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

RECOMMENDED DECISON

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

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

Following discovery, Enforcement Counsel for the OCC ("Enforcement Counsel") and Respondent (collectively "the Parties") filed cross-motions for summary disposition, each contending that there were no material facts in dispute that would preclude a resolution of their motion as a matter of law. Specifically, Enforcement Counsel contended that according to the

[1] Notice ¶ 40.
[2] *See id.* ¶ 48(a).
[3] *Id.* ¶ 46.

undisputed facts, "Respondent colluded with other members of Bank management to withhold and conceal the [Crowe Report] and its contents from the OCC" in a manner, and with a result, that satisfies the statutory elements for the issuance of a prohibition order and assessment of a civil money penalty.[4] Respondent, in turn, maintained that "facts not in dispute show[ed] there was no misconduct,"[5] and that the agency could not prove the requisite culpability and effect elements of its prohibition and civil money penalty actions.[6]

On August 5, 2021, the undersigned issued an order denying Respondent's motion for summary disposition and recommending the grant of Enforcement Counsel's motion with respect to certain aspects of the statutory elements of misconduct, culpability, and effect ("MSD Order"). The MSD Order concluded, based on the undisputed material facts, that (1) Respondent violated 12 U.S.C. § 481 and 18 U.S.C. § 1001(a)(1) by contriving to conceal the existence of the Crowe Report and related materials from OCC examiners; (2) Respondent engaged in unsafe or unsound practices in conducting the affairs of the Bank; (3) the Bank suffered loss as a result of Respondent's misconduct by virtue of its February 2018 guilty plea for obstructing an OCC examination and attendant $500,000 fine; and (4) Respondent exhibited personal dishonesty and willful disregard for the Bank's safety and soundness. The MSD Order further found that disposition of the other issues on which Enforcement Counsel sought summary disposition was either not possible or unnecessary on the factual record as developed.[7]

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

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

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

[7] In particular, the undersigned did not resolve, in the MSD Order, (a) whether Respondent's misconduct met the elements of 18 U.S.C. § 1001(a)(2); (b) whether the Bank suffered reputational harm as a result of Respondent's misconduct; (c) whether Respondent acted with continuing disregard for the safety and soundness of the Bank; (d) whether Respondent recklessly engaged in unsafe or unsound practices for purposes of 12 U.S.C. § 1818(i)(2)(B)(i)(II); (e) whether Respondent's misconduct constituted a pattern of misconduct; and (f) the appropriateness of the amount of the civil money penalty sought by the OCC. *See* MSD Order at 69. It is the undersigned's understanding, based on the Parties' agreement in the August 16, 2021 Joint Status Report, that

On August 16, 2021, the Parties filed a Joint Status Report recognizing that the MSD Order had found that at least one aspect of each element for a 12 U.S.C. § 1818(e) prohibition order and 12 U.S.C. § 1818(i) first- and second-tier civil money penalty had been met, and stating the Parties' agreement that, while contested issues remain, the only remaining issue that requires resolution for purposes of a recommended decision is the appropriateness of the civil money penalty amount. The Parties further agreed that the issue regarding the civil money penalty did not require an in-person hearing and should be resolved on the papers. Accordingly, and pursuant to the Parties' agreement, the undersigned cancelled the scheduled hearing and set dates for the Parties to make written submissions on that topic.

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

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

Enforcement Counsel is no longer pursuing these unadjudicated claims, with the exception of the appropriateness of the civil money penalty amount, and she makes no recommendations regarding them.

I. Jurisdiction

At all times pertinent to this proceeding, the Bank was an insured depository institution pursuant to 12 U.S.C. § 1813(c)(2), and Respondent was an institution-affiliated party ("IAP") as that term is defined in 12 U.S.C. § 1818(u).[8] The Bank is a national banking association within the meaning of 12 U.S.C. § 1813(q)(1)(A) and is chartered and examined by the OCC.[9] As a result, the OCC is the appropriate federal banking agency with jurisdiction over the Bank and its IAPs for purposes of 12 U.S.C. § 1813(q), and it is authorized to initiate and maintain this prohibition and civil money penalty action against Respondent.[10]

II. Applicable Standard

The burden of proof in an administrative proceeding, unless otherwise provided by statute, is on the administrative agency to establish its charges by a preponderance of the evidence.[11] Under the preponderance-of-the-evidence standard, the party with the burden of proof must adduce evidence making it more likely than not that the facts it seeks to prove are true.[12] Here, the OCC has the burden to prove that the statutory elements for the entry of a prohibition order and the assessment of a second-tier civil money penalty have been satisfied.[13] This Tribunal is then tasked with making "a comparative judgment" to determine whether the agency has presented "the greater weight of the evidence" as to the satisfaction of the statutory elements.[14]

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[8] *See* Notice ¶¶ 1-2.

[9] *See id.* ¶ 3.

[10] *See id.* ¶ 4.

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

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

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

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

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

To merit the entry of a prohibition order against an IAP under 12 U.S.C. § 1818(e), an agency must prove the separate elements of misconduct, effect, and culpability. The misconduct element may be satisfied, among other ways, by a showing that the IAP has (1) "violated any law or regulation," (2) "engaged or participated in any unsafe or unsound practice in connection with any insured depository institution or business institution," or (3) "committed or engaged in any act, omission, or practice which constitutes a breach of such party's fiduciary duty."[15] The effect element may be satisfied, in turn, by showing either that the institution at issue thereby "has suffered or probably will suffer financial loss or other damage," that the institution's depositors' interests "have been or could be prejudiced," or that the charged party "has received financial gain or other benefit."[16] And the culpability element may be satisfied when the alleged violation, practice, or breach either "involves personal dishonesty" by the IAP or "demonstrates willful or continuing disregard by such party for the safety or soundness of such insured depository institution."[17]

The imposition of a second-tier civil money penalty under 12 U.S.C. § 1818(i) also requires the satisfaction of multiple elements. First, the agency must show misconduct, which can take the form of a violation of "any law or regulation,"[18] the breach of "any fiduciary duty," or the reckless engagement "in an unsafe or unsound practice in conducting the affairs" of the institution in question.[19] Second, the agency must show some external consequence or characteristic of the

[15] 12 U.S.C. § 1818(e)(1)(A).

[16] *Id.* § 1818(e)(1)(B).

[17] *Id.* § 1818(e)(1)(C).

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

[19] *Id.* § 1818(i)(2)(B)(i).

IAP's alleged misconduct, likewise generally termed "effect" in past decisions issued by the Comptroller of the Currency ("Comptroller"): (1) that it "is part of a pattern of misconduct"; (2) that it "causes or is likely to cause more than a minimal loss to such depository institution"; or (3) that it "results in pecuniary gain or other benefit to such party."[20] Moreover, before any civil money penalty can be assessed upon satisfaction of these elements, the agency must take into account the appropriateness of the amount of penalty sought when considered in light of certain potentially mitigating factors, including the "good faith of the . . . person charged," "the gravity of the violation," and "such other matters as justice may require."[21]

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

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

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

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

resolving enforcement actions.[23] It has also been recognized as "the authoritative definition of an unsafe or unsound practice" by federal appellate courts.[24] The undersigned accordingly adopts the Horne Standard when evaluating charges of unsafe or unsound banking practices under the relevant statutes.

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

In this case, the OCC has charged that, in concealing the existence of the Crowe Report and related materials from examiners, Respondent committed actionable misconduct by violating the law, namely 12 U.S.C. § 481 and 18 U.S.C. § 1001, and engaged in unsafe or unsound practices in conducting the Bank's affairs.[25] Further, with respect to the effect and culpability elements of the relevant statutes, the OCC has asserted, *inter alia*, that Respondent caused the Bank to suffer financial loss as a result of her misconduct; that the conduct involved personal dishonesty on the

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

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

[25] *See* Notice ¶ 48(a).

part of Respondent; and that Respondent demonstrated a willful disregard for the safety and soundness of the Bank.[26] Having concluded in the MSD Order that each of these elements had been satisfied by the undisputed facts of the case, the undersigned finds that the entry of a prohibition order and assessment of a second-tier civil money penalty are both therefore appropriate. Upon consideration of the mitigating factors set forth in 12 U.S.C. § 1818(i)(2)(G), the undersigned also finds that there are some grounds for mitigation of the assessed penalty and that $30,000, rather than $50,000, is the appropriate amount to achieve the punitive, deterrent, and remedial goals for which civil money penalties are intended.

IV. Findings of Fact

These findings are consistent with the undisputed material facts set forth in the MSD Order and drawn as appropriate from the Parties' pleadings, from the Parties' respective statements of material fact ("OCC SOF" and "Resp. SOF") and Respondent's counterstatement of material fact ("Resp. Opp. SOF") submitted in connection with the summary disposition briefing and the exhibits thereto ("OCC-MSD," "R-MSD," "OCC-OPP," and "R-OPP"), and from the post-motion submissions on the topic of the civil money penalty and exhibits thereto ("OCC-CMP" and "R-CMP"). Where relevant, the undersigned will identify genuine factual disputes between the Parties as well as the evidence each side has marshaled in support, although she makes no further factual findings regarding those disputes than were made at summary disposition, given the Parties' agreement that resolution of the remaining contested issues is no longer necessary.

Respondent is a former OCC examiner with significant experience in BSA/AML compliance matters.[27] Following her participation in a 2007 OCC examination of the Bank's

[26] *See id.* ¶ 48(b), (c).

[27] *See* OCC SOF ¶¶ 4-8; Notice ¶ 5. Except where noted, a citation to the Notice in this section indicates that the corresponding portion of Respondent's Answer does not dispute the substance of the facts as stated. *See*, *e.g.*, Answer ¶ 5 (admitting that Respondent "was a commissioned national bank examiner with the OCC from on or

BSA/AML compliance program, Respondent assumed the position of Chief Compliance Officer ("CCO") for the Bank, in which capacity she served until she transferred overseas in July 2012 and was replaced by Lynn Sullivan, an individual who the Notice terms Executive A.[28]

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

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

about June 8, 1998 to on or about February 16, 2008," including as "Compliance Lead Expert for the OCC Western District" beginning in September 2007, and that part of her duties entailed providing expertise and advice on "BSA/AML compliance-related matters").

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

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

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

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

Committee.[32] 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.[33] Both the Crowe Report and the PAR PowerPoint concluded that multiple, significant deficiencies existed in the Bank's BSA/AML compliance program.[34]

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

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[32] *See* OCC SOF ¶¶ 23-26, 32-35; Resp. SOF ¶ 62. During the summary disposition briefing, Respondent generally challenged the provenance of "the exhibits used by Enforcement Counsel as purportedly constituting cover emails and their attached documents," arguing that they were produced during discovery "as stand-alone emails with no attachments[] and separate stand-alone documents with no cover emails." Resp. Opp. SOF at 24 (emphasis omitted). Respondent further observed that documents represented as being cover emails and their attachments were sometimes "produced in reverse order and separated by" hundreds of pages of document production. *Id.* As a result, Respondent argued that "Enforcement Counsel's claims about which documents were attached to which emails were unsupported by evidence, and were in direct contravention of the Tribunal's order regarding production methodologies and Enforcement Counsel's representations." *Id.* at 25. The undersigned noted Respondent's objections and stated that to the extent that Respondent wished to contest the authenticity of specific documents proffered by Enforcement Counsel or argue that specific materials were not attached to specific emails, it could be done at an appropriate later stage, but that the ability of the undersigned to render conclusions in the MSD Order did not require such a granular view. *See* MSD Order at 8 n.19. It is undisputed that draft versions of the Crowe Report and PAR PowerPoint existed and were distributed to Bank personnel during the relevant timeframe. As discussed *infra*, it is undisputed that the draft Crowe Report, in particular, was in the possession of Respondent, in particular, at the time that the OCC requested it from her. Given Respondent's repeated references to the draft report in internal correspondence (also discussed *infra*) at or around the time of the OCC's requests, her knowledge of the existence of the Crowe Report writ large is likewise undisputed. There is no need to delve into the minutiae of Crowe work product distribution within the Bank in order to render some judgment on Respondent's conduct during March and April 2013, the OCC's claims there regarding, and the parties' arguments on the disposition of the same.

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

[34] *See* OCC SOF ¶ 24; Resp. SOF ¶ 60; *see also*, *e.g.*, OCC-MSD-57 (version 0.9 of Crowe Report, dated January 31, 2013) at 4 (finding, among other things, that "[t]he AML department does not appear to be taking an accurate 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."[35] 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)."[36] The OCC directed the Bank to "provide a written response to the BSA/AML examination findings" detailed therein, which the agency would consider "during [its] supervisory review process."[37]

Around this point, Respondent returned to the United States to attend the February 8, 2013 meeting with the OCC and to assist the Bank in its response to the Draft Supervisory Letter.[38] Respondent and CCO Sullivan disagreed on their assessments of the state of the Bank's BSA/AML program and the appropriate response to the OCC's examination findings, and CCO Sullivan relayed her particular concerns (including about the disagreement with Respondent) to Bank management in several communications in late February 2013.[39] On or around February 28, 2013, CCO Sullivan was placed on a forced leave of absence, and Respondent reassumed her prior role as the Bank's Chief Compliance Officer.[40]

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

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

[37] *Id.* at 1.

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

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

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

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

On March 18, 2013, Ms. Sullivan emailed the OCC from her personal email account, alerting the agency to her forced leave of absence and detailing for it the concerns that she had "raised to management and the Board about the deficiencies within [the Bank's] BSA Program."[45] In this email, which was also copied to CEO Ryan, Ms. Sullivan noted that Crowe had been engaged in January 2013 to assess the Bank's BSA/AML compliance program and that "*[t]he Crowe assessment that was shared with management and the Board* found [] core components of the Bank's program to be below industry standards."[46] Ms. Sullivan went on to state that "the Crowe Report [was] discussed in detail with Management and the Board," along with the program risks detailed in her email.[47] The email to the OCC also forwarded Ms. Sullivan's February 26,

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

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

[43] *Id.* at 24.

[44] *See id.*

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

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

[47] *Id.*

2013 communication to CEO Ryan and GC Weiss, in which the Crowe Report was mentioned again: "*[A]s the Crowe assessment confirms*, there are multiple shortcomings across the program, with interdependencies, that with an aggressive project plan will take 9-12 months to fully address."[48]

In short, then, Ms. Sullivan's whistleblower email to the OCC mentions the Crowe Report—as well as its conclusions regarding deficiencies in the Bank's BSA/AML program and the fact that it had been provided to Bank management—three separate times, on the heels of an official response from the Bank several days earlier that did not acknowledge the existence of any Crowe assessment at all. And the OCC examiners who received Ms. Sullivan's email took notice: On the morning of March 19, 2013, Karen Boehler asked the other OCC recipients of the whistleblower communication whether they have "seen the Crowe [Horwath] assessment referenced in this email."[49] Later that afternoon, Shirley Omi responded, saying that she had "checked with Heidi who did [the] audit in February, and she doesn't recall seeing the Crowe [Horwath] assessment."[50] In other words, it is beyond dispute that Ms. Sullivan's March 18, 2013 email alerted the OCC to the existence of a document alternately termed "the Crowe Report" and "the Crowe assessment" that was both inarguably relevant to the scope of its ongoing examination and had not previously been seen by OCC examiners.

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

The OCC followed up on this revelation on March 21, 2013 by emailing Respondent, as acting CCO, to request the Crowe assessment.[51] In particular, the communication from Ms. Omi

[48] *Id.* at 3 (emphasis added).
[49] *Id.* at 1.
[50] *Id.*
[51] *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."[52] There is no dispute that Respondent had herself received a copy of the Crowe Report from Bank Vice President ("VP") Sharon Edgar on March 9, 2013,[53] although Respondent contends that Enforcement Counsel offers no evidence that she had read it or was even consciously aware of its existence at the time of this request.[54] Regardless, VP Edgar's March 9th cover email sending the Crowe Report to Respondent stated, in part: "This is their actual draft report, *so when you hear someone mention a report it is most likely this document*."[55]

Upon receiving Ms. Omi's request, Respondent forwarded it to GC Weiss, writing, in relevant part, that "I think the right answer is that ***Crowe did not perform an assessment***. That while they were engaged to perform a market study/peer benchmark for management and the board, the project was shelved before any report could be issued."[56] In response, GC Weiss began by questioning, "I wonder why they are asking for this now?"[57] He then went on to write:

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

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

[54] *See* Resp. SOF ¶¶ 64(a), 65.

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

[56] OCC-MSD-48 (email thread including March 21, 2013 email from Respondent to GC Weiss) at 2 (emphasis added). The undersigned notes that Respondent herself denies that Crowe ever "conducted a 'peer-benchmarking' analysis," Resp. SOF ¶ 58, and a review of Crowe's Statement of Work and the Crowe Report itself compel the conclusion that Respondent's statement that Crowe was "engaged to perform a market study/peer benchmark" is, at best, an extremely incomplete characterization of the scope of what Crowe was being tasked to do with respect to the Bank's BSA/AML compliance program. *See* OCC-MSD-10 (Statement of Work dated December 27, 2012) at 1 (stating that of Crowe's "three primary objectives" under this agreement, two involved an "assessment" of aspects of the Bank's BSA/AML program, and none were characterized as a "market study" or "peer benchmark"); OCC-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.

[57] 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.***[58]

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

On March 22, 2013, Respondent responded to Ms. Omi ("the March 22, 2013 Email").[60] As GC Weiss suggested, Respondent did not draw any express distinction between draft assessments and final assessments in this response, instead writing:

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

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

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

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

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

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

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

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

Order, the undersigned found that this was a disputed question of fact that could be resolved if necessary at the hearing but was not material to the disposition of the issues before her. *See* MSD Order at 13 n.48.

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

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

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

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

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

OCC examiners evinced an awareness that Respondent's March 22, 2013 communication did not match up with their understanding that the Bank had received work product from Crowe relating to that firm's assessment of the Bank's BSA/AML compliance program. Following Respondent's response, Ms. Omi emailed her supervisor, Assistant Deputy Comptroller ("ADC") Thomas Jorn, asking what she should say in return.[66] ADC Jorn suggested that Ms. Omi contact Respondent again to "[i]ndicate that in going through the information we have it was our understanding that Crowe had provided management with *a report or documents of some type related to BSA*," and expressly request any such materials in whatever form the Bank had received them.[67] On March 25, 2013, Ms. Omi emailed Respondent, relayed the agency's understanding that Crowe had created BSA-related work product for the Bank, and specifically asked for "a copy of what bank management received from Crowe, ***even if it was only preliminary or partial***."[68]

In her deposition, Respondent testified that, during her time as an OCC examiner, it was her expectation that any documents she requested from a bank would be provided "promptly and completely."[69] Respondent also testified that she was aware, as a bank officer, "that there was authority that required the bank to provide books and records to the OCC."[70] Nevertheless, Respondent's initial reaction to Ms. Omi's express request for any draft BSA-related materials that had been given to the Bank by Crowe was not to procure and provide those documents "promptly and completely," but to confirm with CEO Ryan and GC Weiss that the draft Crowe Report was

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

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

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

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

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

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."[71]

In advance of this meeting, Respondent emailed GC Weiss again, asking him to send a copy of "the Crowe document . . . to review before our meeting at 10:30" because she could not locate the copy she thought she had.[72] GC Weiss responded that he "never kept an electronic copy," but that "Sharon [Edgar] may have found a copy in Lynn's papers."[73] Respondent then wrote, "*All the better if you don't have it* as we can then tell Shirley, truthfully, that only Lynn was in receipt of the letter and we are unable to locate a copy."[74] Responding to GC Weiss's earlier email, Ms. Edgar then sent Respondent a copy of the version of the Crowe Report dated January 31, 2013, writing, "*This is the draft Crowe report with an overview of their findings.*[75] I also have a variety of other Crowe documents from Gantt charts to Board and Management presentations so if you want to see them all I can put them together onto the SharePoint site."[76] Several minutes later, GC

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

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

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

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

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

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

Weiss also forwarded the January 31, 2013 Crowe Report to Respondent, as part of a package of BSA-related Crowe materials that had been provided to Bank executives in advance of a BSA Executive Oversight Committee meeting on February 19, 2013.[77]

Following her meeting with CEO Ryan and GC Weiss,[78] Respondent circulated to those individuals a proposed response to Ms. Omi's email, to which GC Weiss offered suggested edits.[79] Respondent then responded to Ms. Omi later that day ("the March 25, 2013 Email").[80] Notwithstanding Ms. Omi's clear request for all Crowe BSA-related reports or documents to the Bank "even if . . . only preliminary or partial," and despite the fact that Respondent had that day been given, and was now in possession of, multiple, lengthy BSA-related Crowe documents that had been provided to Bank management in January and February 2013, including two copies of the Crowe Report, Respondent's response to Ms. Omi attached only a single Crowe document: a seven-page "copy of a proposal Crowe submitted to the Executive Oversight Committee on March 1, 2013" that did not contain any of the conclusions found in the Crowe Report or the PAR PowerPoint regarding deficiencies in the Bank's BSA/AML program.[81] Moreover, although Respondent and her colleagues referred to the Crowe Report repeatedly in their correspondence with each other immediately beforehand as the presumptive subject of Ms. Omi's request,[82] the

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

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

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

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

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

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

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.[83] And while Crowe did utilize a PowerPoint presentation during the discussion, it was not provided to the Bank, as indicated by the fact that it was not included in the board packet. In this meeting and in subsequent conversations, both board members and executive management were very critical of the information being provided noting that there lacked foundation and that assumptions appeared to be based on inaccurate information. . . .
>
> In all, the participants did not find the presentation particularly useful. It was this presentation that prompted management to suspend the work being done by Crowe around the BSA/AML Program Assessment until clearer instructions and parameters could be established with the goal of an end product that the board and management could rely upon to make decisions going forward. Crowe has since been provided with additional information and has, in fact, altered their recommendations on several fronts.
>
> Now that there is more effective sharing of information and clearer communication as to the direction of work, we have picked up where the work ended in mid-February and are utilizing Crowe resources to assist us in completing the BSA/AML Risk Assessment. . . . I've attached a copy of a proposal Crowe submitted to the Executive Oversight Committee on March 1, 2013, which outlines their recommendations for next steps, as described above, and which we've generally accepted. We're happy to discuss further and will certainly share the BSA/AML Risk Assessment when it comes out in draft near the end of April or early May.[84]

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

[84] 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,[85] ADC Jorn contacted CEO Ryan on April 8, 2013 to request the document directly from him.[86] The undersigned notes that ADC Jorn's initial conversation with CEO Ryan appears to have accepted Respondent's framing that the PowerPoint presentation to the Compliance Committee in early February, rather than the significantly more detailed draft Crowe Report upon which the PAR PowerPoint was based, was the operative document that the agency needed to see.[87] Nevertheless, by the time of the follow-up conversation between the two individuals on April 10, 2013, ADC Jorn had made it clear to CEO Ryan that his request was specifically targeted at the draft Crowe Report as well.[88] CEO Ryan agreed to provide the materials requested by ADC Jorn along with a cover letter addressing any information

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

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

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

[88] *See* OCC-MSD-66 (handwritten notes of ADC Jorn following telephone conversations with CEO Ryan on April 8, 2013 and April 10, 2013) at 1 ("Request for PPT from Crowe – have PPT & narrative – 'speaking notes' – separate report one & same – from that the PPT was put together. – Can send both of them – Draft for discussion purposes"); R-MSD-11 (April 11, 2013 email from 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."[89] To give the Bank "time to do a proper cover letter," ADC Jorn agreed to target "sometime next week to [the] end of next week"—that is, by April 19, 2013—for the delivery of the requested materials.[90]

CEO Ryan then went about collecting Crowe documents from others at the Bank and from Crowe itself, including a copy of the February 5, 2013 PAR PowerPoint and the January 31, 2013 "version 0.9" of the Crowe Report that Respondent, GC Weiss, and VP Edgar, among others, already possessed.[91] Bank personnel, including Respondent, began formulating the draft cover letter to accompany the Crowe materials.[92] In so doing, Respondent noted that the agency's focus was likely to be on the Crowe Report rather than the PAR PowerPoint, because it was what had been mentioned in the whistleblower communications and because it "provide[d] the most detailed views of Crowe at the time."[93] Respondent expressed the concern that if the cover letter did not "speak specifically to [the Crowe Report]," then the Bank would "run the risk of the OCC making their own inferences."[94] Concurrently, on April 12, 2013, Ms. Sullivan provided the OCC with materials relating to her whistleblower claims, including a copy of an earlier version of the Crowe Report, denoted as "version 0.1."[95]

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

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

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

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

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

[94] *Id.*

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

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

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

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

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

[98] *Id.*

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

> the Chief Compliance Officer with a copy to Legal Counsel. It was left with Ms. Sullivan who continued to work with Crowe Horwath to develop an execution plan. Management now understands from correspondence sent to the OCC by Ms. Wood that Ms. Sullivan shared the document with her. *We are not aware of further distribution.*[100]

The parties disagree as to the factual accuracy of this paragraph.[101] The undersigned finds that the passage is most reasonably read to be purporting to describe the full extent, at least to the knowledge of the paragraph's drafter, that the Crowe Report was distributed among Bank personnel prior to the OCC's March 25, 2013 Email, whether by the OCC or by people within the Bank itself. The undersigned further finds that the Crowe Report indisputably (and contrary to the representations in this paragraph) was in the possession of Bank personnel other than Ms. Sullivan, Ms. Wood, and GC Weiss prior to March 25, 2013, including Respondent, VP Edgar, and several members of the Bank's Executive Oversight Committee.[102] Thus, if the drafter of this passage were, in fact, aware of this additional distribution of the Crowe Report at the time the cover letter was drafted, the undersigned finds that that portion of the paragraph would be factually inaccurate and is in any event misleading.[103]

Events Leading to Respondent's Dismissal from the Bank

Following the production of the Crowe Report, the OCC returned to the Bank to conduct a further examination in May 2013.[104] On July 2, 2013, the OCC issued a Supervisory Letter

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

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

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

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

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

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

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

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

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

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

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

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

[109] *See* OCC SOF ¶ 74.

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

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

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

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

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

[113] *Id.* at 14.

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

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

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

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

criminal conspiracy to obstruct an OCC examination, which indisputably involved Respondent's alleged misconduct here.

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

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

delegated signatory and had not been constitutionally appointed.[118] On October 16, 2020, as partially modified by an order on March 1, 2021, the undersigned rejected Respondent's argument that the claims against her should be dismissed as time-limited.[119] On March 8, 2021, the undersigned declined to grant Respondent's motion asserting "that the OCC has constructed a system of secret law" and seeking to preclude the Parties from citing any non-public, unpublished precedents.[120] In her summary disposition briefing, Respondent revisited her arguments regarding the applicable statute of limitations, the Appointments Clause of the United States Constitution, and the OCC's purported reliance on "secret law," each of which the undersigned again rejected.[121] Finally, on December 2, 2021, the undersigned denied Respondent's late-filed motion to dismiss this proceeding due to "agency prejudgment."[122] Each of these arguments was thereby recorded and preserved for appeal to the Comptroller of the Currency ("Comptroller") at the appropriate stage in the proceedings, should Respondent wish to revisit them at that time.[123]

Respondent's Finances

Respondent declined to submit a personal financial statement when asked to do so as part of her response to the OCC's initial letter regarding its investigation,[124] and the information on this

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

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

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

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

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

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

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

topic (which is relevant to the size of civil money penalty being assessed) in the Parties' filings is relatively scant. Respondent represents that she has earned an average salary of $50,000 per year since her September 2015 termination from the Bank, a sharp decline from the $220,000 yearly salary that she averaged during her career in banking.[125] She further states that she has net assets of approximately $98,000 excluding the assets in her 401(k) account, which she "understand[s] to be exempt from collections."[126]

It is apparently undisputed that Respondent received a lump sum payment of $291,358 from the Bank in August 2016 following settlement of an Equal Employment Opportunity Commission complaint in connection with her termination.[127] Respondent represents that she purchased a home staging business in 2018 with the remaining proceeds of this settlement, but that the business has "substantially diminished" in value from its purchase price of approximately $400,000 down to approximately $230,000.[128] According to Respondent, 34.9 percent of the home staging business is owned by her directly, while the remainder is owned through her and her husband's respective 401(k) accounts.[129] Respondent asserts that in 2021, she took out a personal loan for $45,000 "to stave off shutting down the company," in addition to pre-existing debts totaling approximately $120,000.[130]

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

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

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

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

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

[130] Resp. CMP Reply at 2.

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

V. Analysis

The August 5, 2021 MSD Order concluded, based on the undisputed material facts, that Respondent had engaged in misconduct with an actionably culpable state of mind when she withheld the Crowe Report from OCC examiners and endeavored to conceal its existence, and further that the Bank had suffered financial loss as a result. Having set forth the relevant factual findings in this case, the undersigned now summarizes the conclusions in the MSD Order as to why each of these statutory elements for the entry of a prohibition order under 12 U.S.C. § 1818(e) and the assessment of a second-tier civil money penalty under 12 U.S.C. § 1818(i) have been met.

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[131] *See id.*

[132] *Id.*

[133] *See id.*

[134] *See id.* at 3.

[135] OCC CMP Response at 8.

The undersigned also considers the appropriateness of the desired civil money penalty amount in light of the mitigating factors set forth in 12 U.S.C. § 1818(i)(2)(G).

A. Misconduct

Enforcement Counsel argued at the summary disposition stage that Respondent's conduct in March and April 2013 constituted an actionable violation of 12 U.S.C. § 481 (failure to provide timely and complete bank information to OCC examiner upon request) and 18 U.S.C. § 1001 (knowing and willful false statements and representations and concealment of material fact) as well as unsafe or unsound practices in conducting the Bank's affairs, any of which individually would, if proven, satisfy the misconduct elements of Sections 1818(e) and Section 1818(i).[136] In response, Respondent argued that her conduct was in no way improper, that she composed the emails in question accurately and in good faith, that she never withheld or sought to conceal the Crowe Report from OCC examiners, and that she did not draft the passages in question in the April 18, 2013 letter. Respondent further argued that there was nothing material about the Crowe Report or any alleged misstatements on Respondent's part, that Respondent indisputably did not act knowingly or willfully, that no reasonable person would have understood Respondent's conduct to constitute a Section 481 violation, and that her conduct was demonstrably neither unsafe nor unsound.[137] For the reasons below, the undersigned agrees with Enforcement Counsel.

1. The OCC's Section 481 Claims

In its summary disposition brief, Enforcement Counsel argued that Respondent caused the Bank to violate its statutory duty under 12 U.S.C. § 481 when she failed to provide the Crowe Report to OCC examiners upon request in March 2013, despite knowingly having that document

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

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

in her possession and understanding it to be responsive to the OCC's inquiry.[138] The undersigned concurs that Respondent's conduct constituted a violation of that statute.

The March 15, 2013 Bank Response Letter that Respondent participated in drafting recognized "that it is the Bank's responsibility to provide complete, accurate, and timely information to the OCC in the examination process."[139] Respondent does not dispute that the source of this responsibility is 12 U.S.C. § 481, which authorizes OCC examiners to conduct thorough examinations of the affairs of any national bank or its affiliates and "make a full and detailed report of the condition of said bank to the Comptroller of the Currency," something that would only be possible if those examiners had access to relevant bank information as needed during the course of their examination.[140] And Respondent acknowledges that, as both a former OCC examiner and a bank officer, she was aware during the relevant period "that there was authority that required the bank to provide books and records to the OCC."[141] It appears beyond dispute, then, that when the OCC sought any materials that Crowe had provided to the Bank in conjunction with its BSA/AML assessment, the Bank had an obligation to provide all such materials—in Respondent's words—"timely and transparently and to the best of [its] abilit[y]."[142]

Respondent contended at summary disposition, however, that a Section 1818 enforcement action may not be premised on even an unconditional and express refusal to comply with a bank's obligations under Section 481, whether this refusal comes from the bank itself or an officer charged

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

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

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

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

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

with liaising with the OCC during its examination.[143] Respondent also argued 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.[144] The undersigned concludes that Respondent is incorrect in both respects.

It is Respondent's position that the OCC may not premise enforcement actions on any violation of Section 481 because Congress has not conferred upon the agency enforcement power over such violations.[145] Yet as explained in this Tribunal's October 16, 2020 Order denying Respondent's motion to dismiss this matter on similar grounds, Section 1818(e) authorizes the federal banking agencies to seek prohibition orders against any IAP who has "directly or indirectly violated any law or regulation," while Section 1818(i) likewise states that the violation of "any law or regulation" is grounds for the assessment of a civil money penalty, presuming in both cases that the other statutory criteria are also met.[146] And 12 U.S.C. § 1813(v) makes it clear that Congress intended the scope of an actionable "violation" under these statutes to be construed broadly to include "any action (alone or with another or others) for or toward causing, bringing about, participating in, counseling, or aiding or abetting a violation."[147] Thus, the conferral of enforcement power that Respondent seeks is contained within Section 1818 itself: if an IAP "brings about" a violation of Section 481 by, for example, causing the Bank to fail to fulfill its

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

[144] *Id.* at 20.

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

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

[147] 12 U.S.C. § 1813(v).

obligation to provide accurate and complete information regarding requested documents to OCC examiners, then the OCC is empowered by Sections 1818(e) and 1818(i) to make this violation the subject of an enforcement action, as it could with the violation of any other law.

Nor is it credible to claim that a bank official in the spring of 2013 would reasonably believe that they could conceal documents from an OCC examiner without consequence. To argue, as Respondent does, that there was no ascertainable standard of conduct "with which the agency expect[ed] parties to conform" when asked for bank information verges on disingenuity, especially given Respondent's own background at the OCC.[148] As the relevant section of the OCC's Policies and Procedures Manual observes, there are multiple statutory provisions even beyond 12 U.S.C. § 481 that make it clear that bank officials should cooperate fully with requests made in the course of an examination.[149] Could the law be clearer in specifically and unequivocally imputing to bank officials the duty of effectuating banks' responsibilities to the OCC during its examination process? Certainly. But Respondent cannot reasonably claim that she did not believe that she had such a duty at the time, when she herself has acknowledged it then and since, and when as a former long-time OCC examiner she should have been under no illusions about the need to give the agency what it asks for if you have access to the requested materials.[150] There may be circumstances in which the lack of a more precise standard should forestall enforcement actions against bank officials who make a good faith if incomplete effort to cooperate with examiners, but that is not

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

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

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

the factual record here. As a standard of behavior, knowing not to withhold a document from the OCC and mislead the agency about the document's existence, when that document has been expressly requested and is in your possession, would be ascertainable under any light.

Respondent further argues that even if an enforcement action could be premised on a violation of a bank's duty to provide prompt and accurate bank information to examiners under Section 481, no such violation occurred in this case.[151] The undersigned cannot agree. The undisputed facts show that at every step, Respondent chose obfuscation, misdirection, or diversion in formulating her responses to Ms. Omi's requests, rather than engaging with the requests themselves fully, candidly, and directly. On March 21, 2013, Ms. Omi asked for a copy of Crowe's BSA assessment report; in return, Respondent hinted heavily that no such report existed while privately making contingency plans in case the agency had obtained a copy of the draft report some other way.[152] On March 25, 2013, Ms. Omi made her request again, emphasizing this time that it encompassed *any* BSA-related report or document that Crowe had provided to Bank management, even if "only preliminary or partial." Instead of supplying the draft Crowe Report, which was unquestionably responsive to Ms. Omi's request and which multiple people at the Bank had sent Respondent *that day*, Respondent opted to inaccurately characterize the PAR PowerPoint (drafts of which she also could have provided Ms. Omi but did not) as if it were the only work product Crowe had created in the course of its January 2013 assessment, once more conveying the impression that the Crowe Report did not exist even in draft form.[153]

Respondent's lack of any mention of the Crowe Report in her March 22, 2013 Email to Ms. Omi could charitably be construed as grounded in a good faith belief that the OCC examiner

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

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

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

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

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

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

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

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

18 U.S.C. § 1001 broadly prohibits "deceptive practices aimed at frustrating or impeding the legitimate functions of government departments or agencies."[159] Importantly, "[t]he several different types of fraudulent conduct proscribed by [S]ection 1001 are not separate offenses," but

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

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

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

[159] *United States v. Tobon-Builes*, 706 F.2d 1092, 1101 (11th Cir. 1983); *accord*, *e.g.*, *United States v. Gilliland*, 312 U.S. 86, 93 (1941); *United States v. Hubbell*, 177 F.3d 11, 13 (D.C. Cir. 1999); *United States v. Arcadipane*, 41 F.3d 1, 4 (1st Cir. 1994); *United States v. Shanks*, 608 F.2d 73, 75 (2d Cir. 1979).

rather "describe different means by which the statute is violated."[160] Subsection (a)(1), for example, brings within the statute's ambit any knowing and willful conduct, in any matter within federal jurisdiction, that "falsifies, conceals, or covers up by any trick, scheme, or device a material fact."[161] By contrast, subsection (a)(2) proscribes the making of "any materially false, fictitious, or fraudulent statement or representation" in such circumstances and with the requisite state of mind.[162] The undersigned addresses each of these provisions in turn.

Concealment and a Duty to Disclose

The D.C. Circuit and the Ninth Circuit both hold that the concealment of a material fact from a government official is only actionable under 18 U.S.C. § 1001(a)(1) if the individual in question had a specific duty to disclose that fact in that context.[163] Respondent asserted at summary disposition that Enforcement Counsel has not, and cannot, establish any duty on her part "to disclose the draft PAR or any Crowe document to the OCC."[164] As the undersigned explains in Part V.A.1 *supra*, however, that is incorrect. As acting CCO of the Bank, it was incumbent upon Respondent, to the best of her ability, to provide "complete, accurate, and timely information" to OCC examiners upon request.[165] If, in that capacity, Respondent is asked for a specific document

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

[161] 18 U.S.C. § 1001(a)(1).

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

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

[164] Resp. Mot. at 11.

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

that is in her possession, then it is Respondent's duty to disclose the existence of that document rather than withholding it and contriving to create the impression that the document does not exist. Respondent, moreover, was aware of this duty.[166] Any argument that she should escape liability under 18 U.S.C. § 1001 because she was entitled to conceal documents requested by the OCC must therefore fail.

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

As an illustrative example of this effort, consider the exchange between Respondent and GC Weiss following Ms. Omi's initial request for "a copy of the assessment report of the Bank's BSA program that Crowe [Horwath] LLC was engaged to perform in January 2013."[170]

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

[167] Resp. Mot. at 11.

[168] *Id.*

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

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

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

In other words, when formulating a response to the OCC's request for "the assessment report" that Crowe created as part of its engagement, Respondent and GC Weiss considered language that would make their response more precise and accurate—specifying that Crowe did not complete a "final report," with the knowledge that a draft report of the January 2013 engagement had been created and shared with the Bank—but shelved that language amidst concerns that referring to a final report might prompt the agency to look into the existence of any remaining drafts. Indeed, when the March 22, 2013 Email does mention a draft report, it is solely in the context of Crowe's assertedly *new* BSA-related engagement with the Bank, for which a draft risk assessment was anticipated "in time for the next board meeting in early May."[175] By promising the OCC a copy of *that* draft report, the March 22, 2013 Email neatly closes the chapter on the OCC's request for January 2013 materials, leaving the reader with the unmistakable impression

[171] OCC-MSD-48 at 2 (March 21, 2013 email from Respondent to GC Weiss).
[172] *Id.* at 1 (March 21, 2013 email from GC Weiss to Respondent).
[173] *Id.* (emphasis added).
[174] OCC-MSD-52 at 2 (March 22, 2013 email from Respondent to Shirley Omi).
[175] *Id.*

that had a draft report arising from the earlier engagement existed, Respondent certainly would have offered to share that as well. These are not the actions of individuals who are operating with transparency and seeming good faith in their dealings with OCC examiners.

One further example of Respondent's tendencies toward concealment should suffice. In the wake of Ms. Omi's express request on March 25, 2013 for all draft Crowe materials provided to the Bank, Respondent emailed GC Weiss for a copy of "the Crowe document . . . to review before our meeting at 10:30."[176] When GC Weiss responded that he did not have an electronic copy of the Crowe Report, Respondent expressed relief at being able to "tell Shirley, *truthfully*, that only Lynn was in receipt of the letter and we are unable to locate a copy."[177] Perhaps unfortunately for Respondent's preference for truth-telling, VP Edgar then provided Respondent with the Crowe Report and more, offering to create a SharePoint site where Respondent could see and obtain "a variety of other Crowe documents from Gantt charts to Board and Management presentations."[178] Respondent turned down the offer.[179]

To all appearances, every document that VP Edgar offered to provide Respondent was unquestionably responsive to Ms. Omi's request an hour prior. GC Weiss also emailed Respondent additional Crowe materials, forwarding her a February 19, 2013 email to the Bank's BSA Executive Oversight Committee that had provided Committee members with the Crowe Report and other responsive documents.[180] Yet remarkably, Respondent's response to Ms. Omi later that

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

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

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

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

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

day did not advert to the existence of *any* of these documents, let alone attach them. Beyond an initial, glancing reference discussed further below, she did not mention the Crowe Report. She did not mention the "Gantt charts" referenced by VP Edgar or the AML Program Roadmap, High Level Roadmap, and Program Enhancement Update sent to her by GC Weiss. The *only* document from the January 2013 engagement that Respondent identified to Ms. Omi, despite having multiple such documents in her possession and knowing how to obtain others, was a single PowerPoint presentation from February 5, 2013, which Respondent misleadingly represented "was not provided to the Bank."[181] Moreover, in referencing the February 5, 2013 PowerPoint presentation immediately after stating that Respondent had spoken to CEO Ryan and GC Weiss "regarding the existence of a draft report coming out of the January BSA Program Review by Crowe Horwath," the March 25, 2013 Email conveyed the clear impression, again, that there were no other documents responsive to the examiner's request and that a "draft report" separate from the February 5 presentation simply did not exist.[182]

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

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

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

conclusion. The undersigned therefore rejects Respondent's assertion that no such concealment is cognizable from the face of Respondent's emails.

False Statements and Representations

Enforcement Counsel separately contended at summary disposition that the March 22, 2013 Email, the March 25, 2013 Email, and the April 18, 2013 Cover Letter all contained false statements and representations made by Respondent that constituted a violation of 18 U.S.C. § 1001(a)(2).[183] Specifically, Enforcement Counsel asserted that (1) the March 22, 2013 Email falsely stated that "Crowe did not complete an assessment," that Crowe was "engaged to perform a market study/peer benchmark analysis," and that "the project was suspended before any report was issued";[184] (2) the March 25, 2013 Email falsely represented "that the only relevant information [Respondent] had gathered 'regarding the existence of a draft report coming out of the January BSA Program Review by Crowe Horwath' after discussing with CEO Ryan and GC Weiss" was that Crowe presented a PowerPoint to the Board and executive management in early February 2013, copies of which it did not provide to them;[185] and (3) the April 18, 2013 Cover Letter falsely represented that the Crowe Report had been circulated only to CCO Sullivan, GC Weiss, and Ms. Wood, when in fact a number of other Bank personnel also had received copies over the relevant time period.[186]

Respondent disputed the falsity of the statements in question, calling the representations made in the March emails "non-responsive" at worst and characterizing the inaccurate description of the Crowe Report's distribution within the Bank in the April cover letter as merely

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

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

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

[186] *See id.* at 19.

"ambiguous."[187] Respondent also disputed that she in fact authored the April 18 statements, averring that "the documentary evidence shows that [she] did not draft the bulk of the purportedly false parts."[188]

Because the undersigned could not find based on the factual record as developed that the assertedly false statements in question were made knowingly and willfully (see *infra*), the MSD Order concluded that it was unnecessary to determine exactly where along a spectrum of "false," "ambiguous," "non-responsive," "unhelpfully vague," and "technically true but extremely misleading" each of these statements fell.[189] With respect to the authorship of the relevant passages in the April 18, 2013 Cover Letter, moreover, and accepting each party's evidence as true in evaluating the other party's motion for summary disposition on that claim,[190] the undersigned found that there was a genuine dispute as to whether Respondent made the April 18 representations that would need to be resolved at the hearing that the Parties have now agreed to forego.[191]

Knowing and Willful Conduct

Both the false statement and concealment components of 18 U.S.C. § 1001 require that the objectionable nature of the conduct at issue be "knowing[] and willful[]," rather than uncalculated, mistaken, or inadvertent.[192] The undersigned concluded in the MSD Order that the undisputed evidence demonstrates that Respondent acted knowingly and willfully in concealing information regarding the Crowe Report and Crowe's January 2013 engagement from OCC examiners, but that

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

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

[189] *See* MSD Order at 44.

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

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

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

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

Materiality

To establish a violation of the relevant provisions of 18 U.S.C. § 1001, the government must show that either the allegedly false representations or the information alleged to have been concealed were material—which is to say, that the concealed facts or false statements had "a natural tendency to influence, or [were] capable of influencing, either a discrete decision or any other function of the agency to which [they were] addressed."[195] It is important to note that a misstatement or concealment need not *actually influence* the agency's decision or its functioning in order to be material, nor does materiality depend on whether the agency in fact relied on the

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

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

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

information in question.[196] Rather, "propensity to influence is enough."[197] And "a false statement can be material even if the decision-maker actually knew or should have known that the statement was false."[198] In *United States v. Safavian*, for example, the D.C. Circuit concluded that a defendant's false statements were material even though "the agent who interviewed [the defendant] knew, based upon his knowledge of the case file, that the incriminating statements were false when [the defendant] uttered them."[199]

Respondent argued at summary disposition that neither the Crowe Report nor any of the other Crowe documents satisfy Section 1001's materiality threshold.[200] According to Respondent, the Crowe materials had no capacity to influence the agency's decision-making surrounding its follow-up examination of the Bank's BSA/AML compliance program, because "Crowe's draft observations about weaknesses were . . . already well known to the OCC," given the OCC's own preliminary conclusions and the information provided to OCC examiners by whistleblowers Sullivan and Wood.[201] Respondent also asserted that "the OCC had full information about the Crowe engagement" by the time it finally received a copy of the Crowe Report on April 18, 2013, noting among other things that "Board minutes provided to the OCC contained discussions of Crowe's work" and that CCO Sullivan had given the OCC copies of various Crowe materials,

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

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

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

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

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

[201] *Id.* at 15.

although not the Crowe Report itself.[202] Finally, Respondent argued that the Crowe Report merely "mirrored some of the OCC's findings" rather than providing the agency with "any new information or identify[ing] a new field of inquiry," and as such there was nothing about the Crowe engagement that did affect, or could have affected, the scope of the OCC's reentry into the Bank in May 2013 for a target exam.[203]

In return, Enforcement Counsel contended that knowledge of the Crowe Report and its conclusions not only could have but *did* influence the decisions and actions of the OCC as it investigated the condition of the Bank's BSA/AML compliance program.[204] Specifically, Enforcement Counsel asserted that the Crowe Report was one of several factors that influenced the OCC's scoping of its follow-up examination, the agency's final decision that the Bank's BSA program was deficient, the "tailoring" of the resultant remedial program imposed by the OCC, and the OCC's decision-making regarding a proposed merger between the Bank and an affiliate.[205] Enforcement Counsel noted that the Crowe Report's ability to corroborate the OCC's own findings was meaningful in light of the March 15, 2013 Bank Response Letter, co-authored by Respondent, that challenged the premise and validity of the agency's findings in numerous respects.[206] And Enforcement Counsel contested Respondent's claim that the OCC had full knowledge of the Crowe engagement from other sources, stating that the Board minutes to which Respondent refers provided little information and that the whistleblowers offered only "general summaries" of Crowe's conclusions.[207]

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[202] *Id.*

[203] *Id.* at 16.

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

[205] OCC Opp. at 24.

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

[207] OCC Opp. at 25.

The undersigned concluded in the MSD Order that she need not determine whether the Crowe Report or the conclusions of the Crowe engagement generally in fact influenced the OCC's actions and decision-making with respect to its examination of the Bank's BSA/AML program, because it is beyond question that they had the propensity to do so. As Enforcement Counsel noted, the existence of a detailed if preliminary report of a third-party auditor engaged by a bank to make an assessment of the adequacy of a program that is the subject of OCC examination would indisputably have "a natural tendency to influence decisions and actions at the OCC because it can provide additional information about deficiencies, root causes and extent of deficiencies, additional areas requiring examination or follow-up, and required corrective action."[208]

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

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[208] *Id.* at 23.

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

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

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

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[211] *See id.* at 26.

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

[213] The MSD Order found, however, that there was no evidence in the record that the allegedly false statements in the April 18, 2013 Cover Letter regarding the scope of the Crowe Report's distribution within the Bank prior to March 25, 2013 would or could have influenced the scope of the OCC's then-ongoing examination as of that date or otherwise had the tendency to affect the agency's decision-making. *See* MSD Order at 49-50. The undersigned therefore concluded that Enforcement Counsel had not met its burden with respect to the materiality of those statements, notwithstanding their factual inaccuracy. *See* Part IV *supra* at 24 (finding that April 18, 2013 Cover Letter inaccurately and misleadingly characterizes the internal distribution of the Crowe Report to Bank personnel as of March 25, 2013).

3. The OCC's Unsafe and Unsound Practices Claims

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

Consistent with the Horne Standard, the Comptroller has held that unsafe and unsound practices for the purpose of Section 1818 encompass "any action, or lack of action, which is contrary to generally accepted standards of prudent operation, the possible consequences of which, if continued, would be abnormal risk or loss or damage to an institution, its shareholders, or the agencies administering the insurance funds."[215] An IAP's practices with respect to the financial institution with which they are affiliated are unsafe or unsound if they pose "reasonably foreseeable undue risk to the institution," which the Comptroller and the D.C. Circuit have interpreted to mean "increased risk of some kind."[216] Furthermore, to support a determination that the conduct in question is contrary to accepted standards of prudent operation, the agency "must make some showing as to the relevant standards and the departure from those standards."[217]

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

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

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

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

Respondent argued that her conduct was not an unsafe or unsound practice "[f]or the same reason that [it] did not constitute a violation of Section 1001 or Section 481."[218] She contended that her consultation with GC Weiss following Ms. Omi's requests was the prudent act of an individual seeking appropriate and accurate counsel from someone with "personal knowledge on the topic of Crowe."[219] Respondent also claimed that her responses to Ms. Omi were not obstructive and merely offered an "explanation of why the Bank had found [the Crowe materials] unhelpful."[220] Finally, Respondent maintained that her decision to withhold the Crowe Report from Ms. Omi did not pose "a reasonably foreseeable undue risk" to the Bank, because any risk of exposure to government enforcement action as a result of this conduct would be "impermissibly circular" and wholly speculative.[221]

In this Tribunal's October 16, 2020 Order denying Respondent's initial dispositive motion, the undersigned concluded "that the Notice's allegations that Respondent knowingly and repeatedly lied to the OCC over a prolonged period and concealed a document central to the agency's examination of the Bank for which she acted as Chief Compliance Officer" met the threshold of unsafe and unsound practices with ease.[222] Nothing about the factual record as more fully developed on summary disposition changes this conclusion. As the Order stated, Respondent's conduct undoubtedly exposed the Bank to "reasonably foreseeable undue risk"—"namely, the risk that [concealing from the OCC] the existence of a third-party auditor report finding deficiencies in the Bank's BSA/AML compliance program and obstructing the agency's examination of that program could have negative consequences for the Bank if and when the

[218] Resp. Mot. at 23.
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] October 16, 2020 Order at 51.

deception was discovered."[223] There is no impermissible circularity in observing that statutes exist—and were known to exist by Respondent at that time, as a bank official and former 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.[224] Nor is it "speculative" to foresee that Respondent's actions risked subjecting both the Bank and herself to liability under those statutes if her conduct was discovered, *as in fact occurred*.

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

This Tribunal has likewise enumerated the many ways in which Respondent's responses to Ms. Omi were themselves evasive, non-responsive, misleading, and less than fully accurate at every turn.[226] Particularly as a former examiner who has acknowledged that the refusal by bank officials to provide requested information is a "red flag" that could signal violations of law,[227]

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[223] *Id.* at 52.

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

[225] October 16, 2020 Order at 52.

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

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

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).[228]

B. Effect

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

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[228] The fulfillment of this aspect of the corresponding prong of Section 1818(i) requires not only a conclusion that Respondent has engaged in unsafe or unsound practices, but that she has done so *recklessly*. *See* 12 U.S.C. § 1818(i)(2)(B)(i); *Patrick Adams*, 2014 WL 8735096, at *49 (articulating recklessness standard). Conduct is "reckless" for the purposes of this statute if "it is done in disregard of, and evidencing conscious indifference to, *a known or obvious risk of a substantial harm*." *Blanton*, 2017 WL 4510840, at *13 (internal quotation marks and citation omitted) (emphasis added). This is a rare instance in the statutory scheme of Sections 1818(e) and 1818(i) in which the agencies have found that the necessary harm or loss must be "substantial" to trigger an element, and the Comptroller has applied this standard in the past to find recklessness in situations where the misconduct in question risked especially dire consequences. In *In the Matter of Blanton*, for example, the Comptroller found a known or obvious risk of substantial harm sufficient for a finding of reckless engagement where the respondent had improperly and repeatedly approved overdrafts that "would have severely affected the Bank's capital" if they were not covered, at a time when "[t]he Bank was in a critically deficient capital condition," which likely would have led to the Bank's failure. *Id.* at *14. In *In the Matter of Grant Thornton LLP*, the Comptroller found recklessness under the same standard when an "auditor fail[ed] to execute basic procedures concerning the most material entries on an insured depository institution's financial statement," such as ignoring evidence "that directly and unequivocally demonstrated that a bank [was] overstating its assets by hundreds of millions of dollars." *In the Matter of Grant Thornton LLP*, Nos. AA-EC-04-02 & -03, 2006 WL 5432171, at *4 (Dec. 29, 2006) (OCC final decision). And in *Dodge v. Comptroller of the Currency*, the D.C. Circuit affirmed the Comptroller's finding of reckless engagement when the respondent manipulated that bank's capital by improperly reporting over $3 million in non-qualifying contributions at a time when the bank was experiencing "considerable losses," thereby "expos[ing] the Bank and its depositors to substantial risk." *Dodge v. Comptroller of the Currency*, 744 F.3d 148, 161 (D.C. Cir. 2014); *see also id.* at 162. Considering this precedent, and given that the undersigned had already concluded that the misconduct elements of Section 1818(i) have been satisfied, the undersigned declined to decide on summary disposition whether the harm "knowingly or obviously" risked by Respondent's misconduct was similarly and sufficiently substantial to constitute reckless engagement in unsafe or unsound practices.

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

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

Any reasonable reading of the obstruction charges to which the Bank pled guilty in February 2018 reveals that they concerned, in significant part, precisely the same misconduct by Respondent that is the subject of the instant action.[231] There can be no dispute that Respondent is the "Executive A" referred to in the Plea Agreement and Charging Documents,[232] and it is likewise undisputed that the Bank admitted to conspiring with Executive A, among others, to obstruct the OCC's examination in March and April 2013, including by making "false and misleading statements to the OCC regarding the existence of reports developed by a third-party consultant, which corroborated the OCC's findings regarding the ineffectiveness of [the Bank's] BSA/AML program."[233] It also cannot be disputed that as a result of this guilty plea, the Bank was fined $500,000.[234] This, by itself, is enough to satisfy the statutory effect elements.[235]

Respondent, of course, disagreed, arguing that the settlement of a separate litigation to which she was not a party—*i.e.*, the Bank's guilty plea to a criminal complaint brought by the Department of Justice ("DOJ")—and "based on the Bank's violation of different laws" cannot be

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

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

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

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

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

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

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

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

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

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

[239] *Id.* at 33.

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

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

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

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

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

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

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

C. Culpability

The final prong of a Section 1818(e) enforcement action for a prohibition order, the "culpability" element, is satisfied by a showing of either personal dishonesty or an IAP's continuing or willful disregard for the safety and soundness of an institution.[245] It is typically,

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

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

[245] 12 U.S.C. § 1818(e)(1)(C).

although not exclusively, appropriate to resolve questions of culpability at the hearing stage rather than on summary disposition.[246] Here, however, the undersigned concludes that the undisputed facts regarding Respondent's conduct—and in particular the email traffic between herself, CEO Ryan, and GC Weiss following each of Ms. Omi's requests for Crowe materials—make her conscious concealment of material information regarding the Crowe Report sufficiently evident, without "making credibility determinations, weighing evidence, and drawing [impermissible] inferences from facts," to find that Respondent has acted with personal dishonesty and willful disregard within the meaning of Section 1818(e).[247]

As Respondent acknowledged in her summary disposition briefing, "[t]he personal dishonesty standard of [Section] 1818(e) is satisfied when a person disguises wrongdoing from the institution's board and regulators, or fails to disclose material information."[248] A finding of personal dishonesty requires evidence that an individual acted with scienter, or some knowledge of the wrongfulness of their actions.[249] In this instance, the MSD Order concluded for the reasons discussed in Part V.A.2 *supra* that Respondent's evasive and occlusive course of conduct in

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[246] *See*, *e.g.*, *Miller v. FDIC*, 906 F.2d 972, 974 (4th Cir. 1990) (noting "the general rule that summary judgment is seldom appropriate in cases wherein particular states of mind are decisive elements of a claim or defense"); *Gomez v. Trustees of Harvard Univ.*, 677 F. Supp. 23, 24 (D.D.C. 1988) (noting that "intent and state of mind [are] areas that are particularly ill-suited for summary disposition"); *but see In the Matter of Carl V. Thomas et al.*, Nos. 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).

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

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

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

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

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

The undersigned has already concluded that Respondent "knowingly and willfully" sought to conceal material facts regarding the existence of the Crowe Report from OCC examiners. *See supra* at 44-45. The undersigned also concluded that, in so doing, Respondent engaged in unsafe

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

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

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

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

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

D. Civil Money Penalty

As a result of the foregoing analysis, the undersigned has concluded that the applicable elements have been met for the imposition of a prohibition order under 12 U.S.C. § 1818(e) and

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

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

[256] Given the relatively short period of time during which Respondent contrived to conceal the Crowe Report, the undersigned cannot also conclude that Respondent acted with continuing disregard, a mental state that manifests over time through, for example, the "voluntary and repeated inattention to" unsafe and unsound practices, or the "knowledge of and failure to correct clearly imprudent and abnormal practices that have been ongoing." *In the Matter of Lawrence A. Swanson, Jr.*, No. AP-ATL-93-7, 1995 WL 329616, at *5 (Apr. 4, 1995) (OTS final decision on reconsideration); *see also Watts*, 2002 WL 31259465, at *8 (continuing disregard is "conduct which is voluntarily engaged in over time"); MSD Order at 62-63. Although there is no minimum length that an IAP must be heedlessly indifferent in order for their disregard to be "continuing" for purposes of culpability, the undersigned's review of previous matters in which that threshold has been met reveals periods of misconduct significantly longer than the two and a half weeks at issue here. *See*, *e.g.*, *Ellsworth*, 2016 WL 11597958, at *17 (continuing disregard where misconduct "involved repeated acts over more than a year"); *Watkins*, 2019 WL 6700075, at *9 (continuing disregard where misconduct took place "repeatedly . . . between July 2010 and November 2012"); *Watts*, 2002 WL 31259465, at *8 (continuing disregard where misconduct amounted to "at least 80 incidents occurring over a period of nearly two years"); *Vickery*, 1997 WL 269105, at *8 (finding that "conduct reflecting recklessness or indifference with respect to an institution's safety" was continuing disregard when "made over a period of some months"); *Dodge*, 744 F.3d at 161 (continuing disregard where conduct took place "on multiple occasions over six reporting periods"). The span of time in which Respondent engaged in her misconduct here is comparatively minuscule, and her misconduct itself substantially self-contained—as Enforcement Counsel observes, this is at heart "a narrow case about how an examiner for the [OCC] requested a document [from Respondent] multiple times." OCC Opp. at 1. The undersigned therefore declined to make a finding of continuing disregard at the summary disposition stage.

the assessment of a second-tier civil money penalty under 12 U.S.C. § 1818(i). Before assessing a civil money penalty, however, the agency is bound to consider the appropriateness of the amount being assessed in light of five mitigating factors: (1) the size of the respondent's financial resources; (2) the respondent's good faith; (3) the gravity of the respondent's violation; (4) the history of any previous violations; and (5) "such other matters as justice may require."[257] With respect to the $50,000 civil money penalty sought by Enforcement Counsel in this matter, the Parties have made submissions adverting to these factors and to the thirteen interagency factors that financial institution regulatory agencies must also weigh in conjunction when determining a civil money penalty amount.[258] Considering the Parties' submissions, assessing the relevant factors, and for the reasons given below, this Tribunal recommends to the Comptroller that there is some cause for mitigation and that $30,000, rather than $50,000, is an appropriate monetary penalty for Respondent's misconduct in this case.

The purpose of a civil money penalty "is to deprive the violators of any financial benefit derived as a result of the violations, provide a sufficient degree of punishment, and [act as] an adequate deterrent to the respondents and others from future violations of banking laws and regulations."[259] The interagency guidance regarding the assessment of civil money penalties further states that "in cases where the violation, practice, or breach causes quantifiable, economic benefit or loss," a civil money penalty amount that merely recompenses the loss or strips the

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[257] 12 U.S.C. § 1818(i)(2)(G).

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

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

violator of their benefit will be insufficient "to promote compliance with statutory and regulatory requirements."[260] Rather, "[t]he penalty amount should reflect a remedial purpose and should provide a deterrent to future misconduct."[261] The undersigned will address each of the five mitigating factors in turn, bearing in mind the punitive, deterrent, and remedial goals that civil money penalties are intended to achieve.

1. Respondent's Financial Resources

The undersigned credits Respondent's representation that she has approximately $98,000 in net assets, not including any retirement fund that she asserts is unreachable by civil money penalty assessment.[262] For lack of contrary evidence, the undersigned also credits Respondent's statement that her average salary since leaving the banking industry has been around $50,000 per year.[263] Respondent also has assets that she claims are not reachable to pay the OCC's assessment, such as a $780,000 house, as well as the admitted ability to obtain funds via personal loan if necessary.[264] She is also married and has her husband's assets for support.[265] In short, according to Respondent's own telling, it would be painful but possible to pay a $50,000 civil money penalty, and there is no indication that an assessment of that amount would pose a crushing burden to her future life prospects. At the same time, Respondent is not so well-off that a larger penalty is necessary for a sufficient punitive and deterrent effect.[266] The undersigned therefore finds that the

[260] Interagency CMP Policy at *2.

[261] *Id.*

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

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

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

[265] *See id.* at 2.

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

size of Respondent's financial resources is not a basis for mitigating the amount of the assessed penalty under the statute.

2. Respondent's Good Faith

The mitigating factor of good faith, in the undersigned's view, encompasses both good faith shown (or not shown) in the course of a respondent's misconduct as well as any showing of good faith made by a respondent, for example through willing cooperation or genuinely expressed regret and responsibility for their actions, during the agency's investigation and the enforcement proceedings themselves. Such an interpretation provides an incentive for respondents to be forthcoming and cooperative through the investigative and enforcement process. That interpretation also lessens the duplicative effect that a finding of personal dishonesty or willfulness or a conscious engagement in misconduct might otherwise have on this mitigating factor—otherwise, no showing of good faith sufficient to mitigate an assessed penalty could ever be made in most cases before this Tribunal.[267]

Here, there is ample evidence that "Respondent sought, to the best of her ability, to conceal the existence of the Crowe Report and the conclusions contained therein from the OCC."[268] There is therefore no question of any good faith in the misconduct itself that might mitigate the assessed amount; the inherent nature of the misconduct is indicative of a "thoroughgoing lack of straightforwardness and an intent to deceive or mislead."[269] As for good faith during the enforcement process, neither party has offered information one way or the other regarding

invitation to this Tribunal to impose a greater penalty . . . invites this Tribunal to impose a penalty that was not contained in the written notice issued by the OCC").

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

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

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

Respondent's level of cooperation or candor, and from the undersigned's perspective, Respondent has been neither candidly remorseful in the course of these proceedings nor actively obstructive. The undersigned accordingly finds that Respondent's good faith is also not a basis for mitigating the assessed penalty amount.

3. Gravity of the Violation

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

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

[270] OCC Opp. at 1.

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

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

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

To be clear: Respondent's misconduct warrants a prohibition order and a monetary penalty. The undersigned finds only that the violation, when viewed in full context, counsels toward a smaller assessment. This is not a case where the respondent is alleged to have engaged in unsafe and unsound practices or other violative conduct for months or years, nor one where the misconduct was undertaken for the respondent's personal financial gain.[276] Rather, the misconduct

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

[274] Resp. CMP Br. at 20.

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

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

spanned three weeks and half a dozen emails in temporarily obstructing the OCC's examination, and there is no evidence that Respondent ever personally profited. The undersigned therefore concludes that some mitigation is appropriate when considering the gravity of the violation, and she recommends an assessment of $30,000 for the civil money penalty in this case.

4. History of Violations

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

5. Such Other Matters as Justice May Require

In their submissions, the Parties advert to the thirteen interagency factors that the banking agencies "have identified . . . as relevant" to the consideration of the statutory mitigating factors and the assessment of an appropriate civil money penalty amount.[278] The undersigned finds that while certain of the interagency factors may weigh in Respondent's favor—specifically, factors 2 (duration and frequency of misconduct), 7 (lack of financial gain to respondent), 9 (lack of history of previous misconduct), 10 (no previous criticism for similar actions), and 12 (lack of tendency to engage in violations)—the factors overall provide no additional basis for mitigation beyond what has already been discussed.[279]

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

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

[279] Indeed, there are a greater number of interagency factors—specifically, factors 1 (evidence of disregard), 3 (continuation of misconduct after notification), 4 (failure to cooperate), 5 (evidence of concealment), 6 (loss to the institution), and 8 (lack of restitution)—that tend to weigh against Respondent when considering the appropriate penalty amount to be assessed. *See* Interagency CMP Policy at *2. The remaining two factors, numbers 11

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

E. Appointments Clause

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

(presence or absence of effective compliance program) and 13 (existence of written agreements intended to prevent violations), are not applicable here. *See id.*; *see also* OCC CMP Br. at 6-7.

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

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

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

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

The undersigned again incorporates the reasoning from the previous matter in full and holds that the OCC's practice of referring to a certain class of senior official as "Deputy Comptroller" or "Senior Deputy Comptroller" does not contravene either the Appointments Clause or the statutory requirement that "no more than four Deputy Comptrollers of the Currency," a constitutional office, be appointed by the Secretary of the Treasury.[284] As the undersigned has explained in depth, the Comptroller's authority to issue Notices of Charges is delegable to "mere employees" like Deputy Comptroller Brickman who are not subject to the Appointments Clause, are not appointed under 12 U.S.C. § 4, and do not wield the statutorily granted powers of a Deputy Comptroller of the Currency.[285] Respondent's constitutional challenge in that regard is therefore without foundation.

VI. Conclusion

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

[284] 12 U.S.C. § 4.

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

accordance with 12 C.F.R. § 19.38, the undersigned therefore recommends that the Comptroller enter a prohibition order against Respondent and assess a second-tier civil money penalty in the amount of $30,000 in consequence of Respondent's misconduct. The record of this proceeding will be transmitted to the Comptroller in conjunction with this Recommended Decision, as well as a certified index of the administrative record and an index of exhibits.

SO ORDERED.

Dated: February 10, 2022

Jennifer Whang, Administrative Law Judge
Office of Financial Institution Adjudication