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

In the Matter of	
Carrie Tolstedt, Former Head of the Community Bank	OCC AA-EC-2019-82
Claudia Russ Anderson, Former Community Bank Group Risk Officer	OCC AA-EC-2019-81
James Strother, Former General Counsel	OCC AA-EC-2019-70
David Julian, Former Chief Auditor	
Paul McLinko, Former Executive Audit Director	OCC AA-EC-2019-71 OCC AA-EC-2019-72
Wells Fargo Bank, N.A. Sioux Falls, South Dakota	ALJ McNeil

ORDER REGARDING RESPONDENTS' MOTIONS FOR ORDERS TO SEAL SUBMISSIONS FILED IN OPPOSITION TO ENFORCEMENT COUNSEL'S MOTIONS FOR SUMMARY DISPOSITION

On March 26, 2021, Enforcement Counsel filed a motion seeking summary disposition in their favor against Respondent Russ Anderson, and on that same day filed a similar separate motion against Respondents Julian and McLinko. Pursuant to an agreed-upon entry, the parties established April 30, 2021 as Respondents' deadline for filing their response to Enforcement Counsel's motions.[1] On April 8, 2021, Respondents Russ Anderson, Julian, and McLinko filed a joint motion seeking an order that would modify the current prehearing schedule by extending to

[1] See Order Regarding Joint Motion Requesting Reconsideration Regarding Schedule issued March 25, 2020.

May 21, 2021 the deadline for Respondents to file a redacted, public version of their response to the summary disposition motions.[2] That motion was denied in an order dated May 3, 2021.[3]

On April 30, 2021, Respondents filed separate responses opposing Enforcement Counsel's summary disposition motions. At the same time, each Respondent also filed separate motions seeking orders sealing portions of their responsive briefs.[4]

Enforcement Counsel's response to Respondents' Motions to Seal is not due until May 18, 2021. Given what I find to be exigent circumstances, most notably the fact that our record now contains submissions that do not conform to OCC Rules of Practice and Procedure or orders of this Tribunal, the following order is entered *ex parte*, without input from Enforcement Counsel. Should Enforcement Counsel wish to be heard regarding Respondents' Motions, they may move for reconsideration of this Order. Such a motion will be timely if filed by May 18, 2021.

I note with concern the potentially misleading language presented by Respondents Russ Anderson and McLinko in their motions to seal.

Respondent Russ Anderson titled her Motion as an "Unopposed Motion to Seal" unredacted versions of documents filed on her behalf opposing Enforcement Counsel's summary disposition motion against her.[5] In the body of the motion, Respondent averred "Respondent Russ Anderson conferred with Enforcement Counsel prior to filing this motion and received the response attached as Exhibit A."[6]

Exhibit A is a portion of an email exchange dated April 29, 2021. The first message, sent by Michael Carpenter, counsel for Respondent Julian, and apparently speaking on behalf of Respondents Russ Anderson, Julian, and McLinko, was addressed to OCC's Enforcement Counsel with copies to all counsel of record.[7] Mr. Carpenter wrote: "Enforcement Counsel: Respondents intend to file unredacted versions of their summary disposition oppositions under

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[2] Motion for Order Bifurcating Response Deadline and for Order Shortening Time for Response Thereto, dated April 8, 2021.

[3] Order Regarding Respondents' Motion for Order Bifurcating Deadline.

[4] See Unopposed Motion to Seal Unredacted Versions of Certain Filings of Respondent Russ Anderson in Response to Enforcement Counsel's Motion for Summary Disposition; Motion to Seal Unredacted Versions of Certain Filings of Respondent Julian in Response to Enforcement Counsel's Motion for Summary Disposition; and Motion to Seal Unredacted Versions of Certain Filings of Respondent McLinko in Response to Enforcement Counsel's Motion for Summary Disposition, each dated April 30, 2021.

[5] Unopposed Motion to Seal Unredacted Versions of Certain Filings of Respondent Russ Anderson in Response to Enforcement Counsel's Motion for Summary Disposition at 1.

[6] *Id*. at 2.

[7] Unopposed Motion to Seal Unredacted Versions of Certain Filings of Respondent Russ Anderson in Response to Enforcement Counsel's Motion for Summary Disposition at Exhibit A, p. 2.

seal and redacted versions publicly. Respondents also intend to file motions to seal the unredacted version. Do you oppose us filing such motions to seal?"

Later the same morning, Enforcement Counsel through Jason Friedman responded (again to all counsel of record):

> Michael: Enforcement Counsel will not oppose any motions to seal information required to be filed under seal by the judge's orders, but you have not provided us information sufficient for us to determine whether or not the redactions you propose to make in your responsive filings are appropriate. As you know, in the past, Respondents have at least provided some information about the basis for their proposed redactions. You have not done that here. Given that, we will reserve our right to oppose. Thanks.

The exchange presented by Respondent Russ Anderson does not demonstrate that her Motion was in fact unopposed. To the contrary, Russ Anderson was explicitly told that she had "not provided us information sufficient to determine whether or not the redactions you propose to make in your responsive pleadings are appropriate." Respondent Russ Anderson thus was on notice prior to filing her Motion that Enforcement Counsel presently lacked enough information to exercise the discretion delegated to them pursuant to the OCC's Uniform Rules – specifically, that they could not ascertain whether the public interest warranted shielding the redacted content from public view.[8]

Compounding the misrepresentation that Russ Anderson's Motion was unopposed, Russ Anderson has filed multiple documents bearing the heading "Under Seal," including her memorandum in opposition to Enforcement Counsel's summary disposition motion and her statement of material facts in opposition. None of the submissions by Respondent Russ Anderson bearing the "Under Seal – Non-Public Version" header are properly identified as being maintained under seal, because none have been identified by Enforcement Counsel as warranting shielding from public view.

The preliminary order from this Tribunal made it clear that Respondents have the ability to seek to have submissions maintained under seal. That order provided thus:

> Pursuant to the OCC's Uniform Rules of Practice and Procedure, Enforcement Counsel has the authority to determine whether to present documents (or parts of documents) under seal, if disclosure would be contrary to the public interest.[9] I construe this allocation of authority to be dispositive with respect to determinations made by Enforcement Counsel. I also find that while Respondents do not have comparable authority, each Respondent nevertheless may propose to present documents or parts of document under

[8] See 12 C.F.R. § 19.33(b), granting discretion to Enforcement Counsel to file "any document or part of a document under seal if disclosure of the document would be contrary to the public interest."

[9] 12 C.F.R. § 19.33(b).

> seal, after which Enforcement Counsel may support or oppose such proposal and, if the proposal is supported, it will be granted; and if opposed then the merits of the proposal will be a matter for my determination.[10]

By filing documents bearing the "Under Seal" header, Respondent Russ Anderson has introduced into our record a set of mislabeled documents, apparently under the presumption that she had established on her own accord the public interest being served by keeping these documents from public view. The remedy is that the documents are ordered stricken, with leave granted to refile without the misleading header.

Respondent McLinko's Motion carries with it all of the deficiencies found in the Motion to Seal filed by Respondent Russ Anderson, with one additional cause for concern. Unlike Russ Anderson's Motion, Respondent McLinko failed to disclose the contents of the email exchange quoted above and which was appended to Russ Anderson's Motion to Seal. Electing to not share the actual contents of the exchange of email messages, McLinko stated he "conferred with Enforcement Counsel prior to filing, and Enforcement Counsel do not oppose the request at this time, but reserve the right to file an opposition."[11]

Were it not for the presentation of the email exchange by Respondent Russ Anderson (and separately by Respondent Julian), this Tribunal would have been misled by McLinko's submission into thinking Enforcement Counsel had determined the public interest was served by McLinko's proposed redactions – when in fact Enforcement Counsel's message to Respondents was the opposite. Respondent McLinko had the affirmative obligation to disclose the true position presented to him by Enforcement Counsel's email response to Mr. Carpenter's inquiry, and breached that obligation.

As was the case regarding Respondent Russ Anderson's submissions, by filing documents bearing the "Under Seal" header, Respondent McLinko has introduced into our record a set of mislabeled documents, apparently under the presumption that he had established on his own accord the public interest being served by keeping these documents from public view. The remedy is that the documents are ordered stricken, with leave granted to refile without the misleading header.

Respondent Julian fully disclosed the true nature of the exchange between Mr. Carpenter and Enforcement Counsel, and made no claim that the redactions he sought had been approved by Enforcement Counsel. This presentation is wholly in accord with both the OCC's Uniform Rules and the January 23, 2020 Order of this Tribunal. That said, however, Respondent Julian has submitted documents bearing the header mistakenly describing the submission as "Unredacted Version – Filed Under Seal." The remedy is that the documents are ordered stricken, with leave granted to refile without the misleading header.

Any refiled submissions shall be conform to the following.

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[10] Designation Notice and Order Requiring Electronic Filing, issued January 23, 2020, at 5.

[11] Motion to Seal Unredacted Versions of Certain Filings of Respondent McLinko in Response to Enforcement Counsel's Motion for Summary Disposition at 2.

Redactions Authorized by the Tribunal's Initial Orders

In the initial set of prehearing orders, this Tribunal directed the following redactions and applied the order to all parties, including Enforcement Counsel:

> To comply with the requirement for public proceedings, while also protecting personal privacy and other legitimate interests, the parties shall redact from all pleadings, documents and exhibits all confidential information, including, but not limited to confidential Bank Secrecy Act/Anti-Money Laundering information, as well as the following personal identifiers:
>
> a. Social Security Numbers – If an individual's social security number must be included in a pleading, only the last four digits of the number should be used.
>
> b. Dates of birth – If an individual's date of birth must be included in a pleading, only the year should be used.
>
> c. Current financial account information – If a current active account number is relevant to the proceeding (i.e. an existing deposit account, demand deposit account, loan, credit card account, or other account number, the public disclosure of which could result in fraudulent compromise of the account), only the last four digits of the account number should be used.[12]

Respondents supported their Motions to Seal with the following description of the bases applicable to the redactions they proposed:

> These filings reference privileged Bank material, nonpublic OCC information dated after September 8, 2016, confidential supervisory information of other agencies, information previously sealed by this Tribunal, and other types of information covered by the Protective Order.[13]

This limited description of the reason for shielding from public view the myriad redactions proposed by Respondents is not sufficient to support their Motions. Accordingly, Respondents' Motions to Seal are each DENIED.

Few if any of the proposed redactions appear to concern social security numbers, dates of birth, or current financial account information. The purpose of this set of redactions was to permit documents bearing personally identifiable information to be *presented to the public*, bereft only of the PII – such that documents with PII can be presented to the public while guarding against inappropriate and unnecessary disclosure of PII.

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[12] Designation Notice and Order Requiring Electronic Filing at 4-5.

[13] Unopposed Motion to Seal Unredacted Versions of Certain Filings of Respondent Russ Anderson in Response to Enforcement Counsel's Motion for Summary Disposition at 1; Motion to Seal Unredacted Versions of Certain Filings of Respondent Julian in Response to Enforcement Counsel's Motion for Summary Disposition at 1; and Motion to Seal Unredacted Versions of Certain Filings of Respondent McLinko in Response to Enforcement Counsel's Motion for Summary Disposition at 1-2.

Respondents' cursory description of the reasons supporting their proposed redactions do not provide this Tribunal, the OCC, or reviewing courts with information sufficient to allow a determination of whether the redactions are truly in the public interest.

Redactions Introduced by Enforcement Counsel

Redactions sought by Enforcement Counsel in this case are governed most directly by 12 U.S.C. § 1818(u) and 12 CFR § 19.33(b), which give the federal banking agencies—here, the OCC—the discretion in OFIA proceedings to file under seal, entirely or partially, any document that it would, in the agency's judgment, be contrary to the public interest to disclose. In conjunction with this, the Uniform Rules also mandate that administrative law judges "take all appropriate steps" to ensure that any parts of documents that an agency seeks to seal in these proceedings remain confidential.

Here, the agency is exercising its discretion to file under seal four categories of information:[14]

- Information over which Wells Fargo Bank ("the Bank") has asserted privilege
- Non-public and confidential supervisory information ("CSI") after September 8, 2016
- Information relating to C/CAMELS/ITCC ("CAMELS") ratings or Risk Assessment System ("RAS") conclusions, including supporting analysis and discussion
- Information designated by other agencies as CSI ("Other Agency CSI")

These four categories were the subject of protective orders issued by this Tribunal on February 23, 2020, March 16, 2020, and May 27, 2020, which directed the parties to publicly redact and file under seal all filings containing any information matching the above descriptions. Pursuant to these orders, Enforcement Counsel's Notice of Charges, the respondents' respective answers, the parties' various expert reports, and now the parties' summary disposition briefing and supporting exhibits have all been filed in both sealed and redacted form.

Unlike Enforcement Counsel, Respondents have no inherent statutory authority to redact certain filings in OFIA proceedings and no vested interest in protecting potentially sensitive bank or regulatory information. Respondents therefore represent that the only information that is redacted in their answers and expert reports is information that some *other* entity—whether the Bank, the OCC, or other agencies—has designated privileged or confidential.[15]

General Framework

In evaluating the parties' respective redactions through the lens of privilege and confidentiality, then, the following considerations arise:

[14] *See* January 21, 2021 Memorandum in Support of Enforcement Counsel's Redaction Report ("EC Memo") at 4-10; April 16, 2021 Memorandum in Support of Enforcement Counsel's Redaction Report ("Second EC Memo") at 3-5.

[15] *See* January 21, 2021 Respondents' Submission in Response to Order Regarding Redactions ("Resp. Memo") at 2.

1) Does the information in question fall within one of the four categories described above (claimed privilege by the Bank, post-September 2016 OCC CSI, Other Agency CSI, and CAMELS/RAS-related information)?

If so, the parties have been compelled to redact and seal that information by the terms of the protective order, and the question is whether it should also be sealed at the hearing and in the ALJ's orders and recommended decision.[16] Those categories are then evaluated as follows:

For information over which the Bank has asserted privilege:

2) What is the basis for the assertion of privilege (attorney-client, work product, etc.)?
3) How is that privilege analyzed under relevant federal or state law?
4) Are there sufficient facts to determine whether the information is in fact privileged?

Both parties have represented that they lack full understanding as to the reasons that the Bank is asserting privilege over specific documents, and indeed take no position as to whether those documents are truly privileged.[17] In many instances, it may not be possible to divine whether a particular privilege applies in a given circumstance without additional contextual information presumably known by the Bank but not available in the record or possessed by the parties. In these cases, this Tribunal will need to decide whether a determination of the merits of a given privilege claim on the record facts is feasible and, if not, whether the information should nevertheless be redacted on the strength of the non-party Bank's assertion of privilege.

In the absence of contravening information, Enforcement Counsel's stance "that disclosure of information over which the Bank *claims* attorney client and/or attorney work-product privilege would be contrary to the public interest"[18] will be credited and such information shall remain redacted or sealed pursuant to the OCC's statutory authority.

For information that is assertedly post-September 2016 OCC CSI or Other Agency CSI:

5) Is the information in question non-public?
6) Does this information fall within the relevant agency's definition of CSI?
7) For OCC CSI, is this information dated after September 8, 2016?

Through its rulemaking, the OCC has designated a broad swathe of non-public agency records and other bank and supervisory information in the agency's possession as *de facto* privileged, sensitive, and confidential, and the Comptroller has emphasized on multiple occasions the importance of maintaining the confidentiality of such non-public OCC

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[16] Pursuant to this Tribunal's Notice of Designation in this case, Enforcement Counsel has also made certain minimal redactions to Personally Identifiable Information ("PII") in its summary disposition filings. *See* Second EC Memo at 5; *see also, e.g.*, Enforcement Counsel's Redaction Report for Dispositive Motion Filings ("EC SD Redactions") at 4.

[17] *See* EC Memo at 4 n.8; Resp. Memo at 2.

[18] EC Memo at 6 (emphasis added).

information. Therefore, any information that meets the criteria of OCC CSI and is dated after September 8, 2016 should be considered validly redacted or sealed, and care should be taken not to disclose such information without agency approval. The same is true of information designated by other agencies (principally, the FRB, CFPB, and FDIC) as CSI and redacted by the OCC as a result.

For information that is related to CAMELS ratings or RAS conclusions:

8) What is the basis for the agency seeking to redact this information?

9) Does this information fall within any cognizable category of privilege?

Supervisory information involving CAMELS ratings or RAS conclusions, including internal agency analysis and discussion thereof, are a subset of non-public OCC CSI. Unlike other CSI, however, Enforcement Counsel in this case has deemed the disclosure of information in this category to be contrary to the public interest regardless of whether the information is dated before or after September 8, 2016. In addition to generally being protected from disclosure as non-public CSI, many documents related to CAMELS ratings and RAS conclusions might also be shielded by the bank examination privilege and the deliberative process privilege, although the OCC has not necessarily invoked these privileges with respect to specific documents in this case.

For information redacted by Enforcement Counsel (in general):

10) Is there a colorable basis for Enforcement Counsel's determination that disclosure of the information would be contrary to the public interest?

Finally, the OCC's statutory discretion to determine that disclosure of information would be contrary to the public interest does not appear to be contingent on any demonstration by the agency that the information is privileged, sensitive, or confidential under a particular standard. In evaluating the agency's exercise of its authority under 12 U.S.C. § 1818(u) to seal or redact documents in preparation for the evidentiary hearing to be held in this enforcement action, the Tribunal will weigh the asserted public interest in non-disclosure in each instance against the general benefits of disclosure and public proceedings. Some deference to the agency's position is due, in light of the discretion conferred upon the agency by statute and Rule 33(b)'s direction that ALJs assist the agency in maintaining the confidentiality of designated documents.

Agency Discretion to Redact Information

12 U.S.C. § 1818(u) provides, in relevant part, that:

> The appropriate Federal banking agency may file any document or part of a document under seal in any administrative enforcement hearing commenced by the agency if disclosure of the document would be contrary to the public interest. A written report shall be made part of any determination to withhold any part of a document from the transcript of [such] hearing.[19]

A companion provision in the OCC's Uniform Rules likewise provides:

[19] 12 U.S.C. § 1818(u)(5).

> Enforcement Counsel, in his or her discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. *The administrative law judge shall take all steps to preserve the confidentiality of such documents or parts thereof,* including closing portions of the hearing to the public.[20]

Both statute and rule are silent as to the contours of an ALJ's inquiry into whether the agency's assertion of public interest when filing documents under seal has a legitimate basis. What little case law exists referencing this mechanism in proceedings by other banking agencies places the decision of what is filed under seal largely in the hands of Enforcement Counsel, although the ALJ also plays a role.[21] None of these cases, it should be said, involved the ALJ overturning or even challenging an Enforcement Counsel determination that disclosure of certain materials would be contrary to the public interest; rather, they came exclusively in the context of a respondent seeking to have all documents in a proceeding sealed or the entire hearing made private.

Looking beyond the banking enforcement context, one superficially analogous situation might be the privilege extended to federal law enforcement agencies to protect investigatory materials from any disclosure that "would be 'contrary to the public interest in the effective functioning of law enforcement.'"[22] In determining whether to apply this law enforcement privilege, district courts are directed to consider several factors, most relevantly including "the extent to which disclosure will thwart government processes by discouraging citizens from giving the government information."[23] Once it has been established that disclosure of materials would be contrary to the public interest, the court must also then "weigh the public interest in non-disclosure against the private need for the information."[24]

There are key differences between this judicially created law enforcement privilege and the banking agencies' statutory authority to file documents under seal in administrative enforcement proceedings. Most notably, there is no interested party here seeking public disclosure of the documents in question; the parties are in agreement that (for example)

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[20] 12 C.F.R. § 19.33(b) (emphasis added).

[21] *See In the Matter of Timothy Fletcher*, Determination on Request for Interlocutory Appeal and Stay, Nos. 17-007-E-I & -CMP-I, 2018 WL 395574, at *5 (FRB Jan. 4, 2018) ("The Board's Rules set out a mechanism for Enforcement Counsel to file material under seal if *they determine* that disclosure of the document would be 'contrary to the public interest.'") (emphasis added); *In the Matter of Bruno Zbinden*, Determination on Request for Private Hearing, No. 93-023-E-I, 1994 WL 117073, at *3 (FRB Apr. 1, 1994) (noting that the "authority" to seal "has been delegated to Board Enforcement Counsel, *who has the discretion to determine* which documents, if any, should be filed under seal") (emphasis added); *In the Matter of Visalia Community Bank*, Decision on Request for Private Hearing, No. 93-141b, 1993 WL 853728, at *2 (FDIC Sep. 16, 1993) (noting that "the ALJ has the authority to provide for the protection of confidential information as he deems appropriate"); *In the Matter of Bay Bank & Trust Co.*, Decision on Request for Private Hearing, No. 92-313b, 1993 WL 853456, at *2 (FDIC May 13, 1993) ("The ALJ appears to have had proper authority to seal certain documents, presuming that the decision to place a particular document under seal complies with the statutory criteria.") (Referencing 12 U.S.C. § 1818(u)).

[22] *In re Anethem, Inc. Data Breach Litig.*, 236 F. Supp. 3d 150, 159 (D.D.C. 2017) (citation omitted).

[23] *In re Sealed Case*, 856 F.2d 268, 272 (D.C. Cir. 1988) (internal quotation marks and citation omitted).

[24] *Anethem*, 236 F. Supp. 3d at 159.

information over which the Bank is asserting privilege is appropriately being sealed. Further, the operative rule here expressly directs ALJs to "take all steps to preserve the confidentiality of" sealed documents; the law enforcement privilege has no comparable component.

Nevertheless, the balancing test described in the context of the law enforcement privilege offers a useful rubric. One might sketch the role of the ALJ in evaluating Enforcement Counsel's determinations under Rule 33(b) as follows:

First, Enforcement Counsel identifies the documents it wishes to seal in whole or in part on this basis, as it has done and continues to do pursuant to the terms of this Tribunal's orders.

Second, Enforcement Counsel provides the ALJ with a reasoned explanation of why disclosure of the information in question would be contrary to the public interest—that is, akin to the law enforcement privilege, a description of "the extent to which disclosure will thwart government processes by discouraging [financial institutions] from giving the government information."[25] (To again take the example of documents over which the Bank is asserting privilege in this case, Enforcement Counsel plausibly states that public disclosure of information that a supervised financial institution considers to be sensitive or privileged would impair "the open exchange of information between [that] institution and OCC examiners" throughout the supervisory process.[26])

Third, the ALJ then weighs that stated harm of disclosure against the well-established but general competing public interest in open and public government proceedings, in order to "assess whether the balance of interests weighs in favor of allowing the Government to withhold those documents."[27] Given Rule 33(b)'s direction that ALJs take steps to maintain the confidentiality of documents identified by Enforcement Counsel, it is reasonable to conclude that some measure of deference will be afforded to Enforcement Counsel's stated position when performing this balancing test.

In support of this deference is a separate provision of 12 U.S.C. § 1818(u), which expressly permits the OCC "in its discretion" to determine that all or part of an adjudicatory enforcement hearing be closed to the public if "holding an open hearing would be contrary to the public interest."[28] In total, the statute and accompanying rule paint a picture of the agency being given significant leeway akin to the APA's "abuse of discretion" standard in its determination of when and how presumptively public hearings and documents should be made private. When evaluating an agency's decision for abuse of discretion, courts assess "whether the decision was

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[25] *In re Sealed Case*, 856 F.2d at 272.

[26] EC Memo at 7; *see also id.* at 6 (referencing "the public interest in open communications between supervised financial institutions and their regulators" and citing *In re Plack*, Final Decision and Order Resolving Remaining Procedural Issues, No. AA-EC-2014-90, at 12 (OCC Apr. 26, 2016)).

[27] *Anethem*, 236 F. Supp. 3d at 159.

[28] 12 U.S.C. § 1818(u)(2). To my knowledge, the OCC has not yet asked that parts of the hearing be sealed, but that would be the natural consequence should the parties utilize exhibits that contain information deemed to be validly withheld from public eye. *See* 12 CFR § 19.33(b) (requiring ALJ to "clos[e] portions of the hearing to the public" as necessary to maintain confidentiality of documents identified by the agency).

based on a consideration of the relevant factors and whether there has been a clear error of judgment."[29] A similar approach is warranted here.

As noted, the OCC is exercising its discretion under 12 U.S.C. § 1818(u) *solely* as to documents that fall within the four substantive categories outlined above and described in the February 23, 2020, March 16, 2020, and May 27, 2020 orders.[30] We now examine each of those categories.

Evaluating Bank Privilege Claims

It is important to note that the parties themselves are not asserting privilege over the documents that have been redacted or sealed on the basis of Bank claims of attorney-client privilege or attorney work product. Rather, the OCC has taken the blanket position that it would be contrary to the public interest to disclose any documents that the Bank believes to be privileged, *whether or not those documents are actually privileged as a matter of law*.[31] In other words, an ALJ's determination that certain information does not meet the applicable privilege standards would not change the agency's desire to exercise its discretion to withhold that information, as long as the Bank was still maintaining its privilege claims. Similarly, Respondents make it clear that they "assert no interest in withholding any of the identified information and take no position on the underlying claims of privilege or confidentiality made."[32]

Crucially, this means that for any redactions for which the basis of the Bank's assertion of privilege is not clear from the face of the redacted material, neither Enforcement Counsel nor Respondents will likely be able to provide additional factual information to enable a firm determination of the merits of the privilege assertion.[33] Furthermore, for many of the redacted documents, it could be challenging to determine whether the information referenced therein is in fact privileged without access to the underlying documents, which the Bank might possess but the parties often will not. In the absence of the Bank appearing before this Tribunal and submitting to an examination of the basis for each of its privilege claims—something that neither the Tribunal nor the parties would likely find appealing—it may not be possible to conduct a

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[29] *Judulang v. Holder*, 565 U.S. 42, 53 (2011) (internal quotation marks and citation omitted).

[30] *See* EC Memo at 4; Second EC Memo at 3-5. Enforcement Counsel represents that information in the Notice of Charges is exclusively redacted due to Bank privilege claims, while redacted information in the expert reports falls within categories of Bank privilege, OCC CSI after September 8, 2016, and CAMELS/RAS-related information. *See* EC Memo at 4. Enforcement Counsel's redaction report in connection with its summary disposition brief and supporting exhibits also contains redactions for Other Agency CSI. *See* Second EC Memo at 5.

[31] *See* EC Memo at 6.

[32] Resp. Memo at 2.

[33] There are also some Bank redactions that Enforcement Counsel does not seek to justify at all. In its memorandum in support of its redaction report submitted in connection with the summary disposition briefing, Enforcement Counsel represents the following: "Enforcement Counsel's redaction report does not include redactions made by the Bank. For example, the publicly filed sworn statement transcripts contain redactions for Bank privilege made by the Bank. Those redactions are not included in Enforcement Counsel's redaction report." Second EC Memo at 3 n.1.

substantive inquiry into the merits of the Bank's assertions of privilege for every document, even if the underlying legal standard for determining whether something is privileged is clear.

There is an additional complication when assessing Bank privilege claims proffered by the OCC as the basis for its redactions. The OCC's asserted public interest in confidentiality of such documents for purposes of 12 U.S.C. § 1818(u) is not tied to whether certain information therein is *in fact* privileged, but to the harm to that would follow to the agency's supervisory ability if documents obtained during the supervisory process that the Bank believes to be shielded from public disclosure are then disclosed to the public. There is a real sense in which an examination of the underlying substance of the Bank's privilege claims is futile as long as the OCC's position is that it is the assertions of privilege by the Bank, rather than the merits of such assertions, that make disclosure contrary to the public interest.

For this reason, when preparing for the public evidentiary hearing in this case, OCC redactions on the basis of Bank privilege will be evaluated primarily not on the merits of the underlying privilege claims, *but as determinations of public interest* under 12 U.S.C. § 1818(u) subject to the "abuse of discretion" framework outlined in the section above. In contrast, for information that *only the respondents* are seeking to seal or redact because the Bank has claimed privilege, the merits of the privilege claims will be assessed to the extent feasible under applicable state or federal privilege law. If the respondents are seeking to redact certain information because it is their understanding that the Bank believes that information to be privileged, then it is reasonable to assume that it will be the OCC's view that disclosure of such information would be contrary to the public interest (even if the OCC's submissions do not utilize the information in question and thus take no express position on it being redacted).

In any event, and as discussed previously, the following approach will be followed when undertaking any substantive analysis of Bank privilege claims in these proceedings:

(1) What is the stated or understood basis for the assertion of privilege (attorney-client, work product, etc.)?

(2) What are the factors governing whether information is privileged in that way?

(3) Applying those factors, is it possible to determine whether the information in question is in fact privileged based on the record?

Privileges at Issue

In this instance, Enforcement Counsel has represented that the Bank's privilege claims are solely predicated on invocations of attorney-client privilege and the attorney work product doctrine.[34] Respondents, on the other hand, denote the Bank's assertions of privilege as simply

[34] *See* EC Memo at 4-5; Second EC Memo at 3; *but see* February 13, 2020 Order Regarding Enforcement Counsel's Motion for Order to File Notice of Charges Under Seal at 1 ("In their Motion, Enforcement Counsel represented that they had reason to believe that documents and other information relevant to this proceeding may be subject to claims of attorney-client privilege, bank privilege, or other privilege by Wells Fargo Bank."); January 23, 2020 Motion to File Under Seal at 1-2 (noting that Notice of Charges contains information that "may be subject to claims of attorney-client or other privilege by [the Bank]"). To the extent that Enforcement Counsel appears to represent

"Bank Privilege" and do not specify which privileges the Bank believes to be at issue.[35] Importantly, a search of federal and state law does not reveal any freestanding "bank privilege" that would permit banks to generally withhold from disclosure confidential or sensitive bank information.[36] In the absence of some more specific elaboration of other privileges being claimed by the Bank, then, "Bank privilege" claims will be limited to those for attorney-client privilege and attorney work product.

Federal vs. State Law

It is well established that the privileges at issue are governed by federal common law in this proceeding. The Supreme Court has held that "[q]uestions of privilege that arise in the course of the adjudication of federal rights are governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."[37] The applicable provision in the Federal Rules of Evidence, which are a helpful guide in areas not specifically addressed by the Uniform Rules,[38] states that federal common law governs privilege issues in civil cases except with regard to "a claim or defense for which state law supplies the rule of decision," or unless the Constitution, the Supreme Court, or Congress says otherwise.[39]

There is no indication that state law should govern here. Section 1818 enforcement actions unquestionably involve the adjudication of federal rights,[40] and nothing in the FDI Act or elsewhere appears to provide for the application of state law to determine privilege questions in OFIA proceedings. Courts also routinely apply only federal common law to questions of attorney-client privilege and the attorney work product doctrine when state law is not otherwise implicated, as it is not here.[41] The factors governing the merits of Bank privilege assertions in

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in its January 23, 2020 motion that privileges other than attorney-client and attorney work product are at issue in the Bank's privilege claims, Enforcement Counsel's January 21, 2021 memo in support of its redaction report provides clarification. *See* EC Memo at 5 ("Enforcement Counsel understand[s] the Bank's privilege claims to be based on common law attorney-client and/or attorney work product privileges as interpreted by the courts.").

[35] *See*, *e.g.*, January 21, 2021 Redaction Report for McLinko Amended Answer ("McLinko Redaction Report"); *see also* Resp. Memo at 2-3. *Cf. In re Lindsey*, 158 F.3d 1263, 1268 (D.C. Cir. 1998) ("[F]ederal courts do not recognize evidentiary privileges unless doing so promotes sufficiently important interests to outweigh the need for probative evidence.") (Internal quotation marks and citation omitted).

[36] As you may know, and as discussed further below, there is a "bank examination privilege" that confers qualified immunity from disclosure upon information prepared by bank examiners or relating to bank examinations or supervision, but this privilege appears to adhere only to materials sought to be shielded by bank examiners and the banking agencies and may not be invoked by banks themselves. *See In re Subpoena Served Upon Comptroller of the Currency*, 967 F.2d 630, 633-34 (D.C. Cir. 1992) (describing contours of bank examination privilege).

[37] *United States v. Zolin*, 491 U.S. 554, 562 (1989) (internal quotation marks and citation omitted).

[38] *See In re Lindsey*, 158 F.3d at 1269 (noting that courts turn to the Federal Rules of Evidence "as evidence of [federal] common law practices").

[39] Fed. R. Evid. 501.

[40] *See Cavallari v. OCC*, 57 F.3d 137, 145 (2d Cir. 1995); *Simpson v. OTS*, 29 F.3d 1418, 1423 (9th Cir. 1994).

[41] *See*, *e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 389-96 (1981) (applying federal common law to attorney-client privilege); *FTC v. Boehringer Ingelheim Pharm., Inc.*, 778 F.3d 142, 148-53 (D.C. Cir. 2015) ("*Boehringer I*") (applying federal common law to attorney work product doctrine).

this case are therefore drawn from federal common law as interpreted by the federal banking agencies and the federal courts.

Attorney-Client Privilege

Broadly, the attorney-client privilege protects "confidential communication[s] between attorney and client . . . made for the purpose of obtaining or providing legal advice."[42] In so doing, it "covers both (i) those communications in which an attorney gives legal advice; and (ii) those communications in which the client informs the attorney of facts that the attorney needs to understand the problem and provide legal advice."[43] The purpose of the privilege is "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice."[44]

In the corporate context such as with the Bank, "[t]he attorney-client privilege covers . . . communications between an attorney and . . . any corporate employee acting at the direction of corporate superiors in order to secure legal advice for the corporation."[45] The "attorney" for this purpose may be either in-house counsel or outside counsel.[46] Similarly, with respect to the federal government, "the 'client' may be the agency and the attorney may be an agency lawyer."[47] In either case, "the privilege protects only those disclosures necessary to obtain [or provide] informed legal advice which might not have been made absent the privilege."[48]

Not all substantive communications with attorneys are protected by the attorney-client privilege.[49] "[C]onsultation with one admitted to the bar but not in that other person's role as a lawyer is not protected."[50] An attorney's "advice on political, strategic, or policy issues," for example, "would not be shielded from disclosure."[51] "[O]rdinary business communications between non-attorneys with an attorney or attorneys as additional recipients" are likewise not privileged.[52] "Parties, including corporations, may not shield otherwise discoverable documents from disclosure by including an attorney on a distribution list."[53] Furthermore, if a

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[42] *FTC v. Boehringer Ingelheim Pharm., Inc.*, 892 F.3d 1264, 1267 (D.C. Cir. 2018) ("*Boehringer II*").

[43] *Id.*

[44] *Swidler & Berlin v. United States*, 524 U.S. 399, 403 (1998) (internal quotation marks and citation omitted).

[45] *EEOC v. George Wash. Univ.*, ___ F. Supp. 3d ____, 020 WL 6504573, at *8 (D.D.C. Nov. 5, 2020) (internal quotation marks and citation omitted).

[46] *Boehringer II*, 892 F.3d at 1267.

[47] *Tax Analysts v. IRS*, 117 F.3d 607, 618 (D.C. Cir. 1997).

[48] *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 862 (D.C. Cir. 1980) (quoting *Fisher v. United States*, 425 U.S. 391, 403 (1976)).

[49] *See EEOC v. BDO USA, LLP*, 876 F.3d 690, 696 (5th Cir. 2017) ("There is no presumption that a company's communications with counsel are privileged.").

[50] *Center for Public Integrity v. Dep't of Defense*, 486 F. Supp. 3d 317, 341 (D.D.C. 2020) (quoting *In re Lindsey*, 148 F.3d 1100, 1106 (D.C. Cir. 1998) (per curiam).

[51] *Id.* (quoting *In re Lindsey*, 148 F.3d at 1106).

[52] *United States ex. rel. Barko v. Halliburton Co.*, 74 F. Supp. 3d 183, 189 (D.D.C. 2014) (no protection where "attorneys were merely incidental recipients of communications made for ordinary business purposes").

[53] *Id.* at 188.

communication with an attorney has both a business purpose and a legal purpose, the court must "determine whether obtaining or providing legal advice was *one of* the significant purposes of the attorney-client communication."[54] If not, the communication is not privileged.

Conversely, there are certain narrow circumstances in which communications involving only non-attorneys can be subject to the attorney-client privilege. "[C]ommunications among non-attorneys can be entitled to protection if they concern matters in which the parties intend to seek legal advice or reflect legal advice provided by an attorney."[55] "Management should be able to discuss amongst themselves the legal advice given to them as agents of the corporation with an expectation of privilege."[56] In addition, "the attorney-client privilege may be extended to non-lawyers who are employed to assist the lawyer in the rendition of professional legal services."[57] For example, "[e]mails between non-attorneys employed in the in-house legal department and other [company] employees . . . are privileged so long as they contain confidential communications for the purpose of legal advice."[58] However, "[t]his extension of the privilege to non-lawyers . . . must be strictly confined within the narrowest possible limits consistent with the logic of its principle and should only occur when the communication was made in confidence for the purposes of obtaining legal advice from the lawyer."[59]

Indeed, "[a] fundamental prerequisite to the assertion of the privilege is confidentiality both at the time of the communication and maintained since."[60] "[T]he circumstances must indicate that the communicating persons reasonably believed that the communication would be confidential. In the corporate context, this requires that internal corporate communications be shared no more widely than necessary to implement the lawyer's advice."[61] Further, "in order for documents sent through e-mail to be protected by the attorney-client privilege, there must be a

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[54] *Boehringer II*, 892 F.3d at 1268 (internal quotation marks and citation omitted) (emphasis in original).

[55] *EEOC*, ___ F. Supp. 3d ____, 2020 WL 6504573, at *8; *see also, e.g.*, *Mischler v. Novagraaf Group BV*, 2019 WL 6135447, at *4 (D.D.C. Nov. 19, 2019) ("[C]ommunications among corporate employees who are not attorneys are entitled to protection if the purpose of those communications was to marshal facts for counsel to use in rendering legal advice."). On the other hand, courts have held that emails to a non-attorney seeking information regarding a broader legal problem are not privileged if there is no specific connection in the email "to that legal problem or to any prospective legal problem." *Jordan v. Dep't of Labor*, 308 F. Supp. 3d 24, 43-44 (D.D.C. 2018).

[56] *McCook Metals LLC v. Alcoa Inc.*, 192 F.R.D. 242, 254 (N.D. Ill. 2000).

[57] *Loftin v. Bande*, 258 F.R.D. 31, 34 (D.D.C. 2009) (internal quotation marks and citation omitted); *see also, e.g.*, *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754, 758 (D.C. Cir. 2014) ("[C]ommunications made by and to non-attorneys serving as agents of attorneys . . . are routinely protected by the attorney-client privilege."); *Barko*, 74 F. Supp. 3d at 189 (privilege attaches where non-attorneys are "acting as agents of attorneys for the purposes of providing legal advice or gathering information to allow the attorneys to provide legal advice").

[58] *Loftin*, 258 F.R.D. at 34; *see also Competitive Enterprise Inst. v. EPA*, 232 F. Supp. 3d 172, 186 (D.D.C. 2017) (privilege applies to emails between non-attorneys that "were exchanged at the request of attorneys and to provide information to attorneys for the purpose of obtaining legal advice").

[59] *Blumenthal v. Drudge*, 186 F.R.D. 236, 243 (D.D.C. 1999) (internal quotation marks and citation omitted).

[60] *Center for Public Integrity*, 486 F. Supp. 3d at 341 (internal quotation marks and citation omitted).

[61] *Barko*, 74 F. Supp. 3d at 190-91 (noting that "[t]ypically, this means that the attorney-client privilege only covers a lawyer's communications with officers and employees with the responsibility for acting on the lawyer's advice").

subjective expectation of confidentiality that is found to be objectively reasonable."[62] It is also well-settled that banks maintain an expectation of confidentiality when providing assertedly privileged materials to the OCC in the course of the supervisory or regulatory process."[63]

Subject to the above refining factors, communications protected by the attorney-client privilege are those "(1) between a client and his or her attorney (2) that are intended to be, and in fact were, kept confidential (3) for the purpose of obtaining or providing legal advice."[64] It should also be noted that "the attorney-client privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney."[65] And documents that merely "referenc[e] communications with attorneys without [substantively] disclosing the [confidential] contents of those communications" are not privileged.[66]

Finally, "[d]etermining whether documents are privileged demands a highly fact-specific analysis."[67] Only when a tribunal "has been exposed to the contested documents and the specific facts which support a finding of privilege under the attorney-client relationship for each document can it make a principled determination as to whether the attorney-client privilege in fact applies."[68]

Attorney Work Product Doctrine

The attorney work product doctrine "is broader than the attorney-client privilege in that it is not restricted solely to confidential communications between an attorney and client."[69] Rather, "[t]he work product doctrine shields materials prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative."[70] The scope of the doctrine "is interpreted broadly to encompass not only trials and other judicial proceedings, but also adversarial administrative matters, settlement negotiations, and the *avoidance* of anticipated

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[62] *Doe 1 v. George Wash. Univ.*, 480 F. Supp. 3d 224, 226 (D.D.C. 2020).

[63] *See* 12 U.S.C. § 1828(x) ("The submission by any person of any information to . . . any Federal banking agency . . . for any purpose in the course of any supervisory or regulatory process . . . shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information.").

[64] *United States v. Mejia*, 655 F.3d 126, 132 (2d Cir. 2011); *accord, e.g.*, *Center for Public Integrity*, 486 F. Supp. 3d at 340-41; *BDO USA*, 876 F.3d at 695 ("For a communication to be protected under the privilege, the proponent must prove (1) that he made a confidential communication; (2) to a lawyer or his subordinate; (3) for the primary purpose of securing either a legal opinion or legal services, or assistance in some legal proceeding.") (Internal quotation marks, citation, and emphasis omitted).

[65] *Boehringer II*, 892 F.3d at 1268 (quoting *Upjohn*, 449 U.S. at 395); *see also Barko*, 74 F. Supp. 3d at 189 ("[A] consultation with a lawyer does not make underlying facts privileged, even though the substance of the discussion about those facts would be.").

[66] *Barko*, 74 F. Supp. 3d at 189.

[67] *In re Grand Jury Subpoena (Mr. S.)*, 662 F.3d 65, 71 (1st Cir. 2011); *accord, e.g.*, *BDO USA*, 876 F.3d at 695; *In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000).

[68] *In re Grand Jury Proceedings*, 220 F.3d at 571.

[69] *Boehringer I*, 778 F.3d at 149.

[70] *Judicial Watch, Inc. v. Dep't of Justice*, 432 F.3d 366, 369 (D.C. Cir. 2005); *see also Shapiro v. Dep't of Justice*, 969 F. Supp. 2d 18, 28 (D.D.C. 2013) ("The work-product doctrine can apply to preparatory work performed not only by attorneys, but also, in some circumstances by nonlawyers.").

litigation."[71] However, "documents that relate only generally to a broad agency program that is investigatory or adversarial in nature are not properly considered to [be protected by this doctrine]."[72]

When assessing the applicability of the work product doctrine, courts inquire "whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation."[73] In other words, "[w]here a document would have been created in substantially similar form regardless of the litigation, work product protection is not available."[74] And documents that may be used or useful in litigation but were "prepared for some purpose other than litigation, [such as] material generated in the ordinary course of business[], likewise do not fall within the doctrine's ambit."[75] "With respect to a document that was generated for more than one purpose, the work product doctrine will only apply if litigation played a substantial role in its creation."[76]

It should be said that "[a]lthough the attorney work product doctrine can protect an attorney's materials in a number of different circumstances, not 'all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases.'"[77] Instead, "courts generally draw a distinction between pure 'opinion' work product, which reflects an attorney's mental processes and is virtually never discoverable, and 'fact' work product, which reflects only relevant, non-privileged facts and is discoverable upon a showing of substantial need and unavailability by other means."[78] To wit, "notes and memoranda reflecting the opinions, judgments, and thought processes of counsel" constitute opinion work product, while documents "whose content has not been sharply focused or weeded by counsel," including "substantially verbatim witness statements contained in interview memoranda," fall within the category of fact work product.[79] However, "[e]ven the factual portions of a document may be withheld, so long as the document as a whole was created in anticipation of litigation."[80]

As with attorney-client privilege, the determination of what "constitutes fact or opinion work product is inherently and necessarily fact-specific."[81] In addition, any "work product

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[71] *General Elec. Co. v. Johnson*, Civ. No. 00-2855, 2006 WL 2616187, at *11 (D.D.C. Sep. 12, 2006).

[72] *Id.*

[73] *Boehringer I*, 773 F.3d at 149 (internal quotation marks and citation omitted); *see also In re Sealed Case*, 146 F.3d 881, 884 (D.C. Cir. 1998) ("For a document to meet this standard, the lawyer must at least have had a subjective belief that litigation was a real possibility, and that belief must have been objectively reasonable.").

[74] *Boehringer I*, 773 F.3d at 149 (internal quotation marks and citation omitted).

[75] *General Elec. Co.*, 2006 WL 2616187, at *11; *see In re Sealed Case*, 146 F.3d at 887 (work product doctrine "has no applicability to documents prepared by lawyers in the ordinary course of business or for other nonlitigation purposes") (internal quotation marks and citation omitted).

[76] *General Elec. Co.*, 2006 WL 2616187, at *11.

[77] *United States v. Clemens*, 793 F. Supp. 2d 236, 244 (D.D.C. 2011) (quoting *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)).

[78] *United States ex rel. Landis v. Tailwind Sports Corp.*, 303 F.R.D. 429, 430-31 (D.D.C. 2014).

[79] *Id.* at 431 (internal quotation marks and citations omitted); *see also Clemens*, 793 F. Supp. 2d at 251-52.

[80] *General Elec. Co.*, 2006 WL 2616187, at *11.

[81] *Clemens*, 793 F. Supp. 2d at 253.

assertion must be supported by some articulable, specific fact or circumstance that illustrates the reasonableness of a belief that litigation was foreseeable."[82] "Sufficient specificity is typically inferred from, for example, the document's identification or a particular violation, alleged violator, investigation, or legal challenge, defense, strategy, or argument."[83] Materials relating to general interpretations of law or broad guidance regarding regulatory compliance likely do not qualify as protected work product.[84] And, of course, "[i]t is the proponent of the work product protection that bears the burden of demonstrating that the prospect of litigation was an independent, legitimate, and genuine purpose for [a] document's creation."[85]

OCC CSI and Other Agency CSI

In addition to redacting and sealing documents on the basis of Bank privilege, the parties have protected from public disclosure certain information designated by other federal agencies (principally the FRB, CFPB, and FDIC) as confidential and sensitive, as well as all OCC CSI dated after September 8, 2016.[86] Information that meets these criteria, as informed by the definition of CSI put forth by each respective agency, will be considered validly redacted or sealed.

The Comptroller has stated that "maintenance of the proper confidentiality of OCC supervisory information is essential to the effectiveness of the OCC's supervisory mission."[87] In furtherance of this goal, the OCC has promulgated regulations and issued guidance regarding confidential and sensitive non-public information, albeit not specifically in the context of administrative enforcement proceedings.[88] To begin with, the OCC provides that it is agency policy that any "non-public OCC information" be considered confidential and privileged.[89] It then defines non-public information to include, *inter alia*:

(i) A record created or obtained[] by the OCC in connection with the OCC's performance of its responsibilities, such as a record concerning supervision, licensing, regulation, and examination of a national bank;

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[82] *General Elec. Co.*, 2006 WL 2616187, at *11.

[83] *Id.*; *see, e.g.*, *In re Sealed Case*, 146 F.3d at 885 (work product protection where lawyer "rendered legal advice in order to protect the client from future litigation about a particular transaction").

[84] *See id.* at *12; *see also, e.g.*, *Coastal States*, 617 F.2d at 864-66; *Evans v. Atwood*, 177 F.R.D. 1, 7 (D.D.C. 1997).

[85] *United States v. ISS Marine Svcs.*, 905 F. Supp. 2d 121, 134 (D.D.C. 2012).

[86] September 8, 2016 "is the date the OCC issued to the Bank a public consent order related to its unsafe or unsound sales practices and unsafe or unsound sales practices risk management." EC Memo at 7 n.9. Enforcement Counsel represents that the OCC is currently revisiting its blanket position of redacting all CSI after this date and will propose an amendment to the operative Protective Order in this vein by June 11, 2021. Second EC Memo at 4.

[87] *In the Matter of Patrick Adams*, Final Decision, 2014 WL 8735096, at *49 (OCC Sep. 30, 2014); *see also In re Plack*, Final Decision and Order Resolving Remaining Procedural Issues, No. AA-EC-2014-90, at 12 (OCC Apr. 26, 2016) (describing potential harm to the OCC's mission "if sensitive or privileged information were not appropriately protected throughout the supervisory process").

[88] With respect to non-public information in administrative proceedings, the OCC invokes its general power to seal all or part of documents pursuant to 12 U.S.C. § 1818(u). *See* EC Memo at 7.

[89] 12 U.S.C. § 4.36(b).

(ii) A record compiled by the OCC . . . in connection with [its] enforcement responsibilities;

(iii) A report of examination, supervisory correspondence, an investigatory file compiled by the OCC . . . in connection with an investigation, and any internal agency memorandum, whether the information is in the possession of the OCC or some other individual or entity;

(iv) [omitted for relevance]

(v) [omitted for relevance]

(vi) Confidential information relating to operating . . . national banks.[90]

In guidance to supervised financial institutions, the OCC has elaborated as to the categories of confidential, non-public information that may not be disclosed by those institutions without the prior permission of the agency, including "any portion of a report of examination, supervisory correspondence, and any representations concerning the report or [] correspondence, or their findings, including the assigned CAMELS rating."[91] In addition, all "[b]ank responses to supervisory correspondence" are considered non-public CSI by the OCC.[92] This would presumably include the responses of bank officers (including the respondents in this matter) to the OCC's 15-day letters, which are supervisory communications that (1) inform an institution-affiliated party ("IAP") that the agency is considering an enforcement action with respect to specific, described misconduct and (2) give the IAP an opportunity to submit information relevant to the agency's consideration of that action.[93]

Furthermore, with respect to information that has been designated confidential and sensitive by other federal agencies, the OCC represents that it is precluded from disclosing that information without the agencies' prior permission.[94] This information includes, for example, "[r]ecords that are contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of the FDIC or any agency responsible for the regulation or supervision of financial institutions."[95] As a result, and as mandated by this Tribunal's May 27, 2020 Supplemental Protective Order, the parties' filings contain redactions on the basis that the information in question falls within the category of Other Agency CSI.[96]

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[90] *Id.* § 4.32(b)(1).

[91] OCC Bulletin 2019-15, *Supervisory Ratings and Other Nonpublic OCC Information Description: Statement on Confidentiality*, 2019 WL 1436879 (OCC Mar. 25, 2019).

[92] *Id.*

[93] *See* OCC Policies and Procedures Manual, PPM 5000-7, *Civil Money Penalties*, at 7-8 (Nov. 13, 2018), *available at* https://www.ots.treas.gov/news-issuances/bulletins/2018/ppm-5000-7.pdf; *see also*, *e.g.*, January 21, 2021 Enforcement Counsel Redaction Report ("EC Pre-SD Redactions") at 11 (redacting information from Respondent Strother's 15-Day Letter Response on the grounds that it "is confidential OCC supervisory information").

[94] Second EC Memo at 5; *see* 12 C.F.R. §§ 261.23 (FRB), 309.6 (FDIC), 1070.47 (CFPB).

[95] 12 C.F.R. § 309.5(g)(8) (FDIC).

[96] *See* May 24, 2020 Unopposed Motion for Supplemental Protective Order at 2-3 (providing details regarding Other Agency CSI); May 27, 2020 Supplemental Protective Order at 3 (noting that "strict confidentiality protections must

Much of the information that is protected from disclosure as non-public agency CSI also may fall under the aegis of bank examination privilege or the deliberative process privilege, as discussed in the following section.

Finally, one note is in order regarding redactions made by the parties to sworn statement transcripts of witness testimony to the OCC. The OCC has determined that such transcripts are the only form of OCC CSI dated after September 8, 2016 *not* to merit a blanket determination that disclosure would be contrary to the public interest, at least so far.[97] Specifically, the March 23, 2020 Protective Order provided that notwithstanding the general designation of OCC CSI dated after September 8, 2016 as shielded from disclosure, "a filing party need not redact or file under seal transcripts of testimony taken by the OCC in connection with its investigation of the Bank's sales practices, unless the party is otherwise required to redact the content of such testimony pursuant to this Protective Order."[98] At the same time, both Enforcement Counsel and the respondents have made significant redactions to exhibits containing or referencing testimony transcripts, on the basis that the Bank has claimed privilege over the testimony in question, even when that testimony does not reference communications with a lawyer.[99] To the extent feasible, then, it may be necessary for the parties and this Tribunal to explore in greater depth whether testimony transcripts in particular are being validly redacted or filed under seal, given the already-discussed lack of a generalized bank privilege to withhold from public disclosure information that may be sensitive or embarrassing but does not fairly constitute privileged attorney-client communications or attorney work product.

CAMELS and RAS Materials

The OCC has determined that all materials relating to CAMELS ratings and RAS conclusions, including any "supporting discussion and analysis," should be shielded from disclosure regardless of whether those materials are dated before or after September 8, 2016.[100] Such information is used by the OCC and other federal bank regulators "to evaluate and document a bank's financial condition and resilience," and as such is particularly highly sensitive and confidential.[101] Even the banks themselves are forbidden from making any representations to

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be afforded to the Other Agency CSI, given that the material is subject to bank examination privilege and concerns sensitive financial and regulatory information").

[97] *See* EC Memo at 7.

[98] March 16, 2020 Protective Order at 6.

[99] *See*, *e.g.*, EC SD Redactions at 4 (identifying the basis for redactions made to ¶ 262 of the Statement of Material Facts in support of Enforcement Counsel's motion for summary disposition as to Respondent Claudia Russ Anderson).

[100] EC Memo at 9.

[101] *Id.* For additional information regarding CAMELS ratings and RAS conclusions, *see* Comptroller's Handbook, Bank Supervision Process, at 23-29 (Sep. 2019), *available at* https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/bank-supervision-process/pub-ch-bank-supervision-process.pdf.

anyone regarding their CAMELS ratings or similar nonpublic supervisory information without prior written permission of the appropriate regulating agency.[102]

In addition to generally being protected from disclosure as non-public CSI, many documents related to CAMELS ratings and RAS conclusions might also be shielded by the *bank examination privilege* and the *deliberative process privilege*, if and when the OCC should choose to invoke those privileges in this case.

The bank examination privilege shields from discovery all agency opinions, conclusions, and recommendations found in bank examination reports and related materials, as well as substantive supervisory communications between the banking agencies and regulated financial institutions.[103] The privilege is deemed necessary in order to maintain the ease and candor of the supervisory relationship that is integral to effective supervision of bank safety and soundness. "Bank management must be open and forthcoming in response to the inquiries of bank examiners, and the examiners must in turn be frank in expressing their concerns about the bank. These conditions simply could not be met as well if communications between the bank and its regulators were not privileged."[104]

By the same token, however, the bank examination privilege is not absolute. First, the privilege "does not protect purely factual material."[105] Second, it can "be overridden where necessary to promote the paramount interest of the Government in having justice done between litigants . . . or in other circumstances when the public's interest in effective government would be furthered by disclosure."[106]

Both broader and narrower than the bank examination privilege, "[t]he deliberative process privilege protects documents reflecting advisory opinions, recommendations, and deliberations comprising an agency's decisionmaking process"[107]—that is, "government documents that are both (i) predecisional and (ii) deliberative in nature."[108] The privilege thus "reflects the commonsense notion that agencies craft better rules when their employees can spell out in writing the pitfalls as well as strengths of policy options, coupled with the understanding

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[102] *See* Interagency Advisory on Confidentiality of CAMELS Ratings and Other Non-Public Supervisory Information, FIL-13-2005, 2015 WL 6320681 (Feb. 28, 2005).

[103] *See In re Subpoena*, 967 F.2d at 633-34.

[104] *Id.* at 634.

[105] *Id.*

[106] *Id.* (internal quotation marks and citations omitted). In making this inquiry and balancing competing interests, courts consider the following factors: "(i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the seriousness of the litigation and the issues involved; (iv) the role of the government in the litigation; and (v) the possibility of future timidity by government employees" if the material is disclosed. *In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 145 F.3d 1422, 1424 (D.C. Cir. 1998) (internal quotation marks and citation omitted). Of course, as previously noted, in this instance the parties are united in the wisdom of keeping confidential supervisory information out of public view, and any balancing of factors should take into account the lack of some particular entity seeking the information's disclosure.

[107] *United Western Bank v. OTS*, 853 F. Supp. 2d 12, 15 (D.D.C. 2012) (internal quotation marks and citations omitted).

[108] *Hall & Assocs. v. EPA*, 956 F.3d 621, 624 (D.C. Cir. 2020) (internal quotation marks and citation omitted).

that employees would be chilled from such rigorous deliberation if they feared it might become public."[109] Bank documents, by definition, cannot be shielded by the deliberative process privilege, because they are not reflective of an agency's internal decisionmaking.

To qualify under the deliberative process privilege, "a requested document must be a direct part of the deliberative process in that it makes recommendations or expresses opinions on legal or policy matters."[110] As with bank examination, "[m]emoranda consisting only of compiled factual material or purely factual material contained in deliberative memoranda and severable from its context would generally be available for discovery by private parties in litigation with the Government."[111] The deliberative process privilege has been applied in the federal banking regulatory and supervisory context, with a similar balancing test considered by the court to determine whether good cause exists for disclosure of deliberative documents.[112]

Procedural Order

Those submissions filed by Respondents bearing the indication that the submission has been filed under seal are ordered stricken and are to be refiled by May 21, 2021.[113] Documents containing material the submitter seeks to have redacted from public view shall be described as Unredacted; versions with redactions shall be identified as Redacted.

Each unredacted document containing proposed redacted material shall bear the heading "Page Contains Content Sought to be Redacted" on the appropriate page or pages.

Each redaction shall be supported by a Redaction Report filed at the same time. Through this Report, the Respondents have the opportunity and the responsibility to identify each redaction appearing in their submissions in opposition to Enforcement Counsel's Motions for Summary Disposition. The Redaction Report will be examined based on the foregoing analysis regarding the use of privileged documents and redactions by the parties.

For each redaction, the Report shall present the text of the redaction, and provide answers to the following questions:

1. The legal basis for withholding from the public the redacted information, with citation to supporting authority. A redaction proposal lacking a sufficient statement of supporting authority will be subject to summary denial.

2. Whether the redaction is based on state law or federal law (or both); and

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[109] *Id.* (internal quotation marks and citation omitted); *see also NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 151 (1975) ("[T]he ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions.").

[110] *United Western Bank*, 853 F. Supp. 2d at 15 (internal quotation marks and citation omitted).

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

[112] *See id.* at 17-18 (weighing competing interests in disclosure of FDIC board materials).

[113] In a prior Motion, Respondents proposed May 21, 2021 as the date by which they would be in a position to file a Redaction Report. See Motion for Order Bifurcating Response Deadline and for Order Shortening Time for Response Thereto, dated April 8, 2021, at 1.

3. Whether the party anticipates introducing the redacted information during the evidentiary hearing requested by Respondents.

The Report shall be presented in the form of an Excel spreadsheet or PDF copy of a spreadsheet identifying the location of the redaction, the full text of the redaction, and answers to the questions shown above. Each Redaction Report will be maintained by this Tribunal under seal, without the need for a motion seeking that result.

A motion seeking the maintenance of any submission shall be accompanied by an unredacted version and a version showing the redactions identified in the Redaction Report.

A Motion for Maintaining Submissions under Seal and its accompanying Redaction Report will be timely if filed by May 21, 2021. Any party may file an objection to the Redaction Report of any other party. Such objection shall be timely if filed within ten days from the date of receipt of the Redaction Report being objected to. Responses to objections shall be timely if filed within seven days of receipt of the objection.

SO ORDERED.

May 10, 2021

Christopher B. McNeil
Administrative Law Judge
Office of Financial Institution Adjudication