the appropriate later stage. For the present, the conclusions of the instant Order do not require such a granular view. It is undisputed that draft versions of the Crowe Report and PAR PowerPoint existed and were distributed to Bank personnel during the relevant timeframe. As discussed *infra*, it is undisputed that the draft Crowe Report, in particular, was in the possession of Respondent, in particular, at the time that the OCC requested it from her. Given Respondent's repeated references to the draft report in internal correspondence (also discussed *infra*) at or around the time of the OCC's requests, her knowledge of the existence of the Crowe Report writ large is likewise undisputed. The undersigned need not delve into the minutiae of Crowe work product distribution within the Bank in order to render some judgment on Respondent's conduct during March and April 2013, the OCC's claims there regarding, and the parties' arguments on the summary disposition of the same.

[20] *See* OCC SOF ¶ 28; Resp. SOF ¶ 61. Respondent contends without apparent dispute that the *specific version* of the PAR PowerPoint deck presented at the February 5, 2013 Compliance Committee meeting was not distributed to, or possessed by, Bank employees and management. *See* Resp. SOF ¶ 61; Resp. Opp. SOF at 23-24. Respondent agrees, however, that earlier versions of the PAR PowerPoint were distributed to Bank personnel, *see* Resp. SOF ¶ 62, and Enforcement Counsel identifies at least one instance in which a document identified as "the final draft of the BSA/AML presentation" was provided to the Bank by Crowe, although the document itself is dated January 31, 2013, rather than February 5, and is slightly shorter than the version represented as having been presented to the Compliance Committee. OCC-MSD-19 (January 31, 2013 email to Lynn Sullivan from Troy La Huis of Crowe); *see* OCC SOF ¶ 32; *compare* OCC-MSD-20 (61-page PAR PowerPoint dated January 31, 2013) *with* OCC-MSD-23 (63-page PAR PowerPoint dated February 5, 2013).

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

pillars of the Bank's BSA program: internal controls, independent testing, and training."[22] Among other things, the letter stated that the OCC was "considering whether the Bank has failed to maintain a compliance program reasonably designed to assure and monitor compliance with the Bank Secrecy Act, requiring the issuance of a Cease and Desist Order pursuant to 12 U.S.C. § 1818(s)."[23] The OCC directed the Bank to "provide a written response to the BSA/AML examination findings" detailed therein, which the agency would consider "during [its] supervisory review process."[24]

Around this point, Respondent returned to the United States to attend the February 8, 2013 meeting with the OCC and to assist the Bank in its response to the Draft Supervisory Letter.[25] Respondent and CCO Sullivan disagreed on their assessments of the state of the Bank's BSA/AML program and the appropriate response to the OCC's examination findings, and CCO Sullivan relayed her particular concerns (including about the disagreement with Respondent) to Bank management in several communications in late February 2013.[26] On or around February 28, 2013, CCO Sullivan was placed on a forced leave of absence, and Respondent reassumed her prior role as the Bank's Chief Compliance Officer.[27]

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

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

[24] *Id.* at 1.

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

[26] *See* OCC SOF ¶¶ 38-39; *see also* OCC-MSD-37 (email thread including February 26, 2013 email from CCO Sullivan to CEO Ryan and GC Weiss) at 4 (stating, *inter alia*, that "there continues to be a divide in my opinion on the state of the AML program and [Respondent's] assessment of the Program, including what are the key risks to [the Bank]"); OCC-MSD-38 (materials provided by CCO Sullivan to OCC, including copy of February 27, 2013 email from CCO Sullivan to CEO Ryan and GC Weiss) at 280-81 (stating that "I am disturbed that [Respondent] and I differ on the key risks to the organization. . . . I do not believe it is prudent to rely on the advice of the person who had oversight when the problem developed. . . . I do not see [Respondent] as a source of advice going forward.").

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

On March 15, 2013, the Bank responded to the OCC's Draft Supervisory Letter with a letter drafted by Bank senior management, including Respondent, CEO Ryan, and GC Weiss ("Bank Response Letter").[28] In this letter, the Bank largely disagreed with the OCC's preliminary findings, stating that it "believe[d] that a closer examination of the Bank's BSA/AML program does not support a finding of a deficiency in any of the four pillars of its compliance program."[29] The letter concluded by recognizing "that it is the Bank's responsibility to provide complete, accurate, and timely information to the OCC in the examination process."[30] The letter did not mention that Crowe had been engaged to conduct an assessment of the Bank's BSA/AML program, nor did it advert to the conclusions of the Crowe Report in any way.[31]

On March 18, 2013, Ms. Sullivan emailed the OCC from her personal email account, alerting the agency to her forced leave of absence and detailing for it the concerns that she had "raised to management and the Board about the deficiencies within [the Bank's] BSA Program."[32] In this email, which was also copied to CEO Ryan, Ms. Sullivan noted that Crowe had been engaged in January 2013 to assess the Bank's BSA/AML compliance program and that "*[t]he Crowe assessment that was shared with management and the Board* found [] core components of the Bank's program to be below industry standards."[33] Ms. Sullivan went on to state that "the Crowe Report [was] discussed in detail with Management and the Board," along with the program risks detailed in this email.[34] The email to the OCC also forwarded Ms. Sullivan's February 26,

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

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

[30] *Id.* at 24.

[31] *See id.*

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

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

[34] *Id.*

2013 communication to CEO Ryan and GC Weiss, in which the Crowe Report was mentioned again: "*[A]s the Crowe assessment confirms*, there are multiple shortcomings across the program, with interdependencies, that with an aggressive project plan will take 9-12 months to fully address."[35]

In short, then, Ms. Sullivan's whistleblower email to the OCC mentions the Crowe Report—as well as its conclusions regarding deficiencies in the Bank's BSA/AML program and the fact that it had been provided to Bank management—three separate times, on the heels of an official response from the Bank several days earlier that did not acknowledge the existence of any Crowe assessment at all. And the OCC examiners who received Ms. Sullivan's email took notice: On the morning of March 19, 2013, Karen Boehler asked the other OCC recipients of the whistleblower communication whether they have "seen the Crowe [Horwath] assessment referenced in this email."[36] Later that afternoon, Shirley Omi responded, saying that she had "checked with Heidi who did [the] audit in February, and she doesn't recall seeing the Crowe [Horwath] assessment."[37] In other words, it appears beyond dispute that Ms. Sullivan's March 18, 2013 email alerted the OCC to the existence of a document alternately termed "the Crowe Report" and "the Crowe assessment" that was both inarguably relevant to the scope of their ongoing examination and had not previously been seen by OCC examiners.

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

The OCC followed up on this revelation on March 21, 2013 by emailing Respondent, as acting CCO, to request the Crowe assessment.[38] In particular, the communication from Ms. Omi

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

[36] *Id.* at 1.

[37] *Id.*

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

to Respondent asked her to "please provide us with *a copy of the assessment report of the Bank's BSA program* that Crowe [Horwath] LLC was engaged to perform in January 2013."[39] There is no dispute that Respondent had herself received a copy of the Crowe Report from Bank Vice President Sharon Edgar on March 9, 2013,[40] although Respondent contends that there is no evidence that she had read it or was even consciously aware of its existence at the time of this request.[41] Regardless, VP Edgar's March 9th cover email sending the Crowe Report to Respondent stated, in part: "This is their actual draft report, *so when you hear someone mention a report it is most likely this document*."[42]

Upon receiving Ms. Omi's request, Respondent forwarded it to GC Weiss, writing, in relevant part, that "I think the right answer is that ***Crowe did not perform an assessment***. That while they were engaged to perform a market study/peer benchmark for management and the board, the project was shelved before any report could be issued."[43] In response, GC Weiss began by questioning, "I wonder why they are asking for this now?"[44] He then went on to write:

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

[40] *See* OCC SOF ¶ 44; Resp. SOF ¶ 64; OCC-MSD-40 (March 9, 2013 email from Sharon Edgar to Respondent attaching "some of the Crowe Horwath documents," including the "Rabobank Anti-Money Laundering Program Assessment and Roadmap"); OCC-MSD-41 (version 0.9 of Crowe Report, dated January 31, 2013).

[41] *See* Resp. SOF ¶¶ 64(a), 65.

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

[43] OCC-MSD-48 (email thread including March 21, 2013 email from Respondent to GC Weiss) at 2 (emphasis added). The undersigned notes that Respondent herself denies that Crowe ever "conducted a 'peer-benchmarking' analysis," Resp. SOF ¶ 58, and a review of Crowe's Statement of Work and the Crowe Report itself compel the conclusion that Respondent's statement that Crowe was "engaged to perform a market study/peer benchmark" is, at best, an extremely incomplete characterization of the scope of what Crowe was being tasked to do with respect to the Bank's BSA/AML compliance program. *See* OCC-MSD-10 (Statement of Work dated December 27, 2012) at 1 (stating that of Crowe's "three primary objectives" under this agreement, two involved an "assessment" of aspects of the Bank's BSA/AML program, and none were characterized as a "market study" or "peer benchmark"); OCC-MSD-41 (version 0.9 of the Crowe Report, dated January 31, 2013) at 3 (stating that "[t]he objective of this assessment was to review the maturity of the existing [BSA/AML] program at [the Bank]"). The undersigned therefore finds that Respondent's description of Crowe's scope of work in her March 21, 2013 email to GC Weiss, in conjunction with her statement that "Crowe did not perform an assessment," does not accurately or fully capture the work done by Crowe in January and February 2013, nor is it responsive to Ms. Omi's specific request.

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

> To the best of my knowledge, Crowe never provided a final report. As you note, they were engaged to provide an assessment and road map. ***They did produce a draft that was shared with management*** and perhaps Terry [Schwakopf]? My guess is that copies of the draft are floating around although our intention was to not keep any draft documents. So I believe your statement is accurate, although should we say no "final report was issued"? ***The obvious concern is they then ask for the draft from Crowe.***[45]

Respondent then wrote back to GC Weiss, stating "I don't know the reason for the request. It is interesting. I'll call you to discuss."[46]

On March 22, 2013, Respondent responded to Ms. Omi ("the March 22, 2013 Email").[47] As GC Weiss suggested, Respondent did not draw any express distinction between draft assessments and final assessments in this response, instead writing:

> *Crowe did not complete an assessment.* While they were engaged to perform a market study/peer benchmark analysis for the benefit of management and the board, the project was suspended before any report was issued. The decision to suspend was made in light of information coming out of the internal investigation being done to develop the OCC response. In part, it became clear that Crowe had not been provided all facts necessary to understand the organization so the emerging observations and action plan were not tailored to our situation. Rather than move in a direction that wasn't reflective of the current state of affairs, management elected to take some time to more thoughtfully determine next steps.
>
> Having taken this time to better consider where we need to go in enhancing our program, we have recently asked Crowe to assist us on several projects, including the BSA/AML risk assessment. We anticipate having a draft in time for the next board meeting in early May. I'd be happy to send you a copy of the draft report.[48]

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

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

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

[48] OCC-MSD-52 (email thread including March 22, 2013 email from Respondent to Shirley Omi) at 2 (emphasis added). The parties disagree about the factual accuracy of Respondent's statement that the Bank had suspended its BSA/AML engagement with Crowe by this date. *See*, *e.g.*, OCC Mot. at 17 ("Crowe completed all of its services/obligations to the Bank; the Bank never suspended the engagement."); Resp. Mot. at 13 (claiming that the Bank "ended Crowe's project that had culminated in the failed February 5 PowerPoint presentation"). The undersigned finds that this is a disputed question of fact to be resolved if necessary at the hearing.

Respondent then forwarded this email to CEO Ryan and GC Weiss, stating: "FYI. My response to Shirley's request for any assessment completed by Crowe."[49] CEO Ryan responded to Respondent and GC Weiss, asking "I wonder where Shirley heard Crowe did a program assessment?"[50] On March 23, 2013, Respondent answered CEO Ryan's question:

> Lynn mentioned it at the exit meeting in February in SF. *What I don't know is whether she took it upon herself to share the draft report.* If I hear back from Shirley indicating they have a draft report, I'll schedule a call to discuss with her why we reject the initial conclusions. I'll also make it clear to her that management did not accept the report and thus it is not considered an 'official bank document.'[51]

Finally, CEO Ryan then wrote, "***Ok let's hope she did not provide a draft report.*** If she did your approach with Shirley is a good one."[52] In all, and as discussed further *infra*, these exchanges between Respondent, CEO Ryan, and GC Weiss paint a clear picture of three individuals who (1) are aware of a draft report that is responsive to Ms. Omi's request; (2) have taken pains to respond to Ms. Omi in a way that does not specifically reference the existence of the report or its conclusions, and which gives the impression that no report was created at all; (3) are uncertain whether and to what extent the OCC knows about or possesses a copy of the draft report; (4) are hopeful that OCC examiners do *not* know about or possess the report; and (5) have no apparent intention to tell the OCC about the report or provide the agency with a copy if it transpires that the agency does not already have one in its possession (but were making contingency plans for their response in the event that they learn the agency does possess a copy).

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[49] *Id.* at 1 (March 22, 2013 email from Respondent to CEO Ryan and GC Weiss).
[50] *Id.* at 1 (March 22, 2013 email from CEO Ryan to Respondent and GC Weiss).
[51] *Id.* at 1 (March 23, 2013 email from Respondent to CEO Ryan and GC Weiss).
[52] *Id.* at 1 (March 23, 2013 email from CEO Ryan to Respondent and GC Weiss).

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

OCC examiners evinced an awareness that Respondent's March 22, 2013 communication did not match up with their understanding that the Bank had received work product from Crowe relating to that firm's assessment of the Bank's BSA/AML compliance program. Following Respondent's response, Ms. Omi emailed her supervisor, Assistant Deputy Comptroller ("ADC") Thomas Jorn, asking what she should say in return.[53] ADC Jorn suggested that Ms. Omi contact Respondent again to "[i]ndicate that in going through the information we have it was our understanding that Crowe had provided management with *a report or documents of some type related to BSA*," and expressly request any such materials in whatever form the Bank had received them.[54] On March 25, 2013, Ms. Omi emailed Respondent, relayed the agency's understanding that Crowe had created BSA-related work product for the Bank, and specifically asked for "a copy of what bank management received from Crowe, ***even if it was only preliminary or partial***."[55]

In her deposition, Respondent testified that, during her time as an OCC examiner, it was her expectation that any documents she requested from a bank would be provided "promptly and completely."[56] Respondent also testified that she was aware, as a bank officer, "that there was authority that required the bank to provide books and records to the OCC."[57] Nevertheless, Respondent's initial reaction to Ms. Omi's express request for any draft BSA-related materials that had been given to the Bank by Crowe was not to procure and provide those documents "promptly and completely," but to confirm with CEO Ryan and GC Weiss that the draft Crowe Report was

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

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

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

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

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

not supposed to be something that the OCC knew about: "It sounds as though Shirley may have the early assessment even though it was never issued and certainly never accepted by management. *To my knowledge we didn't make any statement to the OCC that management received 'a report or document of some type.'* Let's meet to discuss some time today."[58]

In advance of this meeting, Respondent emailed GC Weiss again, asking him to send a copy of "the Crowe document . . . to review before our meeting at 10:30" because she could not locate the copy she thought she had.[59] GC Weiss responded that he "never kept an electronic copy," but that "Sharon [Edgar] may have found a copy in Lynn's papers."[60] Respondent then wrote, "*All the better if you don't have it* as we can then tell Shirley, truthfully, that only Lynn was in receipt of the letter and we are unable to locate a copy."[61] Responding to GC Weiss's earlier email, Ms. Edgar then sent Respondent a copy of the version of the Crowe Report dated January 31, 2013, writing, "*This is the draft Crowe report with an overview of their findings.*[62] I also have a variety of other Crowe documents from Gantt charts to Board and Management presentations so if you want to see them all I can put them together onto the SharePoint site."[63] Several minutes later, GC

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

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

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

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

[62] In her summary disposition briefing, Respondent repeatedly contends that Bank management did not interpret Ms. Omi's March 25, 2013 request as encompassing the draft Crowe Report at all. *See*, *e.g.*, Resp. Opp. at 11 (asserting that "Ms. Akahoshi, Weiss, and Ryan did not 'join issue' with Omi as to what document she was requesting"), 12 (stating that "[t]he bankers plainly thought . . . that the document relevant to Omi's request for 'what bank management received from Crowe' referred to the February 5 PowerPoint presentation by Crowe to the key players in the bank"); Resp. Mot. at 12 (asserting that the PAR PowerPoint, not the Crowe Report, was "the operative Crowe document (and responsive to Omi's request for what Crowe had provided to management) in the bank's view"). The undersigned finds that these assertions are not credible, as the contemporaneous correspondence cited here reveals a clear understanding among Respondent and the Bank officials with whom she was communicating that the Crowe Report was the document to which Ms. Omi's request most centrally referred. *See also* OCC-MSD-40 (March 9, 2013 email from Sharon Edgar to Respondent) (sending Crowe Report to Respondent and stating that "[t]his is their actual draft report, so when you hear someone mention a report it is most likely this document").

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

Weiss also forwarded the January 31, 2013 Crowe Report to Respondent, as part of a package of BSA-related Crowe materials that had been provided to Bank executives in advance of a BSA Executive Oversight Committee meeting on February 19, 2013.[64]

Following her meeting with CEO Ryan and GC Weiss,[65] Respondent circulated to those individuals a proposed response to Ms. Omi's email, to which GC Weiss offered suggested edits.[66] Respondent then responded to Ms. Omi later that day ("the March 25, 2013 Email").[67] Notwithstanding Ms. Omi's clear request for all Crowe BSA-related reports or documents to the Bank "even if . . . only preliminary or partial," and despite the fact that Respondent had that day been given, and was now in possession of, multiple, lengthy BSA-related Crowe documents that had been provided to Bank management in January and February 2013, including two copies of the Crowe Report, Respondent's response to Ms. Omi attached only a single Crowe document: a seven-page "copy of a proposal Crowe submitted to the Executive Oversight Committee on March 1, 2013" that did not contain any of the conclusions found in the Crowe Report or the PAR PowerPoint regarding deficiencies in the Bank's BSA/AML program.[68] Moreover, although Respondent and her colleagues referred to the Crowe Report repeatedly in their correspondence with each other immediately beforehand as the presumptive subject of Ms. Omi's request,[69] the

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

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

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

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

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

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

March 25, 2013 Email again gave the impression of disclaiming any awareness of the Crowe Report's existence even in preliminary or partial form, raising the notion of a report briefly before pivoting to the far more cabined question of whether Crowe had provided Bank management with a copy of the specific PowerPoint deck used during its early February 2013 presentation:

> I've spoken with both John Ryan and Dan Weiss *regarding the existence of a draft report coming out of the January BSA Program Review by Crowe Horwath*. They each reported the same information which is that Crowe had a discussion with the board and members of executive management at the February 4th meeting.[70] And while Crowe did utilize a PowerPoint presentation during the discussion, it was not provided to the Bank, as indicated by the fact that it was not included in the board packet. In this meeting and in subsequent conversations, both board members and executive management were very critical of the information being provided nothing that there lacked foundation and that assumptions appeared to be based on inaccurate information. . . .
>
> In all, the participants did not find the presentation particularly useful. It was this presentation that prompted management to suspend the work being done by Crowe around the BSA/AML Program Assessment until clearer instructions and parameters could be established with the goal of an end product that the board and management could rely upon to make decisions going forward. Crowe has since been provided with additional information and has, in fact, altered their recommendations on several fronts.
>
> Now that there is more effective sharing of information and clearer communication as to the direction of work, we have picked up where the work ended in mid-February and are utilizing Crowe resources to assist us in completing the BSA/AML Risk Assessment. . . . I've attached a copy of a proposal Crowe submitted to the Executive Oversight Committee on March 1, 2013, which outlines their recommendations for next steps, as described above, and which we've generally accepted. We're happy to discuss further and will certainly share the BSA/AML Risk Assessment when it comes out in draft near the end of April or early May.[71]

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

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

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

The OCC Requests the Crowe Assessment Again

Still unsuccessful in obtaining the Crowe assessment described to the OCC by Ms. Sullivan following her forced leave of absence,[72] ADC Jorn contacted CEO Ryan on April 8, 2013 to request the document directly from him.[73] The undersigned notes that ADC Jorn's initial conversation with CEO Ryan appears to have accepted Respondent's framing that the PowerPoint presentation to the Compliance Committee in early February, rather than the significantly more detailed draft Crowe Report upon which the PAR PowerPoint was based, was the operative document that the agency needed to see.[74] Nevertheless, by the time of the follow-up conversation between the two individuals on April 10, 2013, ADC Jorn had made it clear to CEO Ryan that his request was specifically targeted at the draft Crowe Report as well.[75] CEO Ryan agreed to provide the materials requested by ADC Jorn along with a cover letter addressing any information

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

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

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

[75] *See* OCC-MSD-66 (handwritten notes of ADC Jorn following telephone conversations with CEO Ryan on April 8, 2013 and April 10, 2013) at 1 ("Request for PPT from Crowe – have PPT & narrative – 'speaking notes' – separate report one & same – from that the PPT was put together. – Can send both of them – Draft for discussion purposes"); R-MSD-11 (April 11, 2013 email from CEO Ryan to other Bank personnel) ("I had my call with Tom this afternoon and he advised that the examination is still ongoing and they will consider the contents of ***the Crowe report*** and other information as they feel appropriate in finalizing the examination.") (emphasis added).

contained therein that was, in the Bank's view, "inaccurate, incomplete, or misleading."[76] To give the Bank "time to do a proper cover letter," ADC Jorn agreed to target "sometime next week to [the] end of next week"—that is, by April 19, 2013—for the delivery of the requested materials.[77]

CEO Ryan then went about collecting Crowe documents from others at the Bank and from Crowe itself, including a copy of the February 5, 2013 PAR PowerPoint and the January 31, 2013 "version 0.9" of the Crowe Report that Respondent, GC Weiss, and Ms. Edgar, among others, already possessed.[78] Bank personnel, including Respondent, began formulating the draft cover letter to accompany the Crowe materials.[79] In so doing, Respondent noted that the agency's focus was likely to be on the Crowe Report rather than the PAR PowerPoint, because it was what had been mentioned in the whistleblower communications and because it "provide[d] the most detailed views of Crowe at the time."[80] Respondent expressed the concern that if the cover letter did not "speak specifically to [the Crowe Report]," then the Bank would "run the risk of the OCC making their own inferences."[81] Concurrently, on April 12, 2013, Ms. Sullivan provided the OCC with materials relating to her whistleblower claims, including a copy of an earlier version of the Crowe Report, denoted as "version 0.1."[82]

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

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

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

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

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

[81] *Id.*

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

The Bank's April 18th Cover Letter

On April 18, 2013, Respondent emailed ADC Jorn and others at the OCC, attaching version 0.9 of the Crowe Report, a copy of the PAR PowerPoint dated February 5, 2013, and a cover letter "providing background and context to the Crowe Horwath engagement and Management's response thereto."[83] The email states that the PAR PowerPoint (which the Bank terms "the Deck") is being provided in response to the OCC's March 25, 2013 request.[84] Respondent then adds that the Bank has "also included a narrative provided by Crowe Horwath on which the Deck was designed"—in other words, the Crowe Report.[85] The undersigned observes *sua sponte* that this email inaccurately characterizes the OCC's March 25, 2013 request to the extent that it suggests that the OCC at that time had requested only the PAR PowerPoint, or even principally the PAR PowerPoint, rather than the draft Crowe Report itself.[86]

The Bank's seven-page cover letter addresses a number of aspects of Crowe's engagement and the whistleblower claims made by Ms. Sullivan and Ann Marie Wood, another Bank employee who had raised concerns about the Bank's BSA/AML program, but there is one passage in particular that is relevant to the instant action. In discussing the scope of work performed by Crowe in January and February 2013, the letter represented the following:

> Prior to the OCC request for the "Crowe Report" on March 25, 2013, the bank was not in possession of the Deck, which was used by Crowe Horwath to present observations at a meeting of the Compliance Committee on February 5, 2013. The PAR, dated January 31, 2013 [that is, the Crowe Report], was provided only to

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

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

[85] *Id.*

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

> the Chief Compliance Officer with a copy to Legal Counsel. It was left with Ms. Sullivan who continued to work with Crowe Horwath to develop an execution plan. Management now understands from correspondence sent to the OCC by Ms. Wood that Ms. Sullivan shared the document with her. *We are not aware of further distribution.*[87]

The parties disagree as to the factual accuracy of this paragraph.[88] The undersigned finds that the passage is most reasonably read to be purporting to describe the full extent, at least to the knowledge of the paragraph's drafter, that the Crowe Report was distributed among Bank personnel prior to the OCC's March 25, 2013 Email, whether by the OCC or by people within the Bank itself. The undersigned further finds that the Crowe Report indisputably (and contrary to the representations in this paragraph) was in the possession of Bank personnel other than Ms. Sullivan, Ms. Wood, and GC Weiss prior to March 25, 2013, including Respondent, Ms. Edgar, and several members of the Bank's Executive Oversight Committee.[89] Thus, if the drafter of this passage were, in fact, aware of this additional distribution of the Crowe Report at the time the cover letter was drafted, the undersigned finds that that portion of the paragraph would be factually inaccurate and misleading.[90] The parties also dispute the extent to which Respondent was responsible for drafting the passage in question.[91]

Respondent's Edits to Compliance Committee Meeting Minutes

For the first time, Enforcement Counsel in the instant briefing adduces facts concerning Respondent's participation, in late April and mid-May 2013, in the retroactive revision of draft minutes of, and concerning, the February 5, 2013 meeting of the Bank's Board Compliance

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

[88] *See* OCC Mot. at 9, 19; Resp. SOF ¶ 77.

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

[90] The first sentence of the paragraph is likewise inaccurate, or at least misleading, inasmuch as it operates to obscure the undisputed distribution of earlier versions of the PAR PowerPoint to Bank personnel prior to March 25, 2013, even if the February 5th version itself was not so distributed. *See* note 20, *supra*.

[91] *See* Resp. SOF ¶ 77(g); OCC Opp. at 16.

Committee,[92] which Enforcement Counsel contends was done "to further obfuscate the concealment of the Crowe Report from the OCC."[93] The undersigned finds that the factual record with respect to these meeting minutes is not sufficiently developed to aid one way or the other in the resolution of the parties' cross-motions for summary disposition.[94]

Events Leading to Respondent's Dismissal from the Bank

Following the production of the Crowe Report, the OCC returned to the Bank to conduct a further examination in May 2013.[95] On July 2, 2013, the OCC issued a Supervisory Letter documenting its findings from the follow-up examination and concluding that the Bank's BSA/AML compliance program was "deficient" in multiple respects, with "significant issues resulting in violations of laws."[96] The Bank subsequently entered into a Consent Order with the OCC in December 2013 to address the Bank's statutory and regulatory violations and remediate deficiencies in the Bank's BSA/AML program.[97]

On August 13, 2015, the Bank's Remediation Committee issued a decision concluding, *inter alia*, that Respondent (1) had improperly withheld materials responsive to the OCC's March 22, 2013 Email and March 25, 2013 Email; (2) had made statements that "were less than candid and failed to include pertinent information" in response to those emails, such as failing to acknowledge the existence of the draft Crowe Report; and (3) had "shared drafting responsibility"

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[92] *See* OCC SOF ¶¶ 67-68; OCC Mot. at 22-23.

[93] OCC Mot. at 22.

[94] *See* Resp. Opp. at 18 n.9; Resp. Opp. SOF at 72-75. To the extent that Enforcement Counsel wishes to proffer a more fully developed account of Respondent's conduct with respect to the February 5, 2013 meeting minutes as suggestive of a continuing disregard or recklessness sufficient to satisfy those elements of 12 U.S.C. §§ 1818(e) and 1818(i), it may do so at an appropriate later stage. *See infra* at 62-65 (holding that summary disposition of claims of continuing disregard and recklessness is premature).

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

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

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

for the April 18, 2013 letter to the OCC that "was inaccurate in that it understated the scope of distribution of the [Crowe] Report within [the Bank] as of March 25, 2013."[98] The Remediation Committee further, and unanimously, concluded that Respondent had engaged in misconduct that violated Bank policy and "has resulted, or will result, in considerable loss and/or damage to the reputation of [the Bank]."[99] On September 9, 2015, Respondent's employment with the Bank was terminated for cause.[100]

The Bank's Guilty Plea

On February 7, 2018, the Bank pled guilty to criminally conspiring with "Executive A, Executive B, and Executive C, and others . . . to corruptly obstruct and attempt to obstruct an examination of a financial institution by [the OCC]."[101] It is undisputed that Executive A is Respondent[102] and that the charges involving Executive A to which the Bank pled guilty arose in part out of Respondent's conduct in March and April 2013 related to the OCC's requests for the draft Crowe Report.[103] For example, the charging document against the Bank alleged that Respondent, along with others at the Bank, conspired to (1) "conceal from the OCC the existence of, and the substance of the information contained within [the Crowe Report]"; and (2) "delay and limit disclosure of [the Crowe Report] to the OCC, despite specific and repeated requests by OCC examiners."[104] As a result of the guilty plea, the Bank was fined $500,000 and was subject to a civil money forfeiture totaling $368,701,259.[105]

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

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

[100] *See* OCC SOF ¶ 74.

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

[102] *See* OCC SOF ¶ 75(a); OCC-MSD-89 (Bank Charging Document) at 4.

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

[104] *Id.* at 14.

[105] OCC-MSD-88 (Plea Agreement) at 8; *see* OCC SOF ¶¶ 75(b), (c). Respondent argues that the civil money forfeiture was wholly attributable to alleged offenses separate from the misconduct at issue here. *See* Resp. Mot. at 32

On the same day that the Bank entered its guilty plea, it also entered into a Consent Order with the OCC for a $50 million civil money penalty arising in part from the alleged efforts of "[f]ormer senior officers of the Bank" to "conceal[] from the OCC documents requested by OCC officials and examiners that were relevant to the OCC's evaluation of the Bank's BSA/AML compliance program."[106]

The Instant Action

The OCC commenced these proceedings against Respondent on April 17, 2018. The agency's allegations against Respondent center around her statements in the March 22, 2013 Email, the March 25, 2013 Email, and (allegedly) the April 18, 2013 cover letter, as well as her general course of conduct in allegedly concealing and seeking to divert the OCC's attention from the existence of, and conclusions contained in, the Crowe Report, despite repeated overt requests by OCC examiners. According to the OCC, Respondent's conduct constitutes a violation of 12 U.S.C. § 4481, which addresses the power of OCC examiners to conduct bank examinations, and of 18 U.S.C. § 1001, which governs the willful concealment or misstatement of material facts in the course of a federal investigation or other proceeding, as well as being actionably unsafe or unsound. Each of these potential violations is addressed in further detail *infra*.

On April 24, 2020, following the reassignment of this case from Administrative Law Judge ("ALJ") C. Richard Miserendino to the undersigned in the wake of the Supreme Court's decision

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(arguing that forfeiture arose from "money laundering and structuring offenses, not the discrete false statement and concealment violations alleged here") (emphasis omitted) (citing OCC-MSD-88 (Plea Agreement) at 38). Even if true, it appears without dispute that the $500,000 fine paid by the Bank in connection with its guilty plea was attributable at least in part to the criminal conspiracy charges involving Respondent and the Crowe Report.

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

in *Lucia v. Securities & Exchange Commission*,[107] the undersigned denied Respondent's motion to dismiss this action on the various grounds that the previous ALJs presiding over the action had not been constitutionally appointed; that the undersigned had not been constitutionally appointed; and that the individual who issued the Notice on behalf of the OCC was not an appropriately delegated signatory and had not been constitutionally appointed.[108] On October 16, 2020, as partially modified by an order on March 1, 2021, the undersigned rejected Respondent's argument that the claims against her should be dismissed as time-limited.[109] And on March 8, 2021, the undersigned declined to grant Respondent's motion asserting "that the OCC has constructed a system of secret law" and seeking to prohibit the parties from citing any non-public, unpublished precedents.[110] Each of these arguments was thereby recorded and preserved for appeal to the Comptroller of the Currency ("Comptroller") at the appropriate stage in the proceedings, should Respondent wish to revisit those issues before the Comptroller at that time.[111]

The parties have now filed cross-motions for summary disposition, each contending that a determination of whether the statutory elements of 12 U.S.C. §§ 1818(e) and 1818(i) have been satisfied in this case may be resolved in their favor based on the factual record as presently developed. In addition, Respondent revisits her arguments regarding the applicable statute of

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[107] 585 U.S. ___, 138 S. Ct. 2044 (2018).

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

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

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

[111] *See*, *e.g.*, April 24, 2020 Order at 9 (preserving for appeal all "arguments regarding the constitutionality of the limitations on the removal of ALJs"); *see also* 12 C.F.R. §§ 19.39 (Exceptions to recommended decision), 19.40 (Review by the Comptroller).

limitations, the Appointments Clause of the United States Constitution, and the OCC's purported reliance on "secret law," arguing that these grounds entitle her to summary disposition as well.

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

Any evaluation of the parties' cross-motions for summary disposition 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).[112] *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. § 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-

[112] The undersigned finds that Respondent is an IAP of the Bank as that term is defined in 12 U.S.C. § 1818(u).

tier penalty sought by the OCC.[113] 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.[114] For a second-tier penalty to be assessed, by contrast, the agency must show not only misconduct,[115] 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."[116] As with Section 1818(e), 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

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[113] *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).

[114] 12 U.S.C. § 1818(i)(2)(A).

[115] 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).

[116] 12 U.S.C. § 1818(i)(2)(B)(ii).

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."[117] This so-called Horne Standard has long guided federal banking agencies, including the OCC, in bringing and resolving enforcement actions.[118] It has also been recognized as "the authoritative definition of an unsafe or unsound practice" by federal appellate courts.[119] 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.

Here, as noted, 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. 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," including "significant reputational harm."[120] *Id.* ¶ 46. With respect to the culpability element of Section 1818(e), the OCC alleges that Respondent's conduct "involved personal dishonesty and/or

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[117] *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).

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

[119] *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).

[120] The Notice also alleged that "Respondent received financial gain or other benefit" from her misconduct sufficient to satisfy the statutory effect element, but the undersigned concluded that this allegation was not credibly pled. *See* March 1, 2021 Order at 9 ("There is no reasonable inference that may be drawn to support the assertion that Respondent engaging in allegedly unsafe or unsound behavior and violating multiple statutes by refusing to provide OCC examiners access to documents to which they were indisputably entitled could have *benefited* Respondent by increasing her job security.") (emphasis in original). The OCC does not allege that the effect element of Section 1818(e) is met by probable (as opposed to actual) financial loss or other damage to the Bank or either probable or actual prejudice to the Bank's depositors. *See* 12 U.S.C. § 1818(e)(1)(B).

demonstrated a willful or continuing disregard for the safety and soundness of the Bank." *Id.* ¶ 48(c). 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 . . . and/or caused more than minimal loss to the Bank."[121] *Id.* ¶ 50(b).

IV. Argument and Analysis

Enforcement Counsel argues that the undisputed facts of Respondent's conduct in March and April 2013 constitute actionable violations of 12 U.S.C. § 481 (failure to provide timely and complete bank information to OCC examiner upon request) and 18 U.S.C. § 1001 (knowing and willful false statements and representations and concealment of material fact) as well as unsafe or unsound practices in conducting the Bank's affairs, any of which individually would, if proven, satisfy the misconduct elements of Sections 1818(e) and Section 1818(i).[122] Enforcement Counsel also argues that the Bank has indisputably suffered loss and reputational damage as a result of Respondent's conduct and that Respondent acted with personal dishonesty and willful or continuing disregard for the Bank's safety or soundness, thereby satisfying the statutory effect and culpability elements of a Section 1818(e) prohibition order, respectively.[123] Finally, with respect to the imposition of a $50,000 second-tier civil money penalty under Section 1818(i), Enforcement Counsel argues that Respondent's engagement in unsafe or unsound practices was reckless and that her conduct was part of a pattern of misconduct.[124]

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[121] The OCC also alleged in the Notice that the conduct in question "resulted in pecuniary gain or other benefit to [] Respondent," Notice ¶ 50(b), but the undersigned concludes that this allegation is not credibly pled for the same reason as given in note 120 *supra*.

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

[123] *See id.* at 28 (loss), 29-30 (personal dishonesty), 30-33 (willful or continuing disregard).

[124] *See id.* at 34-36 (reckless engagement), 36-37 (pattern of misconduct).

In addition to contesting each aspect of Enforcement Counsel's arguments, *see generally* Resp. Opp., Respondent maintains that she is entitled to summary disposition of all of the OCC's claims. Specifically, Respondent argues that the undisputed facts demonstrate that her conduct was in no way improper, that she composed the emails in question accurately and in good faith, that she never withheld or sought to conceal the Crowe Report from OCC examiners, and that she did not draft the passages in question in the April 18, 2013 letter. Respondent further argues that there was nothing material about the Crowe Report or any alleged misstatements on Respondent's part, that Respondent indisputably did not act knowingly or willfully, that no reasonable person would have understood Respondent's conduct to constitute a Section 481 violation, and that her conduct was demonstrably neither unsafe nor unsound. Moreover, Respondent argues that the OCC cannot demonstrate that Respondent caused any loss to the Bank and cannot use the government's own settlement of different claims against a different party as a basis for Respondent's liability. Lastly, Respondent argues that there was no pattern of misconduct, that Respondent indisputably did not demonstrate a level of culpability necessary to trigger that statutory element, and that Respondent is entitled to summary disposition based on a number of additional arguments that have already been addressed and largely rejected in earlier orders.

A. The Undisputed Evidence Shows That Respondent Engaged in Actionable Misconduct

As discussed further below, the undersigned finds based on the undisputed factual record that Respondent violated 12 U.S.C. § 481 and 18 U.S.C. § 1001(a)(1) by withholding the Crowe Report from OCC examiners and endeavoring to conceal its existence. The undersigned also finds that Respondent's conduct constituted actionably unsafe or unsound practices in that it was reasonably foreseeable that her obstruction of the OCC's examination could expose the Bank to risk of liability and adverse agency action. Any of these findings standing alone is enough to hold

that Respondent has engaged in actionable misconduct for the purposes of 12 U.S.C. §§ 1818(e) and 1818(i). Finally, the undersigned concludes that the undisputed material facts are not sufficient to establish, at this stage, that Respondent knowingly and willfully made false statements and representations to the OCC in violation of 18 U.S.C. § 1001(a)(2) or that the misrepresentations contained in the April 18, 2013 cover letter, which Respondent disputes having authored, were in fact material.

1. <u>The OCC's Section 481 Claims</u>

Enforcement Counsel argues that Respondent "caus[ed] the Bank to violate its statutory duty under 12 U.S.C. § 481," OCC Mot. at 16, thereby satisfying the misconduct prongs of Sections 1818(e) and 1818(i), when she failed to provide the Crowe Report to OCC examiners upon request in March 2013, despite knowingly having that document in her possession and understanding it to be responsive to the OCC's inquiry. The undersigned agrees.

The March 15, 2013 Bank Response Letter that Respondent participated in drafting recognized "that it is the Bank's responsibility to provide complete, accurate, and timely information to the OCC in the examination process."[125] Respondent does not dispute that the source of this responsibility is 12 U.S.C. § 481, which 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," something that would only be possible if those examiners had access to relevant bank information as needed during the course of their examination.[126] And Respondent acknowledges that, as both a former

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

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

OCC examiner and a bank officer, she was aware during the relevant period "that there was authority that required the bank to provide books and records to the OCC."[127] It appears beyond dispute, then, that when the OCC sought any materials that Crowe had provided to the Bank in conjunction with its BSA/AML assessment, the Bank had an obligation to provide all such materials—in Respondent's words—"timely and transparently and to the best of [its] abilit[y]."[128]

Respondent now contends, however, that a Section 1818 enforcement action may not be premised on even an unconditional and express refusal to comply with a bank's obligations under Section 481, whether this refusal comes from the bank itself or an officer charged with liaising with the OCC during its examination. *See* Resp. Mot. at 19-20. Respondent also argues that permitting the agency to maintain such an action here would "violate[] basic due process," as no reasonable person in March 2013 would have known that misleading OCC examiners regarding the existence of documents they had specifically requested could, in some circumstances, lead the OCC to pursue adverse action against the individual in question. *Id.* at 20. The undersigned concludes that Respondent is incorrect in both respects.

It is Respondent's position that the OCC may not premise enforcement actions on any violation of Section 481 because Congress has not conferred upon the agency enforcement power over such violations.[129] *See id.* at 19. Yet as explained in this Tribunal's October 16, 2020 Order denying Respondent's motion to dismiss this matter on similar grounds, Section 1818(e) authorizes the federal banking agencies to seek prohibition orders against any IAP who has "directly or indirectly violated any law or regulation," while Section 1818(i) likewise states that the violation

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

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

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

of "any law or regulation" is grounds for the assessment of a civil money penalty, presuming in both cases that the other statutory criteria are also met.[130] And 12 U.S.C. § 1813(v) makes it clear that Congress intended the scope of an actionable "violation" under these statutes to be construed broadly to include "any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation."[131] Thus, the conferral of enforcement power that Respondent seeks is contained within Section 1818 itself: if an IAP "brings about" a violation of Section 481 by, for example, causing the Bank to fail to fulfill its obligation to provide accurate and complete information regarding requested documents to OCC examiners, then the OCC is empowered by Sections 1818(e) and 1818(i) to make this violation the subject of an enforcement action, as it could with the violation of any other law.

Nor is it credible to claim that a bank official in the Spring of 2013 would reasonably believe that they could conceal documents from an OCC examiner without consequence. To argue, as Respondent does, that there was no ascertainable standard of conduct "with which the agency expect[ed] parties to conform" when asked for bank information verges on disingenuity, especially given Respondent's own background at the OCC.[132] As the relevant section of the OCC's Policies and Procedures Manual observes, there are multiple statutory provisions even beyond 12 U.S.C. § 481 that make it clear that bank officials should cooperate fully with requests made in the course of an examination.[133] Could the law be clearer in specifically and unequivocally imputing to bank officials the duty of effectuating banks' responsibilities to the OCC during its examination

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[130] 12 U.S.C. §§ 1818(e)(1)(A)(i)(I), 1818(i)(2)(A)(i); *see* October 16, 2020 Order at 33-35.

[131] 12 U.S.C. § 1813(v).

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

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

process? Certainly. But Respondent cannot reasonably claim that she did not believe that she had such a duty at the time, when she herself has acknowledged it then and since, and when as a former long-time OCC examiner she should have been under no illusions about the need to give the agency what it asks for if you have access to the requested materials.[134] There may be circumstances in which the lack of a more precise standard should forestall enforcement actions against bank officials who make a good faith if incomplete effort to cooperate with examiners, but that is not the factual record here. As a standard of behavior, knowing not to withhold a document from the OCC and mislead the agency about the document's existence, when that document has been expressly requested and is in your possession, would be ascertainable under any light.

Respondent argues that even if an enforcement action could be premised on a violation of a bank's duty to provide prompt and accurate bank information to examiners under Section 481, no such violation occurred here. *See* Resp. Mot. at 21-22. The undersigned cannot agree. The undisputed facts show that at every step, Respondent chose obfuscation, misdirection, or diversion in formulating her responses to Ms. Omi's requests, rather than engaging with the requests themselves fully, candidly, and directly. On March 21, 2013, Ms. Omi asked for a copy of Crowe's BSA assessment report; in return, Respondent hinted heavily that no such report existed while privately making contingency plans in case the agency had obtained a copy of the draft report some other way.[135] On March 25, 2013, Ms. Omi made her request again, emphasizing this time that it encompassed *any* BSA-related report or document that Crowe had provided to Bank management,

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

[135] *See* Part II *supra* at 12-14 (citing exhibits).

even if "only preliminary or partial." Instead of supplying the draft Crowe Report, which was unquestionably responsive to Ms. Omi's request and which multiple people at the Bank had sent Respondent *that day*, Respondent opted to inaccurately characterize the PAR PowerPoint (drafts of which she also could have provided Ms. Omi but did not) as if it were the only work product Crowe had created in the course of its January 2013 assessment, once more conveying the impression that the Crowe Report did not exist even in draft form.[136]

Respondent's lack of any mention of the Crowe Report in her March 22, 2013 Email to Ms. Omi could charitably be construed as grounded in a good faith belief that the OCC examiner was only interested in "final" documents (although even this is belied by Respondent's colloquies with CEO Ryan and GC Weiss regarding "the draft from Crowe" and "the draft report" immediately before and afterwards). Once Ms. Omi clarified that she was seeking any preliminary materials the Bank had received from Crowe, however, Respondent had an obligation to provide those materials—or, at the very least, complete and accurate information about those materials—in a "timely and transparent[]" manner and to the best of her ability.[137] Respondent could have attached the Crowe Report to her March 25, 2013 Email to Ms. Omi as she was requested (and required) to do, but she did not. Respondent could have acknowledged the existence of the Crowe Report in that same email; again, she did not. There is, in fact, no indication that she even contemplated either course of action, or indeed that she ever intended to give the Crowe Report to the OCC if left to her own devices, despite having it in her possession and knowing that it was responsive to the agency's request. Not until ADC Jorn contacted CEO Ryan two weeks later did the Bank finally take steps to provide the Crowe Report as requested, albeit with a cover letter

[136] *See id.* at 15-19 (citing exhibits).
[137] OCC-MSD-108 (Akahoshi Dep.) at 41:8-9.

inaccurately representing the extent to which the report had previously been circulated among Bank personnel.[138]

In sum, OCC examiners are entitled to prompt and complete access to bank information upon request during their examination, pursuant to the authority granted them in 12 U.S.C. § 481. Bank officials whose positions empower them to act as liaisons with OCC examiners have an obligation to make a reasonable effort to timely provide materials requested by those examiners in the scope of their duties and to otherwise provide accurate and responsive information relevant to those requests. Respondent possessed the Crowe Report, knew it to be responsive to the OCC's March 25, 2013 request, and yet withheld it from the examiner. In her March 25, 2013 Email, Respondent also failed to fully or accurately characterize the extent to which Crowe had provided preliminary BSA/AML work product to the Bank, despite a direct request to turn over all such materials. As a result, Respondent caused the Bank to violate its undisputed duty under Section 481, thereby satisfying the misconduct prongs of a Section 1818 enforcement action for a prohibition order and the assessment of a civil money penalty.

2. The OCC's Section 1001 Claims

In addition to violating 12 U.S.C. § 481, Enforcement Counsel argues that Respondent's conduct constitutes a violation of 18 U.S.C. § 1001, which encompasses both the making of materially false statements and the concealment of material facts from government officials in the course of their duties. *See* OCC Mot. at 16-26. The undersigned finds that the undisputed record establishes that Respondent knowingly and willfully concealed material facts from OCC examiners regarding the nature of the Crowe work product provided to Bank officials in January and February 2013, thereby violating 18 U.S.C. § 1001(a)(1). The undersigned concludes,

[138] *See* Part II *supra* at 19-22 (citing exhibits).

however, that a determination of whether Respondent *also* knowingly and willfully made materially false statements or representations for the purposes of 12 U.S.C. § 1001(a)(2) is premature at this time.

18 U.S.C. § 1001 broadly prohibits "deceptive practices aimed at frustrating or impeding the legitimate functions of government departments or agencies."[139] 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."[140] 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."[141] 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.[142] Enforcement Counsel contends that Respondent's conduct in March and April 2013 violated both of these provisions.[143] Respondent, by contrast, argues that the necessary elements of a Section 1001 violation under either subsection have not been satisfied for a number of reasons, which the undersigned addresses in turn.

Concealment and a Duty to Disclose

The D.C. Circuit and the Ninth Circuit both hold that the concealment of a material fact from a government official is only actionable under 18 U.S.C. § 1001(a)(1) if the individual in

[139] *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).

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

[141] 18 U.S.C. § 1001(a)(1).

[142] *Id.* § 1001(a)(2).

[143] *See* October 16, 2020 Order at 43-44 (finding that the Notice pleads violations of both the concealment prong and the false statement prong of 18 U.S.C. § 1001). There is a third category of prohibited conduct, the making or use of "any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry," *id.* § 1001(a)(3), which Enforcement Counsel does not plead and which is not at issue here.

question had a specific duty to disclose that fact in that context.[144] Respondent asserts that Enforcement Counsel has not, and cannot, establish any duty on her part "to disclose the draft PAR or any Crowe document to the OCC." Resp. Mot. at 11. As the undersigned explains in Part IV.A.1 *supra*, however, that is incorrect. As acting CCO of the Bank, it was incumbent upon Respondent, to the best of her ability, to provide "complete, accurate, and timely information" to OCC examiners upon request.[145] If, in that capacity, Respondent is asked for a specific document that is in her possession, it is Respondent's duty to disclose the existence of that document rather than withholding it and contriving to create the impression that the document does not exist. Respondent, moreover, was aware of this duty.[146] Any argument that she should escape liability under 18 U.S.C. § 1001 because she was entitled to conceal documents requested by the OCC must therefore fail.

Respondent also argues that Enforcement Counsel presents no evidence of any "concealment scheme" sufficient to satisfy the standard of Section 1001(a)(1). Resp. Mot. at 11. According to Respondent, "[t]he March emails, on their face, did not conceal documents—they conveyed to the OCC Mrs. Akahoshi's (second-hand) understanding that Crowe's work was incomplete, unreliable, and thus might waste the OCC's time." *Id.* This, too, is wrong. Respondent's communications with CEO Ryan and GC Weiss and the carefully opaque phrasing

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

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

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

of her responses to Ms. Omi, as detailed *supra* at 11-19, give every indication of a sustained, collusive effort on the part of Respondent and her colleagues to prevent an examiner charged with assessing deficiencies in the Bank's BSA/AML compliance program from learning about, or coming into possession of, a third-party report finding numerous such deficiencies, if in fact the agency was not already aware that the report existed.[147]

As an illustrative example of this effort, consider the exchange between Respondent and GC Weiss following Ms. Omi's initial request for "a copy of the assessment report of the Bank's BSA program that Crowe [Horwath] LLC was engaged to perform in January 2013."[148] Respondent forwarded Ms. Omi's request to GC Weiss and proposed responding that "Crowe did not perform an assessment" and that "the project was shelved before any report could be issued."[149] Replying to this, GC Weiss noted that while to his knowledge "Crowe never provided a final report[,] . . . [t]hey did produce a draft that was shared with management."[150] GC Weiss then suggested revising the wording of the response to state that "no '*final* report was issued,'" adding that "[t]he obvious concern is they then ask for the draft from Crowe."[151] The March 22, 2013 Email to Ms. Omi keeps Respondent's initial language and does not distinguish between "final" reports and any draft versions of reports created in connection with the January 2013 engagement, asserting only that no report was issued.[152]

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

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

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

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

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

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

In other words, when formulating a response to the OCC's request for "the assessment report" that Crowe created as part of its engagement, Respondent and GC Weiss considered language that would make their response more precise and accurate—specifying that Crowe did not complete a "final report," with the knowledge that a draft report of the January 2013 engagement had been created and shared with the Bank—but shelved that language amidst concerns that referring to a final report might prompt the agency to look into the existence of any remaining drafts. Indeed, when the March 22, 2013 Email does mention a draft report, it is in the context of Crowe's assertedly *new* BSA-related engagement with the Bank, for which a draft risk assessment was anticipated "in time for the next board meeting in early May."[153] By promising the OCC a copy of *that* draft report, the March 22, 2013 Email neatly closes the chapter on the OCC's request for January 2013 materials, leaving the reader with the unmistakable impression that had a draft report arising from the earlier engagement existed, Respondent certainly would have offered to share that as well. These are not the actions of individuals who are operating with transparency and seeming good faith in their dealings with OCC examiners.

One further example of Respondent's tendencies toward concealment should suffice. In the wake of Ms. Omi's express request on March 25, 2013 for all draft Crowe materials provided to the Bank, Respondent emailed GC Weiss for a copy of "the Crowe document . . . to review before our meeting at 10:30."[154] When GC Weiss responded that he did not have an electronic copy of the Crowe Report, Respondent expressed relief at being able to "tell Shirley, *truthfully*, that only Lynn was in receipt of the letter and we are unable to locate a copy."[155] Perhaps unfortunately for Respondent's preference for truth-telling, Ms. Edgar then provided Respondent

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[153] *Id.*

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

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

with the Crowe Report and more, offering to create a SharePoint site where Respondent could see and obtain "a variety of other Crowe documents from Gantt charts to Board and Management presentations."[156] Respondent turned down the offer.[157]

To all appearances, every document that Ms. Edgar offered to provide Respondent was unquestionably responsive to Ms. Omi's request an hour prior. GC Weiss also emailed Respondent additional Crowe materials, forwarding her a February 19, 2013 email to the Bank's BSA Executive Oversight Committee that had provided Committee members with the Crowe Report and other responsive documents.[158] Yet remarkably, Respondent's response to Ms. Omi later that day did not advert to the existence of *any* of these documents, let alone attach them. Beyond an initial, glancing reference discussed further below, she did not mention the Crowe Report. She did not mention the "Gantt charts" referenced by Ms. Edgar or the AML Program Roadmap, High Level Roadmap, and Program Enhancement Update sent to her by GC Weiss. The *only* document from the January 2013 engagement that Respondent identified to Ms. Omi, despite having multiple such documents in her possession and knowing how to obtain others, was a single PowerPoint presentation from February 5, 2013, which Respondent misleadingly represented "was not provided to the Bank."[159] Moreover, in referencing the February 5, 2013 PowerPoint presentation immediately after stating that Respondent had spoken to CEO Ryan and GC Weiss "regarding the

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

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

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

[159] OCC-MSD-64 at 1 (March 25, 2013 email from Respondent to Shirley Omi et al.). As discussed in note 20 *supra*, this representation is misleading because even if the specific version of the PAR PowerPoint dated February 5, 2013 had not been circulated within the Bank, it is undisputed that other draft or related versions of the PowerPoint presentation were provided to Bank personnel, including a PowerPoint entitled "AML Program Enhancement Update" that was in Respondent's possession at the time of her response to Ms. Omi. *See* OCC-MSD-58 at 1 (March 25, 2013 email from GC Weiss to Respondent).

existence of a draft report coming out of the January BSA Program Review by Crowe Horwath," the March 25, 2013 Email conveyed the clear impression, again, that there were no other documents responsive to the examiner's request and that a "draft report" separate from the February 5 presentation simply did not exist.[160]

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

False Statements and Representations

Enforcement Counsel contends that the March 22, 2013 Email, the March 25, 2013 Email, and the April 18, 2013 Cover Letter all contain false statements and representations made by Respondent that separately constitute a violation of 18 U.S.C. § 1001(a)(2). *See* OCC Mot. at 17. Specifically, Enforcement Counsel asserts that (1) the March 22, 2013 Email falsely stated that "Crowe did not complete an assessment," that Crowe was "engaged to perform a market study/peer benchmark analysis," and that "the project was suspended before any report was issued";[161] (2) the March 25, 2013 Email falsely represented "that the only relevant information [Respondent] had gathered 'regarding the existence of a draft report coming out of the January BSA Program Review

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[160] *See supra* at 16 n.62 (finding, contrary to Respondent's assertions in the instant briefing, that "the contemporaneous correspondence . . . reveals a clear understanding among Respondent and the Bank officials with whom she was communicating that the Crowe Report was the document to which Ms. Omi's [March 25, 2013] request most centrally referred").

[161] OCC Mot. at 17 (quoting OCC-MSD-52 (March 22, 2013 email from Respondent to Shirley Omi)).

by Crowe Horwath' after discussing with CEO Ryan and GC Weiss" was that Crowe presented a PowerPoint to the Board and executive management in early February 2013, copies of which it did not provide to them;[162] and (3) the April 18, 2013 Cover Letter falsely represented that the Crowe Report had been circulated only to CCO Sullivan, GC Weiss, and Ms. Wood, when in fact a number of other Bank personnel also had received copies over the relevant time period.[163]

Respondent disputes the falsity of the statements in question, calling the representations made in the March emails "non-responsive" at worst and characterizing the inaccurate description of the Crowe Report's distribution within the Bank in the April cover letter as merely "ambiguous." Resp. Mot. at 13, 14. Respondent also disputes that she in fact authored the April 18 statements, averring that "the documentary evidence shows that [she] did not draft the bulk of the purportedly false parts." *Id.* at 13 (emphasis omitted).

Because the undersigned finds below that Enforcement Counsel has not yet satisfied its burden in demonstrating that the assertedly false statements in question were made knowingly and willfully, it is unnecessary to determine at this time exactly where along a spectrum of "false," "ambiguous," "non-responsive," "unhelpfully vague," and "technically true but extremely misleading" each statement falls. With respect to the authorship of the relevant passages in the April 18, 2013 Cover Letter, moreover, and accepting each party's evidence as true in evaluating the other party's motion for summary disposition on that claim,[164] the undersigned finds that there is a genuine factual dispute as to whether Respondent made the April 18 representations (as well

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

[163] *See id.* at 19.

[164] *See Schaerr*, 435 F. Supp. 3d at 107; *Heffernan*, 417 F. Supp. 3d at 7.

as whether the representations were both knowingly inaccurate and material, as discussed *infra*) that should be resolved at the hearing.

Knowing and Willful Conduct

Both the false statement and concealment components of 18 U.S.C. § 1001 require that the objectionable nature of the conduct at issue be "knowing[] and willful[]," rather than uncalculated, mistaken, or inadvertent.[165] The undersigned concludes that the undisputed evidence demonstrates that Respondent acted knowingly and willfully in concealing information regarding the Crowe Report and Crowe's January 2013 engagement from OCC examiners, but that Enforcement Counsel has not yet shown the same intentional state of mind in Respondent's allegedly false statements and representations. That is, it is clear that Respondent knowingly endeavored to prevent the OCC from becoming aware of the conclusions in the Crowe Report, for the reasons detailed *supra* at 39-43. It is less clear, based on the present record, that part of Respondent's strategy in this endeavor was to consciously and affirmatively lie to the OCC examiner, rather than frame her responses in a manner contrived to mislead Ms. Omi, allow her to draw the wrong conclusions regarding the existence of the Crowe Report, and otherwise subtly thwart her examination, but without telling the examiner direct untruths or making provably false statements.[166] This element is therefore satisfied for concealment under 18 U.S.C. § 1001 but not for the making of false statements or representations.[167]

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[165] 18 U.S.C. § 1001(a); *see also*, *e.g.*, *Dixon v. United States*, 548 U.S. 1, 5 (2006) ("[U]nless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense. And the term 'willfully' . . . requires a defendant to have acted with knowledge that his conduct was unlawful.") (internal quotation marks and citations omitted).

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

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

Materiality

To establish a violation of the relevant provisions of 18 U.S.C. § 1001, the government must show that either the allegedly false representations or the information alleged to have been concealed were material—which is to say, that the concealed facts or false statements had "a natural tendency to influence, or [were] capable of influencing, either a discrete decision or any other function of the agency to which [they were] addressed."[168] It is important to note that a misstatement or concealment need not *actually influence* the agency's decision or its functioning in order to be material, nor does materiality depend on whether the agency in fact relied on the information in question.[169] Rather, "propensity to influence is enough."[170] And "a false statement can be material even if the decision-maker actually knew or should have known that the statement was false."[171] In *United States v. Safavian*, for example, the D.C. Circuit concluded that a defendant's false statements were material even though "the agent who interviewed [the defendant] knew, based upon his knowledge of the case file, that the incriminating statements were false when [the defendant] uttered them."[172]

Here, Respondent argues that neither the Crowe Report nor any of the other Crowe documents satisfy Section 1001's materiality threshold. *See* Resp. Mot. at 14. According to Respondent, the Crowe materials had no capacity to influence the agency's decision-making

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

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

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

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

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

surrounding its follow-up examination of the Bank's BSA/AML compliance program, because "Crowe's draft observations about weaknesses were . . . already well known to the OCC," given the OCC's own preliminary conclusions and the information provided to OCC examiners by whistleblowers Sullivan and Wood. *Id.* at 15. Respondent also asserts that "the OCC had full information about the Crowe engagement" by the time it finally received a copy of the Crowe Report on April 18, 2013, noting among other things that "Board minutes provided to the OCC contained discussions of Crowe's work" and that CCO Sullivan had given the OCC copies of various Crowe materials, although not the Crowe Report itself. *Id.* Finally, Respondent argues that the Crowe Report merely "mirrored some of the OCC's findings" rather than providing the agency with "any new information or identify[ing] a new field of inquiry," and as such there was nothing about the Crowe engagement that did affect, or could have affected, the scope of the OCC's reentry into the Bank in May 2013 for a target exam. *Id.* at 16.

In return, Enforcement Counsel contends that knowledge of the Crowe Report and its conclusions not only could have but *did* influence the decisions and actions of the OCC as it investigated the condition of the Bank's BSA/AML compliance program. *See* OCC Mot. at 24-26; OCC Opp. at 22-26. Specifically, Enforcement Counsel asserts that the Crowe Report was one of several factors that influenced the OCC's scoping of its follow-up examination, the agency's final decision that the Bank's BSA program was deficient, the "tailoring" of the resultant remedial program imposed by the OCC, and the OCC's decision-making regarding a proposed merger between the Bank and an affiliate. OCC Opp. at 24. Enforcement Counsel notes that the Crowe Report's ability to corroborate the OCC's own findings was meaningful in light of the March 15, 2013 Bank Response Letter, co-authored by Respondent, that challenged the premise and validity

of the agency's findings in numerous respects.[173] *See id.* And Enforcement Counsel contests Respondent's claim that the OCC had full knowledge of the Crowe engagement from other sources, stating that the Board minutes to which Respondent refers provided little information and that the whistleblowers offered only "general summaries" of Crowe's conclusions. *Id.* at 25.

The undersigned need not determine whether the Crowe Report or the conclusions of the Crowe engagement generally in fact influenced the OCC's actions and decision-making with respect to its examination of the Bank's BSA/AML program, because it is beyond question that they had the propensity to do so. As Enforcement Counsel notes, the existence of a detailed if preliminary report of a third-party auditor engaged by a bank to make an assessment of the adequacy of a program that is the subject of OCC examination would indisputably have "a natural tendency to influence decisions and actions at the OCC because it can provide additional information about deficiencies, root causes and extent of deficiencies, additional areas requiring examination or follow-up, and required corrective action." *Id.* at 23. At the time that CCO Sullivan first alerted the OCC to the existence of the Crowe Report and Crowe's engagement generally, the agency had just received a dense and lengthy letter from the Bank, largely drafted by Respondent, that pushed back on each one of the OCC's conclusions regarding asserted deficiencies in the Bank's BSA/AML program.[174] That the Bank had engaged an auditor that had reached the same conclusions at the same time as the OCC—while perhaps using a different approach, reviewing different materials, or speaking to different witnesses—appears likely to be quite pertinent to the OCC's decision-making process at that time, especially since the Bank Response Letter omitted any mention of that auditor and its assessment entirely. The undersigned agrees with Enforcement

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

[174] *See generally id.*

Counsel that the Crowe Report could reasonably have been expected to offer the OCC "a roadmap . . . [as it] sought to reconcile the information provided in management's response with the OCC's initial findings and information obtained from bank employees."[175]

With respect to the whistleblowers, moreover, it is also true that obtaining copies of the Crowe Report and other materials from that engagement provided a way for the OCC to substantiate the concerns that those individuals were raising. *See id.* at 26. As for Respondent's contention that the Crowe Report did not contain any new information or open up any new lines of inquiry, this misses the mark: not only is the existence of the Crowe Report itself a material fact for the above-stated reasons, but the specific conclusions of the report are in some sense beside the point. The OCC received information that a BSA/AML assessment report drafted by Crowe existed, determined that obtaining that document would be useful to their examination process, and requested the report from Respondent multiple times.[176] There can be no debate that the subject of the Crowe engagement was directly related to the OCC's examination. The OCC examiners' desire to understand and collect what Crowe had provided to the Bank and to incorporate relevant information from the engagement into their examination—that is, to give the report and its conclusions *an opportunity to influence the agency's decision-making*—alone speaks to that information's materiality, and Respondent's refusal to accommodate the agency's requests or acknowledge the existence of the Crowe Report in her March 22, 2013 and March 25, 2013 Emails must in turn represent an actionable concealment of material facts.

The same cannot be said, at least at this juncture, for the allegedly false statements contained in the April 18, 2013 Cover Letter. Enforcement Counsel has presented no evidence to

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

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

indicate that a more accurate understanding, as of that date, of the scope of the Crowe Report's distribution within the Bank prior to March 25, 2013 would or could have influenced the scope of the OCC's then-ongoing examination or otherwise had the tendency to affect the agency's decision-making. Until and unless such a showing has been made, the undersigned concludes that Enforcement Counsel has not met its burden with respect to the materiality of those statements, notwithstanding their factual inaccuracy.[177]

3. The OCC's Unsafe and Unsound Practices Claims

Enforcement Counsel additionally contends that Respondent's conduct in connection with the OCC's requests for the Crowe Report constituted actionably unsafe or unsound practices in conducting the affairs of a financial institution, which is an independent basis for satisfying the misconduct prongs of 12 U.S.C. §§ 1818(e) and 1818(i). The undersigned concurs with Enforcement Counsel and finds that Respondent engaged in imprudent conduct that foreseeably could have, and did, cause an "abnormal risk" of loss or damage to the Bank, as the Horne Standard requires of any unsafe or unsound practices claim.[178]

Consistent with the Horne Standard, the Comptroller has held that unsafe and unsound practices for the purpose of Section 1818 encompass "any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds."[179] An IAP's practices with respect to the financial

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[177] *See supra* at 21-22 (finding that April 18, 2013 Cover Letter inaccurately and misleadingly characterizes the internal distribution of the Crowe Report to Bank personnel as of March 25, 2013).

[178] *Patrick Adams*, 2014 WL 8735096, at **11-14 (discussing Horne Standard).

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

institution with which they are affiliated are unsafe or unsound if they pose "reasonably foreseeable undue risk to the institution," which the Comptroller and the D.C. Circuit have interpreted to mean "increased risk of some kind."[180] Furthermore, to support a determination that the conduct in question is contrary to accepted standards of prudent operation, the agency "must make some showing as to the relevant standards and the departure from those standards."[181]

Respondent argues that her conduct was not an unsafe or unsound practice "[f]or the same reason that [it] did not constitute a violation of Section 1001 or Section 481." Resp. Mot. at 23. She contends that her consultation with GC Weiss following Ms. Omi's requests was the prudent act of an individual seeking appropriate and accurate counsel from someone with "personal knowledge on the topic of Crowe." *Id.* Respondent also claims that her responses to Ms. Omi were not obstructive and merely offered an "explanation of why the Bank had found [the Crowe materials] unhelpful." *Id.* Finally, Respondent maintains that her decision to withhold the Crowe Report from Ms. Omi did not pose "a reasonably foreseeable undue risk" to the Bank, because any risk of exposure to government enforcement action as a result of this conduct would be "impermissibly circular" and wholly speculative. *Id.*

In this Tribunal's October 16, 2020 Order denying Respondent's previous dispositive motion, the undersigned concluded "that the Notice's allegations that Respondent knowingly and repeatedly lied to the OCC over a prolonged period and concealed a document central to the agency's examination of the Bank for which she acted as Chief Compliance Officer" met the threshold of unsafe and unsound practices with ease.[182] Nothing about the factual record as now

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

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

[182] October 16, 2020 Order at 51.

and more fully developed changes this conclusion. As the Order stated, Respondent's conduct undoubtedly exposed the Bank to "reasonably foreseeable undue risk"—"namely, the risk that [concealing from the OCC] the existence of a third-party auditor report finding deficiencies in the Bank's BSA/AML compliance program and obstructing the agency's examination of that program could have negative consequences for the Bank if and when the deception was discovered."[183] There is no impermissible circularity in observing that statutes exist—and were known to exist by Respondent at that time, as a bank official and former long-time OCC examiner—proscribing the obstruction of OCC examinations and the concealment of facts from OCC examiners and imposing upon banks the obligation to accommodate requests made through the examination process.[184] Nor is it "speculative" to foresee that Respondent's actions risked subjecting both the Bank and herself to liability under those statutes if her conduct was discovered, *as in fact occurred*.

Enforcement Counsel has also made an ample showing that Respondent's conduct departed from a relevant and established standard of prudent operation: the expectation and obligation that a bank official will not seek to conceal the existence of requested documents from an OCC examiner. Again, the facts here do not simply reflect that Respondent "dithered and dallied in providing the agency with the materials it had requested," but that she engaged in multiple internal discussions—including with the very individual whose counsel she now claims to have been prudently seeking—in which she and they unmistakably sought to "contrive[] ways to keep the Crowe Report out of the agency's hands and off its radar."[185] This Tribunal has likewise enumerated the many ways in which Respondent's responses to Ms. Omi were themselves evasive,

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[183] *Id.* at 52.

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

[185] October 16, 2020 Order at 52.

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

One final note regarding this issue: the Comptroller has made it clear that the conclusions of OCC examiners regarding the extent to which "a particular practice poses a safety and soundness concern" are entitled to a significant measure of deference by the ALJ.[189] Examiner judgments and conclusions on unsafe or unsound practices that are based on "objectively verifiable facts" may not be rejected by the ALJ "unless there is a finding that they are a) without an objective factual basis, or b) outside the zone of reasonableness or arbitrary and capricious."[190] Here, Deputy Comptroller Karen Boehler, who served as Associate Deputy Comptroller with oversight responsibilities regarding the OCC's supervision of the Bank at the time of Respondent's misconduct, has opined that "Respondent's failure to provide the Crowe Report to the OCC when requested, her false and misleading statements to the OCC regarding the Crowe Report, and her collusion with others at the Bank to conceal the Crowe Report and its contents from the OCC exposed the Bank to abnormal risk" and constituted unsafe and unsound practices.[191] Ms. Boehler

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

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

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

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

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

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

also concludes that these practices were reckless in that they "were done in disregard of, or evidenced a conscious indifference to, a known or obvious risk of substantial harm."[192]

Respondent objects to Ms. Boehler's declaration, arguing *inter alia* that her opinions are generally not entitled to deference because she "is in no better a position to assess the facts surrounding these issues or to draw legal conclusions than the Tribunal" and that her opinion on recklessness in particular should be disregarded because it bears on Respondent's state of mind and culpability rather than any consideration of the safety and soundness of her conduct. Resp. Opp. at 30. The first of these objections is unfounded, given the Comptroller's clear direction that the conclusions of examiners regarding unsafe or unsound practices should be given deference.[193] The undersigned finds that Ms. Boehler's conclusion that Respondent's conduct exposed the Bank to abnormal risk is, while relatively conclusory in its framing, nevertheless based on objectively verifiable facts that are not "outside the zone of reasonableness or arbitrary and capricious"; the undersigned therefore defers to that conclusion (and has independently drawn the same conclusion in any event). As to Respondent's second objection, however, the undersigned finds that it has merit: examiners may well be best situated to adjudge whether a respondent meets the threshold of certain bank-related misconduct, given their experience and expertise, but there is no authority of which the undersigned is aware that prescribes that the legal conclusions of examiners regarding the "conscious indifference" or other state of mind of the subject of an administrative enforcement action are entitled to deference, and the undersigned therefore accords none.[194]

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[192] *Id.* ¶ 43.

[193] *See Patrick Adams*, 2014 WL 8735096, at *36 (holding that "[t]he conclusion that given conduct is an unsafe or unsound practice is ultimately an application of a legal standard to evidence, including examiner judgment, and deference is due that judgment").

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

B. Respondent's Misconduct Indisputably Caused Loss to the Bank

The effect elements of 12 U.S.C. §§ 1818(e) and 1818(i) may be satisfied with a showing that the financial institution suffered "financial loss or other damage" as a result of an IAP's misconduct and that the misconduct caused "more than a minimal loss" to the institution, respectively.[195] The undersigned agrees with Enforcement Counsel that, at the very least, the $500,000 fine paid by the Bank for obstructing the OCC's examination into its BSA/AML program arose from Respondent's misconduct and constitutes actionable loss, and thus a triggering "effect," under these statutes. *See* OCC Mot. at 28-29; OCC SOF ¶¶ 75-76.

Any reasonable reading of the obstruction charges to which the Bank pled guilty in February 2018 reveals that they concerned, in significant part, precisely the same misconduct by Respondent that is the subject of the instant action. *See supra* at 24. There can be no dispute that Respondent is the "Executive A" referred to in the Plea Agreement and Charging Documents, and it is likewise undisputed that the Bank admitted to conspiring with Executive A, among others, to obstruct the OCC's examination in March and April 2013, including by making "false and misleading statements to the OCC regarding the existence of reports developed by a third-party consultant, which corroborated the OCC's findings regarding the ineffectiveness of [the Bank's] BSA/AML program."[196] It also cannot be disputed that as a result of this guilty plea, the Bank was

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[195] 12 U.S.C. §§ 1818(e)(1)(B), 1818(i)(2)(B)(ii).

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

fined $500,000.[197] This, by itself, is enough to satisfy the effect elements of 12 U.S.C. §§ 1818(e) and 1818(i).[198]

Respondent, of course, disagrees. She argues that the settlement of a separate litigation to which she was not a party—*i.e.*, the Bank's guilty plea to a criminal complaint brought by the Department of Justice ("DOJ")—and "based on the Bank's violation of different laws" cannot be used "to establish an element of her liability here," as a matter of constitutional due process. Resp. Mot. at 26, 27 (emphases omitted). Respondent contends that it is impossible to know how much the Bank's decision to enter into the guilty plea was based on Respondent's conduct rather than unrelated business judgment. *See id.* at 28-29. She asserts that the guilty plea of one party "may not be introduced as substantive evidence of another defendant's guilt." *Id.* at 31 (internal quotation marks and citation omitted). And she claims generally that "there is no plausible way to consider the alleged brief concealment of a draft consultant's report in March 2013" as the cause of Bank loss in connection with a DOJ investigation and prosecution "prompted by years-long BSA/AML violations that purportedly resulted in the laundering of hundreds of millions of dollars through [the Bank]." *Id.* at 33.

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

[198] Enforcement Counsel also alleges, and argues, that the Bank suffered reputational damage as a result of Respondent's misconduct, proffering a statement by the Bank's Remediation Committee to that effect in their decisional document regarding Respondent. OCC Opp. at 8-9 ("[T]he Bank itself acknowledged that Respondent's misconduct 'has resulted, or will result, in considerable loss and/or damage to the reputation of the Bank and/or Rabobank Nederland.'") (quoting OCC-MSD-86 (Remediation Committee Decision) at 4). Despite Enforcement Counsel's further contention that "[e]vidence of that reputational harm to the Bank can be easily found through an internet search even today," *id.* at 9, the undersigned finds that Enforcement Counsel has not yet presented sufficient evidence of reputational damage to the Bank as a result of Respondent's conduct for summary disposition of that issue in the agency's favor.

Respondent's arguments are off-base. To begin with, the undersigned concludes that payments made by a bank in furtherance of a settlement or plea agreement may be used as evidence of bank loss to fulfill the effect elements of Section 1818, if the enforcement agency can show that the settlement occurred "by reason of" a respondent's actionable misconduct.[199] Of course, evidence of causation is not evidence of liability for the underlying violations of law, and Enforcement Counsel must demonstrate separately that Respondent committed misconduct—that is, that she violated 12 U.S.C. § 481 or 18 U.S.C. § 1001 or engaged in unsafe or unsound practices—without adverting to the merits of any allegations or admissions made by the Bank in the Plea Agreement, which it has done.

Moreover, it should be without question that Respondent can "cause" the Bank to incur loss through the entry of a guilty plea even if Respondent was not a party to that prosecution and her conduct not adjudicated to rise to the level of the particular legal violations being asserted here. To hold otherwise would effectively immunize IAPs from any liability for unsafe or unsound practices or violations or law that exposed their institutions to significant legal or regulatory risk unless the IAP's institution chose to take its chances by contesting an enforcement action or prosecution until a final judgment is assessed against it (and perhaps not even then, under Respondent's logic). A bank's decision to plead guilty to a prosecution for some certain loss now rather than risking a much greater loss and more severe consequences later should not absolve from liability the individual on whose conduct such claims are based. No such restriction is apparent from the text of Section 1818, and the undersigned will not impose one. An IAP who transfers $100,000 of a bank's money into her personal account has caused loss to the bank; an

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

IAP whose conduct is the impetus for a $500,000 fine following a guilty plea should be no less liable, if that conduct is actionable under Section 1818.

Nor does it present an insuperable barrier to eventual proof of causation that the Plea Agreement also resolved Bank exposures unrelated to Respondent's concealment of the Crowe Report, as Respondent contends. *See* Resp. Mot. at 33. As the Federal Deposit Insurance Corporation ("FDIC") Board of Directors has held, a respondent in an enforcement action under Sections 1818(e) and 1818(i) "cannot escape liability simply because others have contributed to the bank's loss as well."[200] Similarly, interpreting a related statutory provision in *In the Matter of Grant Thornton LLP*, the Comptroller concluded that an independent auditor had caused actionable loss to a bank through its issuance of an unqualified audit opinion, even though it was the bank's actions in response to the opinion that arguably were more directly responsible for any loss suffered.[201] Likewise here, it is immaterial that other misconduct related to the Bank's BSA/AML program may have played a part in the DOJ's prosecution and the Bank's eventual guilty plea, as long as some of the loss as a result of that guilty plea is fairly attributable to Respondent as well. And the Plea Agreement makes it clear that a primary driver of the obstruction of the OCC's 2013 examination to which the Bank pled guilty was Respondent's conduct in response to repeated examiner requests for the Crowe Report and related materials.

The DOJ prosecuted the Bank for its part in, among other things, the concealment from the OCC of the existence of the Crowe Report and the substance of the information contained therein,

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

[201] *In the Matter of Grant Thornton LLP*, Nos. AA-EC-04-02 & -03, 2006 WL 5432171, at *25 (Dec. 29, 2006) (OCC final decision) (noting that under the auditor's theory of causation, "conduct of independent contractors could never be the cause of a loss or other adverse effect for purposes of [the applicable statute], because it would always be the financial institution's acts or omissions that led to the loss to, or adverse effect on, the bank").

as well as the decision to "delay and limit disclosure of [the Crowe Report] to the OCC, despite specific and repeated requests by OCC examiners," in which actions Respondent played a central role.[202] As part of its resultant guilty plea, the Bank paid a fine of $500,000. Therefore, Respondent's misconduct caused the Bank to suffer financial loss. It is that straightforward.

C. Respondent Has Demonstrated Personal Dishonesty and Willful Disregard for the Safety and Soundness of the Bank

The final prong of a Section 1818(e) enforcement action for a prohibition order, the "culpability" element, is satisfied by a showing of either personal dishonesty or an IAP's continuing or willful disregard for the safety and soundness of an institution.[203] It is typically, although not exclusively, appropriate to resolve questions of culpability at the hearing stage rather than on summary disposition.[204] Here, however, the undisputed facts regarding Respondent's conduct—and in particular the email traffic between herself, CEO Ryan, and GC Weiss following each of Ms. Omi's requests for Crowe materials—make her conscious concealment of material information regarding the Crowe Report sufficiently evident, without "making credibility determinations, weighing evidence, and drawing [impermissible] inferences from facts," to find that Respondent has acted with personal dishonesty and willful disregard within the meaning of Section 1818(e).[205] By the same token, and resolving all reasonable inferences in favor of

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

[203] 12 U.S.C. § 1818(e)(1)(C).

[204] *See*, *e.g.*, *Miller v. FDIC*, 906 F.2d 972, 974 (4th Cir. 1990) (noting "the general rule that summary judgment is seldom appropriate in cases wherein particular states of mind are decisive elements of a claim or defense"); *Gomez v. Trustees of Harvard Univ.*, 677 F. Supp. 23, 24 (D.D.C. 1988) (noting that "intent and state of mind [are] areas that are particularly ill-suited for summary disposition"); *but see In the Matter of Carl V. Thomas et al.*, Nos. 99-027-B-I, -CMP-I, & E-I, 2005 WL 1520020, at *7 (June 7, 2005) (FRB final decision) (finding Section 1818(e) culpability elements satisfied on summary disposition); *In the Matter of Charles F. Watts*, Nos. 98-046e & -044k, 2002 WL 31259465, at *6 (Aug. 6, 2002) (FDIC final decision) (same).

[205] *Blanton*, 2017 WL 4510840, at *6 (internal quotation marks and citation omitted) (noting that "there is no genuine issue [of fact] if the evidence presented [by the non-moving party] is of insufficient caliber or quantity to allow a rational finder of fact to find for the non-movant"); *cf. Brodie v. Dep't of HHS*, 715 F. Supp. 2d 74, 81-82 (D.D.C. 2010) (affirming ALJ's summary disposition against respondent where "the record . . . supported only one

Respondent as the non-moving party, the undersigned will reserve a finding that that Respondent also acted "with heedless indifference" over a sufficient period of time as needed for a determination of continuing disregard for the safety or soundness of the Bank.[206] Enforcement Counsel may seek to show at hearing that Respondent's behavior meets the level of continuing disregard as well if it so chooses.

As Respondent acknowledges, "[t]he personal dishonesty standard of [Section] 1818(e) is satisfied when a person disguises wrongdoing from the institution's board and regulators, or fails to disclose material information."[207] A finding of personal dishonesty requires evidence that an individual acted with scienter, or some knowledge of the wrongfulness of their actions.[208] In this instance, the undersigned concludes for the reasons discussed in Part IV.A.2 *supra* that Respondent's evasive and occlusive course of conduct in response to Ms. Omi's requests for information and materials related to the January 2013 Crowe engagement exhibited a thoroughgoing lack of straightforwardness and an intent to deceive or mislead that is more than sufficient to support a finding of personal dishonesty. The extensive record of email evidence does not fairly admit to multiple interpretations of Respondent's actions other than that she knew that the Crowe Report and its contents were responsive to requests by Ms. Omi and took steps to

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reasonable inference regarding [respondent's] state of mind: [that he] had been either knowing or reckless with regard to the falsification of information," and where respondent "had failed to offer any specific facts or evidence at the summary disposition stage that would support his claims of blamelessness or counter [the agency's] evidence").

[206] *Ellsworth*, 2016 11597958, at *17.

[207] Resp. Mot. at 35 (quoting *Dodge v. Comptroller of the Currency*, 744 F.3d 148, 160 (D.C. Cir. 2014)); *accord In the Matter of Frank Smith and Mark Kiolbasa*, No. 18-036-E-I, 2021 WL 1590337, at *28 (Mar. 24, 2021) (FRB final decision).

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

mislead the examiner, withhold the document, and convey the impression that it had not been provided to the Bank.

Both continuing and willful disregard also require some showing of scienter.[209] "Willful disregard is deliberate conduct that exposes the bank to abnormal risk of loss or harm contrary to prudent banking practices, while continuing disregard is conduct that has been voluntarily engaged in over a period of time with heedless indifference to the prospective consequences."[210] For conduct to constitute willful disregard, it is not necessary to find that an IAP "deliberately exposed the Bank to abnormal risk of loss or harm,"[211] only that the unsafe or unsound banking practice engaged in by the individual was done intentionally and was not "technical or inadvertent."[212] Continuing disregard, in turn, requires evidence of "a mental state akin to recklessness"[213] that has manifested through, for example, the "voluntary and repeated inattention to" unsafe and unsound practices, or the "knowledge of and failure to correct clearly imprudent and abnormal practices that have been ongoing."[214]

The undersigned has already concluded that Respondent "knowingly and willfully" sought to conceal material facts regarding the existence of the Crowe Report from OCC examiners. *See supra* at 45. The undersigned also has concluded that, in so doing, Respondent engaged in unsafe

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

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

[211] *In the Matter of Charles R. Vickery, Jr.*, No. AA-EC-96-95, 1997 WL 269106, at *8 (Apr. 14, 1997) (OCC final decision); *see also Smith and Kiolbasa*, 2021 WL 1590337, at *29 (noting that "[a]n officer acts willfully when he is aware of his conduct; willfulness does not require a showing that Respondent was aware of the law") (internal quotation marks and citation omitted).

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

[213] *Smith and Kiolbasa*, 2021 WL 1590337, at *29 (internal quotation marks and citation omitted).

[214] *In the Matter of Lawrence A. Swanson, Jr.*, No. AP-ATL-93-7, 1995 WL 329616, at *5 (Apr. 4, 1995) (OTS final decision on reconsideration); *see also Watts*, 2002 WL 31259465, at *8 (continuing disregard is "conduct which is voluntarily engaged in over time").

or unsound practices in conducting the Bank's affairs—that is, imprudent practices that exposed the Bank to abnormal risk of loss or harm. *See supra* at 50-54. It is therefore no great step to find that the actions taken to effectuate this concealment were "intentional conduct that constitute[d] an unsafe or unsound banking practice," as necessary for a finding of willful disregard for the Bank's safety and soundness.[215] "Willful disregard refers to that conduct which is practiced deliberately with full knowledge of the facts and risks, and which potentially exposes a bank to abnormal risk of loss or harm."[216] Respondent knew that the Crowe Report was the central target of Ms. Omi's requests, *see supra* at 16-18, and yet imprudently chose to expose the Bank to the risk of liability or enforcement action rather than provide it to her, thus willfully disregarding the safety and soundness of the Bank.[217]

As for continuing disregard, the undersigned is not yet persuaded that Respondent exhibited "heedless indifference" to the Bank's safety and soundness for a sufficient period of time.[218] Although there is no programmatic minimum length that an IAP must be heedlessly indifferent in order for their disregard to be "continuing" for purposes of culpability, the undersigned's review of previous matters in which that threshold has been met reveals periods of misconduct significantly longer than the two and a half weeks at issue here.[219] In *In the Matter of*

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

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

[217] The undersigned does not find, however, that Respondent's conduct related to the April 18, 2013 Cover Letter evidenced willful disregard, because material facts are in dispute regarding the letter's authorship. *See supra* at 21-22, 44-45. The undersigned likewise does not find that Respondent knowingly made materially false statements or representations within the meaning of 18 U.S.C. § 1001(a)(2) with willful disregard, because that predicate also has not yet been established. *See supra* at 43-45, 49-50. Enforcement Counsel may pursue these avenues at the hearing if it chooses.

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

[219] The bulk of Respondent's misconduct that has thus far been established took place over the five day period of March 21, 2013 through March 25, 2013, although Respondent's failure to provide the Crowe Report to the OCC constitutes a continuing violation of 12 U.S.C. § 481 that lasted until April 8, 2013, when CEO Ryan agreed to compile Crowe materials for ADC Jorn, or April 10, 2013, when ADC Jorn offered to give the Bank until April 19, 2013 to produce the Crowe Report, the PAR PowerPoint, and a supporting cover letter. *See supra* at 19-20; *see also* March 1, 2021 Order at 10 (failure to provide requested documents is continuing violation of Section 481).

Vickery, for example, the Comptroller found that "conduct reflecting recklessness or indifference with respect to an institution's safety" was continuing disregard when "made over a period of some months."[220] And in *Dodge v. Comptroller of the Currency*, the D.C. Circuit affirmed a finding of continuing disregard when the respondent "exposed the Bank and its depositors to substantial risk . . . on multiple occasions over six reporting periods."[221] The period of time in which Respondent engaged in her misconduct here is comparatively minuscule, and her misconduct itself relatively self-contained—as Enforcement Counsel observes, this is at heart "a narrow case about how an examiner for the [OCC] requested a document [from Respondent] multiple times." OCC Opp. at 1. The undersigned therefore declines to find at this stage that Respondent exhibited continuing disregard for the Bank's safety and soundness through her actions.

D. Respondent's Conduct Satisfies the Elements of a First- and Second-Tier Civil Money Penalty

12 U.S.C. § 1818(i) provides that the OCC may assess a civil money penalty against Respondent if the statutory elements discussed in Part III *supra* are met. It further provides that, in determining the appropriate amount of such penalty, the agency must consider certain potentially mitigating factors that are enumerated in the statute.[222] Enforcement Counsel argues that the undisputed material facts establish the basis for both a first- and second-tier civil money penalty, *see* OCC Mot. at 33-36, and offers its own "analysis of the statutory and interagency factors"[223] in support of its requested $50,000 penalty amount, *id.* at 38. The undersigned agrees

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[220] *Vickery*, 1997 WL 269105, at *9.

[221] *Dodge*, 744 F.3d at 161; *see also*, *e.g.*, *Ellsworth*, 2016 WL 11597958, at *17 (continuing disregard where misconduct "involved repeated acts over more than a year"); *Watkins*, 2019 WL 6700075, at *9 (continuing disregard where misconduct took place "repeatedly . . . between July 2010 and November 2012"); *Watts*, 2002 WL 31259465, at *8 (continuing disregard where misconduct amounted to "at least 80 incidents occurring over a period of nearly two years").

[222] *See* 12 U.S.C. § 1818(i)(2)(G).

[223] The Federal Financial Institutions Examination Council ("FFIEC") has promulgated interagency guidance outlining thirteen factors to be considered when determining the assessment of civil money penalties. *See* OCC

that the elements of a first- and second-tier civil money penalty have been met but finds that any showing regarding the statutory mitigating factors should be made by both parties at a later stage in this matter.

1. Section 1818(i)'s Misconduct Element

As with a prohibition order under Section 1818(e), both first-tier and second-tier civil money penalties under Section 1818(i) require proof of some form of actionable misconduct, including the violation of "any law or regulation." Here, the misconduct element is satisfied in each respect by Respondent's violation of 12 U.S.C. § 481 and 18 U.S.C. § 1001(a)(1), as discussed in Parts IV.A.1 and IV.A.2 *supra*.[224]

Enforcement Counsel argues that a second-tier penalty is appropriate for the additional reason that Respondent has recklessly engaged in unsafe or unsound practices in conducting the Bank's affairs.[225] OCC Mot. at 34-36. Conduct is "reckless" for the purposes of this statute if "it is done in disregard of, and evidencing conscious indifference to, *a known or obvious risk of a substantial harm*."[226] This is a rare instance in the statutory scheme of Sections 1818(e) and 1818(i) in which the agencies have found that the necessary harm or loss must be "substantial" to trigger an element,[227] and the Comptroller has applied this standard in the past to find recklessness in situations where the misconduct in question risked especially dire consequences. In *In the Matter of Blanton*, for example, the Comptroller found a known or obvious risk of substantial harm sufficient for a finding of reckless engagement where the respondent had improperly and

Mot. at 38 (citing FFIEC's Interagency Policy Regarding the Assessment of Civil Money Penalties by the Federal Financial Institutions Regulatory Agencies, 63 Fed. Reg. 30226 (June 3, 1998)).

[224] *See* 12 U.S.C. §§ 1818(i)(2)(A)(i), (B)(i)(I).

[225] *See id.* § 1818(i)(2)(B)(i)(II).

[226] *Blanton*, 2017 WL 4510840, at *13 (internal quotation marks and citation omitted) (emphasis added).

[227] The only other exception is for the assessment of a third-tier civil money penalty, not at issue here, which requires that the IAP have "knowingly and recklessly cause[d] a substantial loss to [the] depository institution or a substantial pecuniary gain or other benefit to such party." 12 U.S.C. § 1818(i)(2)(C)(ii).

repeatedly approved overdrafts that "would have severely affected the Bank's capital" if they were not covered, at a time when "[t]he Bank was in a critically deficient capital condition," which likely would have led to the Bank's failure.[228] In *In the Matter of Grant Thornton LLP*, the Comptroller found recklessness under the same standard when an "auditor fail[ed] to execute basic procedures concerning the most material entries on an insured depository institution's financial statement," such as ignoring evidence "that directly and unequivocally demonstrated that a bank [was] overstating its assets by hundreds of millions of dollars."[229] And in *Dodge v. Comptroller of the Currency*, the D.C. Circuit affirmed the Comptroller's finding of reckless engagement when the respondent manipulated that bank's capital by improperly reporting over $3 million in non-qualifying contributions at a time when the bank was experiencing "considerable losses," thereby "expos[ing] the Bank and its depositors to substantial risk."[230] Considering this precedent, and given that the undersigned has already concluded that the misconduct elements of Section 1818(i) have been satisfied, the undersigned finds it unnecessary to decide on the present record whether the harm "knowingly or obviously" risked by Respondent's misconduct is similarly and sufficiently substantial to constitute reckless engagement in unsafe or unsound practices.

2. <u>Section 1818(i)'s Effect Element</u>

Enforcement Counsel argues that Respondent's misconduct has caused "more than a minimal loss" to the Bank and "is part of a pattern of misconduct," either one of which, if true, would be sufficient to satisfy the remaining statutory prong for the assessment of a second-tier

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[228] *Blanton*, 2017 WL 4510840 at *14. The Comptroller's finding of recklessness was affirmed by the D.C. Circuit, which noted as well that the OCC had repeatedly notified the respondent "of the dangers of the Bank's [overdraft] practice" and that other Bank employees had also "alerted [the respondent] to the overdrafts and reminded him of the OCC's position that the overdrafts were unduly risky," leaving no doubt that the respondent "was aware of the risk posed by the overdrafts . . . but took only perfunctory steps to mitigate the risk." *Blanton*, 909 F.3d at 1173-74 (internal quotation marks and citation omitted).

[229] *Grant Thornton LLP*, 2006 WL 5432171, at *4.

[230] *Dodge*, 744 F.3d at 161; *see also id.* at 162.

civil money penalty.[231] OCC Mot. at 36-37. Because the undisputed material facts demonstrate conclusively that Respondent caused the Bank loss for the reasons stated in Part IV.B *supra*, it is unnecessary to determine at this time whether Respondent's misconduct in March and April 2013 was "part of a pattern of misconduct" within the meaning of the statute.[232]

3. Statutory Mitigating Factors

Before assessing a civil money penalty, the agency is bound to consider the appropriateness of the amount being assessed in light of four mitigating factors: (1) "the size of financial resources and good faith of the insured depository institution or other person charged"; (2) "the gravity of the violation"; (3) "the history of previous violations"; and (4) "such other matters as justice may require."[233] Enforcement Counsel now seeks to justify the $50,000 civil money penalty it seeks in this matter by adverting to these factors and to the thirteen interagency factors that the OCC also should take into account in its assessment. *See* OCC Mot. 38-39. The undersigned agrees with Respondent that consideration of any mitigating factors is premature at this stage, *see* Resp. Opp. at 32-34, not least because the precise contours of Respondent's violation are still at issue and because Respondent should be afforded an opportunity to be heard regarding her good faith, financial resources, and "such other matters as justice may require."

E. Respondent's Other Arguments for Summary Disposition Must Fail and Have Been Preserved For Appeal

Respondent makes several other arguments in support of her motion for summary disposition of the claims against her, all of which touch upon issues that have already been raised

[231] 12 U.S.C. § 1818(i)(2)(B)(ii).

[232] Moreover, because the undersigned does not here resolve the question of whether Respondent's misconduct was part of a pattern of misconduct actionable under Section 1818(i), it is also unnecessary to address at this juncture Respondent's argument that she is entitled to summary disposition on Enforcement Counsel's "pattern of misconduct" claim. *See* Resp. Mot. at 34.

[233] 12 U.S.C. § 1818(i)(2)(G).

and decided before this Tribunal in this case. *See* Resp. Mot. at 42-45. The undersigned rejects these arguments for the reasons provided below but notes that they have been preserved for appeal and eventual consideration by the Comptroller, should Respondent choose to raise them again at an appropriate later stage.

First, Respondent argues that she is entitled to summary disposition of the claims that she violated 12 U.S.C. § 481 and 18 U.S.C. § 1001(a)(1), on the grounds that the facts now show that any continuing violation of those statutes could not have extended beyond April 10, 2013, and therefore the OCC's April 17, 2018 Notice was untimely asserted under the relevant five-year statute of limitations.[234] *See id.* at 42-43. Respondent is correct that any concealment or refusal to produce the Crowe Report ended by April 10, 2013, when ADC Jorn and CEO Ryan agreed that the Bank would produce the document by April 19, 2013 at the latest.[235] This is immaterial, however. The undersigned has held that the Bank suffered loss by reason of Respondent's misconduct in February 2018, when it entered its guilty plea for obstruction of an OCC examination and agreed to pay a $500,000 fine.[236] Therefore, because the effect prongs of Section 1818(e) and 1818(i) were not fulfilled until February 2018, the OCC's claim against Respondent did not fully accrue until that date, and its action was timely brought regardless of the specific date that Respondent's misconduct can be said to have ended.[237] *See* OCC Opp. at 26.

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[234] *See* October 16, 2020 Order at 44-47 (holding that continuing violations of Section 1001's concealment provision extended until April 18, 2013 for limitations purposes); March 1, 2021 Order at at 10-11 (same holding with respect to Section 481).

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

[236] *See* Part IV.B *supra* at 55-59.

[237] *See* March 1, 2021 Order at 8-10 (finding that the claims against Respondent accrued in February 2018); *see also* October 16, 2020 Order at 19 ("'[T]he 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. . . . [I]f not all of the elements of a cause of action have been met, then a claim has not yet accrued and [28 U.S.C. § 2462's]'s five-year limitations period has not yet begun to run.") (quoting *Gabelli v. SEC*, 568 U.S. 442, 448 (2013)).

Next, Respondent asserts that she is entitled to summary disposition "because the OCC has constructed a system of secret law that contravenes the Administrative Procedure Act and due process" and places Respondent at an inherent disadvantage. Resp. Mot. at 44. The undersigned has already considered and denied Respondent's related motion on the OCC's "reliance on nonpublic administrative decisions and opinions,"[238] *id.*, and holds here that Respondent's objections on that ground are similarly no basis for granting summary disposition in her favor of all claims against her.

Finally, Respondent maintains (in a roughly sketched argument spanning a single sentence) that summary disposition in her favor is merited because the individual who issued the Notice on behalf of the OCC, Deputy Comptroller for Special Supervision Michael R. Brickman, was unlawfully appointed in violation of 12 U.S.C. § 4. *See id.* at 44-45. The undersigned briefly addressed and rejected a related argument in her April 24, 2020 Order Reviewing Prior Administrative Law Judges' Prehearing Actions and will do so again here.[239] In an Order denying a motion to dismiss in another matter before this Tribunal that has since been administratively closed, the undersigned also explained in detail why the OCC's practice of referring to a certain class of senior official as "Deputy Comptroller" or "Senior Deputy Comptroller, while unnecessarily confusing, does not contravene either the Appointments Clause of the United States Constitution or 12 U.S.C. § 4's requirement that "no more than four Deputy Comptrollers of the Currency" be appointed by the Secretary of the Treasury.[240] The undersigned provides a copy of that Order for the parties' edification and convenience and incorporates its reasoning in full.

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[238] *See* March 8, 2021 Order at 3.

[239] *See* April 24, 2020 Order at 6.

[240] *See* Order Denying Enforcement Counsel's Motion for Default and Respondent's Omnibus Motion to Dismiss, *In the Matter of Richard Usher*, OCC No. AA-EC-2017-3 (July 28, 2020) at 77-84 (holding that the Comptroller's authority to issue Notices of Charges is delegable to "mere employees" who are not subject to the Appointments

V. Conclusion

The undersigned hereby recommends the partial entry of summary disposition in favor of Enforcement Counsel in the manner and to the extent detailed above. Specifically, based on the undisputed material facts of the case, the undersigned finds that:

(1) Respondent violated 12 U.S.C. § 481 and 18 U.S.C. § 1001(a)(1), thereby satisfying the misconduct prongs of 12 U.S.C. §§ 1818(e) and 1818(i);

(2) Respondent engaged in unsafe or unsound practices in conducting the affairs of the Bank, thereby additionally satisfying the misconduct prong of 12 U.S.C. § 1818(e);

(3) Respondent exhibited personal dishonesty and willful disregard for the Bank's safety and soundness, thereby satisfying the culpability prong of 12 U.S.C. § 1818(e); and

(4) Respondent's misconduct caused loss to the Bank, thereby satisfying the effect prongs of 12 U.S.C. §§ 1818(e) and 1818(i).

In addition to the facts identified in this Order as being the subject of material dispute, the undersigned also concludes that resolution of the following issues is either not possible or unnecessary at this time as the facts are presently developed: (a) whether Respondent's misconduct meets the elements of 18 U.S.C. § 1001(a)(2); (b) whether the Bank suffered reputational harm as a result of Respondent's misconduct; (c) whether Respondent acted with continuing disregard for the safety and soundness of the Bank; (d) whether Respondent recklessly engaged in unsafe or unsound practices for purposes of 12 U.S.C. § 1818(i)(2)(B)(i)(II); (e) whether Respondent's misconduct constitutes a pattern of misconduct; and (f) the appropriateness of the amount of the civil money penalty sought by the OCC.

Clause, are not appointed under 12 U.S.C. § 4, and do not wield the statutorily granted powers of a Deputy Comptroller of the Currency).

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

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

SO ORDERED.

Dated: August 5, 2021

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Jennifer Whang
Administrative Law Judge
Office of Financial Institution Adjudication

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