REPORT OF INVESTIGATION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION
OFFICE OF INSPECTOR GENERAL

Case No. OIG-553

Improper Actions Relating to the Leasing of Office Space

May 16, 2011

REDACTION KEY

AC = Attorney-Client Privilege
Protected by FOIA Exemption (b)(5)

DP = Deliberative Process Privilege
Protected by FOIA Exemption (b)(5)

PII = Personal Identifying Information
Protected by FOIA Exemptions (b)(6) & (b)(7)(C)

Table of Contents

REPORT OF INVESTIGATION

UNITED STATES SECURITIES AND EXCHANGE COMMISSION OFFICE OF INSPECTOR GENERAL

Improper Actions Relating to the Leasing of Office Space

Case No. OIG-553

INTRODUCTION

On July 28, 2010, the Securities and Exchange Commission ("SEC" or "Commission") Office of Administrative Services leased approximately 900,000 square feet of space for a ten-year period at a newly-renovated office building at 400 Seventh Street, SW, in Washington, DC, known as Constitution Center. The lease also included a right of first refusal for the remaining 500,000 square feet at Constitution Center. The SEC estimated the costs associated with leasing and occupying Constitution Center at $556,811,589.

In early October 2010, the SEC informed David Nassif Associates ("DNA"), the owner of Constitution Center, that it did not need approximately 600,000 of the 900,000 square feet it had leased, nor the 500,000 square feet that had been subject to the right of first refusal. In January 2011, DNA signed leases with two other agencies for approximately 558,000 square feet of the space that the SEC had leased. In March 2011, the SEC informed DNA that it was trying to sub-lease the remaining 342,000 square feet covered by its lease. To date, the SEC has not been successful in sub-leasing the remaining space, although efforts are continuing. The SEC and DNA are currently in a dispute regarding the SEC's obligation to compensate DNA for damages allegedly caused by the SEC's actions. DNA has asserted damages of $93,979,493. The SEC denies that any damages are owed.

In October and November 2010, the SEC Office of Inspector General ("OIG") received several written complaints regarding the SEC's actions related to Constitution Center. These complaints alleged that the decision to lease Constitution Center had been ill-conceived, was the result of poor management practices, and was made without Congressional funding for the significant projected growth necessary to support the decision. On November 16, 2010, the OIG opened this investigation into those allegations.

EXECUTIVE SUMMARY

The OIG investigation found that the circumstances surrounding the SEC's entering into a lease contract with David Nassif Associates ("DNA") for 900,000 square feet of space at the Constitution Center facility in July 2010 represents another in a long history of missteps and misguided leasing decisions made by the SEC since it was granted independent leasing authority by Congress in 1990. We found that notwithstanding this significant authority, the SEC had not even established a Leasing Branch until April 2009 and did not put into place leasing policies and procedures until August 2010.

The OIG investigation further found that based upon estimates of increased funding primarily to meet the requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), between June and July of 2010, the SEC Office of Administrative Services ("OAS") conducted a deeply flawed and unsound analysis to justify the need for the SEC to lease 900,000 square feet of space at the Constitution Center facility. We found that OAS grossly overestimated the amount of space needed at SEC Headquarters for the SEC's projected expansion by more than 300 percent and used these groundless and unsupportable figures to justify the SEC committing to an expenditure of $556,811,589 over 10 years.

The OIG investigation also found that OAS prepared a faulty Justification and Approval to support entering into the lease contract for the Constitution Center facility without competition. This Justification and Approval was prepared after the SEC had already signed the contract to lease the Constitution Center facility. Further, OAS backdated the Justification and Approval, thereby creating the false impression that it had been prepared only a few days after they entered into the lease contract. In actuality, the Justification and Approval was not finalized until a month later.

A brief summary of our findings is set forth as follows. In 1990, Congress provided the SEC with independent leasing authority, which exempted the SEC from General Services Administration ("GSA") regulations and directives. 15 U.S.C. § 78d(b)(3). The House Conference Report for this legislation expressed its clear intention that "the authority granted the Commission to lease its own office space directly will be exercised vigorously by the Commission to achieve actual cost savings and to increase the Commission's productivity and efficiency." H.R. Conf. Rep. 101-924.

Since being granted independent leasing authority, there have been several expensive missteps related to the SEC's leasing actions and management of its space. In May 2005, the SEC disclosed to a House Subcommittee that it had identified unbudgeted costs of approximately $48 million attributable to misestimates and omissions of costs associated with the construction of its headquarters facilities near Union Station, known as Station Place One and Two. In 2007, merely a year after moving into its new headquarters, the SEC embarked on a major "restacking" project in which various SEC employees were shuffled to different office spaces at a cost of over $3 million. An OIG

audit of the project found that there was no record of a cost-benefit analysis having been conducted before implementing this restacking project. An OIG survey found that an overwhelming majority of Commission staff affected had been satisfied with the location of their workspace before the restacking project was initiated, and did not believe the restacking project benefits were worth the cost and time of construction, packing, moving, and unpacking.

The OIG investigation further found that as a result of a belief that the SEC would receive significant increases to its appropriation in Fiscal Year ("FY") 2011, FY 2012, and FY 2013, OAS made grandiose plans to lease an upscale facility at Constitution Center. On May 14, 2010, the SEC submitted an authorization request to the Chairman of the United States Senate Committee on Banking, Housing, and Urban Affairs, requesting $1.507 billion for FY 2012 in order to fund an increase of 800 new staff positions. On May 20, 2010, the United States Senate passed a version of the financial regulatory reform bill that eventually became Dodd-Frank (the U.S. House of Representatives had passed a version of the legislation on December 11, 2009). The SEC estimated that it would need to add another 800 positions in FY 2011 and FY 2012 to implement Dodd-Frank. After the reconciliation process between the two versions of the financial regulatory reform bills, Dodd-Frank became law on July 21, 2010. Dodd-Frank authorized an increase in the agency's budget from the $1.11 billion appropriated in FY 2010 to $1.3 billion in FY 2011, $1.5 billion in FY 2012, and $2.25 billion by FY 2015.

Authorization of funding for an executive agency like the SEC does not guarantee that the agency will be appropriated the funds. An authorization request is the first step in the SEC's lengthy budget process. An authorization request is submitted to Congress in May of the fiscal year two years prior to the fiscal year for which the authorization is requested (*e.g.*, the FY 2012 authorization request takes place in May 2010). The following September, several months after the authorization request is made, the SEC submits a proposed budget request to OMB. In November, the next step of the budget request process takes place: OMB replies to the SEC with a "pass-back," and the SEC and OMB then usually negotiate the amount of the budget request. Several months later, the President formally submits a budget proposal to Congress. Once the President makes the budget request to Congress, Congress then begins the decision-making process as to how much money to appropriate the SEC and other agencies. SEC employees interviewed in connection with this investigation acknowledged that an authorization may indicate an intention for Congress to provide funding, but circumstances frequently change and, therefore, federal agencies understand that until the money is appropriated, they cannot count on that money coming to them.

Notwithstanding the uncertainty of actually being appropriated the amount requested through this process, in May 2010, OAS began planning for an expansion at SEC Headquarters based on the agency's FY 2012 budget request. Initially, the SEC's Associate Executive Director of OAS, Sharon Sheehan, and the former Chief of the

Leasing Branch, OAS Supv. 5 [1] decided that the agency needed to lease approximately 300,000 square feet of space to accommodate the SEC's needs through FY 2012. In May 2010, OAS Supv. 5 plan was to solicit offers from three properties within walking distance of Station Place to meet its space needs. However, on June 2, 2010, OAS Supv. 5 received an e-mail from the real estate broker for a facility at Constitution Center, on 7th and D Street, SW, approximately two miles from the SEC's Station Place facility near Union Station, regarding its availability and some of its features.

The 1.4 million square foot Constitution Center had just been renovated in "one of the largest office redevelopment projects in Washington, DC." One of the more attractive features of the Constitution Center facility was its 5,000 square foot lobby with spacious accommodations for a guard desk(s), security screening room, shuttle elevator lobby, and display space, and which included Jerusalem limestone floors and marble walls, wood and metal paneling, decorative light and a floor-to-ceiling glass wall facing the landscaped courtyard. The facility promised abundant daylighting, panoramic views of the city and surrounding region and an open plaza area of the existing building that had been transformed into a one acre private garden.

Almost immediately after being contacted by the broker for Constitution Center, OAS decided to expand the delineated locality of consideration in order to add Constitution Center to the other three buildings that would be included in the solicitation for offers for approximately 300,000 square feet.

On June 17, 2010, OAS and the Executive Director briefed Chairman Mary Schapiro on its immediate expansion plans at SEC Headquarters. At that briefing, OAS Supv. 5 told the Chairman that the SEC needed to immediately lease 280,000 to 315,000 square feet in Washington, DC and identified on a map specific locations for that expansion, including Constitution Center. Both Chairman Schapiro and her former Deputy Chief of Staff, Kayla Gillan, recalled the Chairman expressing a clear preference for the locations that were within walking distance of Station Place as opposed to Constitution Center. Chairman Schapiro also questioned whether the SEC needed 300,000 additional square feet in light of the fact that she believed the SEC should concentrate its growth in the regional offices.

However, the OIG investigation found that notwithstanding Chairman Schapiro's expressions in mid June of her preference for a facility closer to Station Place and her questioning of why the SEC needed as much as 300,000 square feet of space, by mid July, the Executive Director came back to the Chairman with an urgent recommendation that the SEC immediately lease 900,000 square feet of space with the only available option being the Constitution Center facility. The OIG investigation found that the analysis that OAS performed to justify the need for three times its original estimate of necessary square footage, and its determination that the Constitution Center facility was the only available option, was deeply flawed and based on unfounded and unsupportable

[1] During the course of the OIG's investigation, OAS Supv. 5 retired from the SEC.

projections. We found that OAS grossly overestimated the amount of space needed at SEC Headquarters for the SEC's projected expansion.

The OIG investigation found that OAS assumed all of the new positions in the SEC's Office of Financial Management's ("OFM") projections for FY 2011 and FY 2012 would be allocated to SEC Headquarters and none of those new positions would be allocated to the SEC's regional offices. This assumption was contrary to the Chairman's position communicated to OAS at the June 17, 2010 meeting that as much as possible of the SEC's future growth should occur in the regional offices, not SEC Headquarters. We found that although there were discussions about the need for a calculation of the number of positions being allocated to the regions, none was ever conducted. Sheehan acknowledged that assuming that all of the new positions would be in SEC Headquarters would "inflate the number."

We also found that OAS conducted its analysis of the SEC's space needs by factoring in a standard of 400 square feet per person when calculating how much space would be needed for the additional positions it believed it was gaining as a result of Dodd-Frank and associated increases in the SEC's budget. A Realty Specialist in OAS explained to the OIG that she and OAS Supv. 5 developed the standard by dividing the square footage of existing office space by the number of people the SEC had authority to hire for the offices in that space at Headquarters and several of the SEC's regional offices. The Realty Specialist described the standard as a "WAG" (wild-ass guess) and a "back of the envelope" calculation, and she stated in her OIG testimony that "we didn't do this scientifically." OAS's 400 square feet per-person standard was an "all-inclusive number" that included common spaces and amenities. It included an additional 10 percent for contractors, 10 percent for interns and temporary staff, and five percent for future growth. Notwithstanding this "all-inclusive" number, we found that when OAS later did its calculations to justify the Constitution Center lease, it added even more unnecessary space by double-counting for contractors, interns and temporary staff as well as future growth into the projections of space needed. We also found that each one of these estimates was wildly inflated and unsupported by the data OAS was using.

The OIG investigation found that the OAS inflated its estimate of new positions that would need space by including an estimate of the number of contractors that would be hired in addition to the number of SEC employees. That estimate was prepared by OAS Supv. 4, OAS Assistant Director for Real Property Operations. In early-June 2010, Sheehan asked the OAS OAS Supv. 2 Space Management & Mail Operations to obtain information about the number of contractors in the agency. On June 12, 2010, the OAS Supv. 2 reported back, "Right now, based on the Contractor numbers I have at [Station Place], I can justify us using a 10%, Contractor to Position, factor." The OAS Supv. 2 later learned that OAS needed the numbers to be larger. He testified regarding his understanding of why OAS Supv. 5 needed the number to be larger, "what I understand she was trying to do was to make sure that whatever size lease she entered into was enough to meet our needs. And I think that in this case, if we were going to take the whole building, the numbers needed to be larger." Ultimately, OAS ignored the data that had

been gathered during the first two weeks of June 2010 that indicated the correct contractor ratio was 10 percent and inflated their calculation of space by adding contractors using a completely arbitrary 20 percent ratio.

In addition, we found that the OAS estimate of new positions that would need space included an estimate of the number of interns and temporary staff that would be hired in addition to employees. The OAS estimate of interns and temporary staff assumed a ratio of 16.5 percent (nine percent for interns and 7.5 percent for temporary staff). However, the OIG found that OAS's estimate of interns and temporary staff positions was significantly higher than the estimate in the data it received. On July 16, 2010, a management program analyst in the SEC's Office of Human Resources provided OAS with "the [peak] numbers [for interns and temporary staff]" which ranged from approximately four to seven percent for the six fiscal years of data that she analyzed.

Further, the OIG investigation found that OAS's calculations increased the amount of space required for every person to be hired in FY 2011 and FY 2012 by 10 percent for "inventory" representing "vacant offices you have for expansion and unanticipated growth, that kind of thing." However, as was the case with the contractors, temporary staff and interns, the 400 square foot standard itself had already incorporated an inventory factor into the calculation. Moreover, the 10 percent inventory factor added was double the five percent factor previously determined to be appropriate.

We also found that the OAS estimate of new positions that would need space included an assumption not only about FY 2011 and FY 2012 but also that in FY 2013, the SEC's appropriation would increase by 50 percent of the agency's FY 2012 budget request. We found that the assumption of 50 percent growth in 2013 was arbitrary and unsupported. Based on the FY 2013 assumption, OAS projected that the SEC would add another 295 positions in that year and again assumed that all of those positions would be allocated to SEC Headquarters. We found that this estimate was not based upon any firm numbers or projections and was contrary to the SEC's planning and budget process, which does not project growth more than two years into the future.

The OIG investigation found that OAS used the above-described overinflated estimates to calculate a space need of 934,000 square feet. On Friday, July 23, 2010, Executive Director Diego Ruiz met with Chairman Schapiro, Chief of Staff Didem Nisanci, and then-Deputy Chief of Staff Gillan to recommend that the SEC lease 900,000 square feet of space at Constitution Center. Gillan recalled the July 23, 2010 meeting with Ruiz, and that Ruiz had come to her "and said that he needed to see Mary [Schapiro] quickly because he needed to make a quick decision on Constitution Center. That the other possible space opportunities had evaporated, gone to others, were no longer available. And that this one was really all that was left and that we needed to act quickly."

Chairman Schapiro testified regarding the July 23, 2010 meeting with Ruiz:

> I remember explicitly being told there really wasn't any other space available that could fulfill our needs and that there was a time – a sense of we were about to lose this. We had lost other space that we had apparently indicated an interest in and that we were about to lose this. So there was a sense of urgency on their part.

Gillan testified that Ruiz did not explain in the July 23, 2010 meeting, or at any other time, that the assertion that SEC Headquarters needed an additional 900,000 square feet was predicated, in part, on the assumption that all of the agency's new positions in FY 2011 and FY 2012 would be allocated to SEC Headquarters. Gillan testified that, "[I]n fact, that's inconsistent with what I had understood, because ... [Chairman Schapiro] specifically said that, to the extent possible, she wanted new hires to go to the regions." Gillan also testified that Ruiz did not explain in the July 23, 2010 meeting, or at any other time, that the assertion that SEC Headquarters needed an additional 900,000 square feet was predicated, in part, on OAS's projections of significant growth in FY 2013.

On July 23, 2010, Ruiz sent an e-mail to Sheehan, OAS Supv. 4 and OAS Supv. 5 stating, "Met with Chairman this morning, and we have her approval to move forward." The OIG investigation found that the SEC negotiated the contract for 900,000 square feet at Constitution Center in three business days, signing the contract on July 28, 2010. On July 27, 2010, the SEC staff involved in that negotiation discussed the fact that they had "no bargaining power" because "Sharon [Sheehan] wants this signed tomorrow." Internal e-mails show that OAS feared losing the building to the National Aeronautics and Space Administration, which had also expressed an interest in the facility.

On July 28, 2010, the SEC executed the letter contract committing the SEC to lease approximately 900,000 square feet of space at Constitution Center. The contract set a multiphase delivery schedule, in which Phase 1, approximately 350,000 square feet, would be delivered no later than September 2011, and Phase 2, approximately 550,000 square feet, would be delivered no later than September 2012. The contract stated that "the SEC's interests require that [DNA] be given a binding commitment so that the space required will be committed to the SEC and initial build out for the Phase 1 space can commence immediately ..." The lease term in the contract was ten years. OAS Supv. 5 estimated the costs associated with leasing and occupying Constitution Center would be $556,811,589.

The Letter Contract also granted the SEC the right of first refusal for the remaining approximately 500,000 square feet of space at Constitution Center until December 15, 2010. If the SEC had exercised this option, it would have leased the entire 1,400,000 square feet of space at Constitution Center. OAS Supv. 5 testified that OAS wanted a right of first refusal on all of the remaining space at Constitution Center "because the

Congress was throwing money at us" and "Sharon [Sheehan] was always hoping that we wouldn't have anybody else in the building. That we would be able to ultimately justify the need for the whole building or something."

After the SEC committed itself to the ten year lease term at a cost of $556,811,589, it prepared a Justification and Approval for Other than Full and Open Competition, which is required by the Federal Acquisition Regulation ("FAR") when an agency decides not to allow for full and open competition on a procurement or lease. The FAR permits other than full and open competition only "when the agency's need for the supplies or services is of such an unusual and compelling urgency that the Government would be **seriously injured** unless the agency is permitted to limit the number of sources from which it solicits bids or proposals." 48 C.F.R. § 6.3202-2 (emphasis added).

The OIG investigation found that the Justification and Approval to lease space at Constitution Center without competition was inadequate, not properly reviewed, and backdated. The Justification and Approval provided as follows:

> To fulfill these new responsibilities it is necessary to significantly increase full-time staff and supporting contractors by approximately 2,335 personnel to be located at the SEC's headquarters in Washington, DC. However, the SEC's current headquarters is full. Accordingly the SEC has a requirement of an unusual and compelling urgency to obtain approximately 900,000 rentable square feet (r.s.f.) of additional headquarters space in the Washington, D.C. Central Business District, as this is the amount of space required to accommodate the approximately 2,335 new staff and contractors in headquarters.

The Justification and Approval asserted that the 900,000 square feet "must be in a single building or integrated facility to support the SEC's functional requirements and operational efficiency."

An OAS Management and Program Analyst signed the Justification and Approval as the SEC's Competition Advocate. She testified that she did not take any steps to verify that the information in the Justification and Approval was accurate, "[o]ther than asking OAS Supv. 5 the contracting officer, you know, just general questions, 'Is this indeed urgent and compelling.'" She further testified that when she signed the Justification and Approval, she was not aware that funding for that projected growth had not been appropriated. She also did not have an understanding of when the projected 2,335 personnel were expected to be hired. Further, she acknowledged in testimony that the SEC would in fact not be "seriously injured" if it lost the opportunity to rent one contiguous building and had to rent multiple buildings to fill its space needs.

The FAR also requires that a Justification and Approval for Other than Full and Open Competition be posted publicly "within 30 days after contract award." The Letter Contract was signed on July 28, 2010. Accordingly, the deadline for publication of the Justification and Approval was August 27, 2010. On September 3, 2010, the SEC publicly posted the Justification and Approval on the Federal Business Opportunities website. The document was signed by four individuals with all four signatures dated August 2, 2010.

However, the OIG investigation found that the Justification and Approval was not finalized until September 2, 2010, and substantial revisions were being made up to that date. We found that three of the four signatories executed the signature page on August 2, 2010, before a draft even remotely close to the final version existed. The OIG found that the SEC's Competition Advocate executed the signature page on August 31, 2010, initially backdated her signature to August 27, 2010, but subsequently whited-out the "7" on the date to make it appear that she also had signed the document on August 2, 2010. The actions of the signatories to the Justification and Approval gave the public the false impression that the document was finalized a few days after the Letter Contract was signed, and there was only a delay in its publication.

The OIG investigation also found that there is significant uncertainty among the SEC staff regarding important requirements in connection with government leasing and serious questions as to whether the SEC complied with several requirements in connection with its leasing of Constitution Center. Appendix B of the United States Office of Management and Budget ("OMB") Circular No. A-11 states that "Agencies are required to submit to OMB representatives the following types of leasing and other non-routine financing proposals for review of the scoring impact: Any proposed lease of a capital asset where total Government payments over the full term of the lease would exceed $50 million." Although the evidence shows the SEC initially contemplated providing OMB with the written notification and senior Agency officials believed that OMB had been formally notified, no written notification was provided.

In addition, there is a possibility that the SEC violated the Antideficiency Act in connection with its lease of Constitution Center. The Antideficiency Act prohibits officers or employees of the government from involving the government "in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. § 1341(a)(1)(B). The incurring of an obligation in excess or advance of appropriations violates the Act. Notwithstanding its July 28, 2010 commitment to a 10-year lease at Constitution Center, the SEC did not obligate the entire amount of rent payments due under the lease. Although the SEC has been granted independent leasing authority statutorily and is generally granted authority to enter into multiyear leases in its annual appropriations, the U.S. Government Accountability Office ("GAO") has found that "[t]he existence of multiyear leasing authority by itself does not necessarily tell you how to record obligations under a lease." GAO has distinguished agencies such as the GSA with "specific statutory direction" to obligate funds for multiyear leases one year at a time, from agencies such as the Federal Emergency Management Agency ("FEMA")

which do not have such explicit direction. Because the SEC, like FEMA, does not have specific statutory direction to obligate funds for its multiyear leases on an annual basis, its lease obligations may have to be obligated in their entirety at the time they are incurred, and the SEC thus may have violated the Antideficiency Act in connection with its commitment to lease space at Constitution Center.

In early October 2010, the SEC informed DNA that it could not use approximately 600,000 of the 900,000 square feet of space it had contracted for at Constitution Center and asked for DNA's assistance in finding other tenants for that space. In November 2010, DNA began negotiations with the Federal Housing Finance Agency ("FHFA") and the Office of the Comptroller of the Currency ("OCC") to lease portions of Constitution Center. In January of 2011, OCC and FHFA entered into contracts for space at Constitution Center, leaving approximately 350,000 square feet to which the SEC remains committed . The SEC now hopes to sublease even the remaining 350,000 square feet. On January 18, 2011, DNA's counsel sent a demand letter to the SEC asserting that the SEC's actions had caused DNA to incur $93,979,493 in costs at Constitution Center.

The OIG investigation further found that a "closed" and "rigid" atmosphere within OAS may have contributed to the irresponsible decisions made with respect to the Constitution Center Lease. In the course of this OIG investigation, several witnesses who sought to remain anonymous came forward to the OIG to provide information concerning the environment and the decision-making processes within OAS. These witnesses described an environment in which inexperienced senior management make unwise decisions without any input from employees with significant knowledge and experience. We found that questioning of upper management decisions by the staff is "not allowed" and that OAS Associate Executive Director Sheehan surrounds herself with "yes-men" and "does not want to hear what [experienced staff] will tell her." These individuals testified that upon learning of the SEC's decision to lease 900,000 square feet of space at Constitution Center, they "just couldn't understand how they could justify that amount of space ..." and were "flabbergasted" by the decisions. One experienced employee testified that OAS management had "grandiose plans" and was significantly influenced by the upscale nature of the facility.

The OIG is recommending that the newly appointed Chief Operating Officer/Executive Director carefully review the report's findings and conduct a thorough and comprehensive review and assessment of all matters currently under the purview of OAS. We further recommend that the Chief Operating Officer/Executive Director, upon conclusion of such review and assessment, determine the appropriate disciplinary and/or performance-based action to be taken for matters that are discussed in this report of investigation as well as other issues identified during the review and assessment, including, at a minimum, consideration of disciplinary action against Sharon Sheehan and OAS Supv. 4, up to and including dismissal, and consideration of disciplinary action against the Competition Advocate, for their actions in connection with the gross overestimation of the amount of space needed at SEC Headquarters for the SEC's

projected expansion, failures to provide complete and accurate information to the Chairman's office, and the preparation of a faulty and back-dated Justification and Approval to support eliminating competition.

Finally, we recommend that the Office of Financial Management, in consultation with the Office of General Counsel, request a formal opinion from the Comptroller General as to whether the Commission violated the Antideficiency Act by failing to obligate appropriate funds for the Constitution Center lease.

SCOPE OF THE OIG INVESTIGATION

I. Review of E-mails

The OIG made numerous requests to the SEC's Office of Information Technology ("OIT") for the e-mails of current and former SEC employees for various periods of time pertinent to the investigation. The e-mails were received, loaded onto computers with specialized search tools and searched on a continuous basis throughout the course of the investigation.

In all, the OIG received from OIT e-mails for a total of 27 current or former SEC employees for the time period pertinent to the investigation. These included: 19 employees of OAS, three employees of the Office of Financial Management, two Office of the General Counsel employees, two employees of the Office of the Chairman, and one employee of the Office of the Executive Director. The OIG estimates that it obtained and searched over 1.5 million e-mails during the course of its investigation.

II. Document Requests and Review of Records

The OIG made several requests to OAS for documents relating to its leasing practices. The OIG had numerous e-mail and telephonic communications with OAS regarding the scope and timing of the document requests and responses. We carefully reviewed and analyzed the information received as a result of our document production requests. These documents included, but were not limited to, those relating to the Constitution Center lease, planning information for the lease, documents concerning approval of the lease by parties within or outside the SEC, documents concerning approval of funding for the lease by parties within and outside of the SEC, documents relating to the leasing of office space in Station Place Three, documents relating to the availability of space in Station Place Three, and documents relating to analyses of current and future SEC staff size.

III. Testimony and Interviews

The OIG took the sworn testimony of 18 witnesses and interviewed 11 other individuals with knowledge of facts or circumstances surrounding the SEC's leasing activities.

The OIG conducted testimony on-the-record and under oath of the following 18 individuals:

1. [redacted], Assistant Director, Office of Real Property Operations, Office of Administrative Services, Securities and Exchange Commission; taken on January 28, 2011 ("January 28, 2011 [redacted] Testimony Tr.") and March 29, 2011 ("March 29, 2011 [redacted] Testimony Tr."). Excerpts of testimony transcripts are attached as Exhibits 1 and 2, respectively.

2. [redacted] Chief, Leasing Branch, Office of Administrative Services, Securities and Exchange Commission; taken on January 31, 2011 ("January 31, 2011 [redacted] Testimony Tr.") and March 29, 2011 ("March 29, 2011 [redacted] Testimony Tr."). Excerpts of testimony transcripts are attached as Exhibits 3 and 4, respectively.

3. [redacted] Planning and Budget Office, Office of Financial Management, Securities and Exchange Commission; taken on February 2, 2011 ("[redacted] Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 5.

4. Sharon Sheehan, Associate Executive Director, Office of Administrative Services, Securities and Exchange Commission; taken on February 8, 2011 ("February 8, 2011 Sheehan Testimony Tr.") and March 29, 2011 ("March 29, 2011 Sheehan Testimony Tr."). Excerpts of testimony transcripts are attached as Exhibits 6 and 7, respectively.

5. [redacted] Program and Management Analyst, Office of Administrative Services, Securities and Exchange Commission; taken on February 17, 2011 ("[redacted] Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 8.

6. [redacted] Management Analyst, Office of Financial Management, Securities and Exchange Commission; taken on March 4, 2011 ("[redacted] Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 9.

7. Kenneth Johnson, Chief Financial Officer, Office of Financial Management, Securities and Exchange Commission; taken on March 7, 2011 ("Johnson Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 10.

8. Diego Ruiz, Executive Director, Office of the Executive Director, Securities and Exchange Commission; taken on March 9, 2011 ("Ruiz Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 11.

9. Unidentified Program Manager,[2] Office of Administrative Services, Securities and Exchange Commission; taken on March 16, 2011 ("Unidentified Program Manager Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 12.

10. Unidentified Employee 1,[3] Office of Administrative Services, Securities and Exchange Commission; taken on March 16, 2011 ("Unidentified Employee 1 Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 13.

11. Unidentified Employee 2,[4] Office of Administrative Services, Securities and Exchange Commission; taken on March 16, 2011 ("Unidentified Employee 2 Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 14.

12. OGC Atty 1 Office of the General Counsel, Securities and Exchange Commission; taken on March 17, 2011 ("OGC Atty 1 Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 15.

13. OGC Atty 2, Special Trial Counsel, Office of the General Counsel, Securities and Exchange Commission; taken on March 17, 2011 ("OGC Atty 2 Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 16.

14. OAS Empl. 2 Realty Specialist, Office of Administrative Services, Securities and Exchange Commission; taken on March 24, 2011 (OAS Empl. 2 Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 17.

15. OAS Empl. 3 Budget Analyst, Office of Administrative Services, Securities and Exchange Commission; taken on March 25, 2011 ("OAS Empl. 3 Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 18.

16. Kayla Gillan, Deputy Chief of Staff, Office of the Chairman, Securities and Exchange Commission; taken on April 8, 2011 ("Gillan Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 19.

17 OAS Supv. 2 Space Management & Mail Operations, Office of Administrative Services, Securities and Exchange Commission; taken on March 11, 2011 ("OAS Supv. 2 Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 20.

---

[2] This witness asked the OIG not to be identified in the OIG's report for this investigation.
[3] This witness asked the OIG not to be identified in the OIG's report for this investigation.
[4] This witness asked the OIG not to be identified in the OIG's report for this investigation.

18. Mary Schapiro, Chairman, Securities and Exchange Commission; taken on March 18, 2011 ("Schapiro Testimony Tr."). Excerpts of testimony transcript are attached as Exhibit 21.

The OIG also conducted interviews of the following 11 individuals with relevant expertise and/or knowledge of information pertinent to the investigation:

1. Timothy Jaroch, Managing Partner, David Nassif Associates; conducted on January 11, 2011 ("Jaroch Interview Transcript") and May 6, 2011 ("Jaroch Interview Memorandum"). Excerpts of interview transcript are attached as Exhibit 22; Memorandum of Interview is attached as Exhibit 23.

2. Anonymous Complainant;[5] conducted on January 14, 2011.

3. Thomas Cafferty, Deputy-in-Charge, Docket Services, SDNY; conducted on February 3, 2011.

4. OMB Empl. 1 Budget Examiner, Office of Management and Budget; conducted on February 22, 2011 ("OMB Empl. 1 Interview Memorandum"). Memorandum of Interview is attached as Exhibit 24.

5. OMB Empl. 2 Program Examiner, Office of Management and Budget; conducted on March 23, 2011.

6. OHR Empl. Management Program Analyst, Office of Human Resources, Securities and Exchange Commission; conducted on April 1, 2011 ("OHR Empl. Interview Transcript"). Excerpts of interview transcript are attached as Exhibit 25.

7. Unidentified Space Management Specialist,[6] Office of Administrative Services, Securities and Exchange Commission; conducted on April 5, 2011.

8. Daniel Dooley, Managing Director, Tishman Speyer Properties; conducted on April 5, 2011 ("Dooley Interview Memorandum"). Memorandum of Interview is attached as Exhibit 26.

9. Thomas Finan, Managing Director, Trammell Crow Company; conducted on April 18, 2011 ("Finan Interview Memorandum"). Memorandum of Interview is attached as Exhibit 27.

[5] This witness asked the OIG not to be identified in the OIG's report for this investigation.
[6] This witness asked the OIG not to be identified in the OIG's report for this investigation.

10. OAS Empl. 4 Realty Specialist, Office of Administrative Services, Securities and Exchange Commission; conducted on April 19, 2011 ("OAS Empl. 4 Interview Transcript"). Excerpts of interview transcript are attached as Exhibit 28.

11. David Guin, Expert Consultant, Securities and Exchange Commission; conducted on April 28, 2011 ("Guin Interview Memorandum"); Memorandum of Interview is attached as Exhibit 29.

RELEVANT STATUTES, RULES AND REGULATIONS

Government-Wide Standards of Ethical Conduct

The Standards of Ethical Conduct for Employees of the Executive Branch, which applies to every federal employee, states that employees "shall put forth honest effort in the performance of their duties." 5 C.F.R. § 2635.101(b).

Securities Exchange Act of 1934

"Notwithstanding any other provision of law, the Commission is authorized to enter directly into leases for real property for office, meeting, storage, and other space as necessary to carry out its functions, and shall be exempt from any General Services Administration space management regulations or directives." 15 U.S.C. Sec. 78d.

Federal Acquisition Regulation ("FAR")

FAR 6.302-2 states:

> When the agency's need for the supplies or services is of such an unusual and compelling urgency that the Government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals, full and open competition need not be provided for.

48 C.F.R. § 6.302-2.

FAR Section 6.303-2 states: "Each justification shall contain sufficient facts and rationale to justify the use of the specific authority cited. As a minimum, each justification ... shall include ... [a] description of the supplies or services required to meet the agency's needs (including the estimated value)." 48 C.F.R. § 6.303-2.

FAR 6.305 states: "In the case of a contract award permitted under 6.302-2, the justification shall be posted within 30 days after contract award." 48 C.F.R. § 6.305.

FAR Section 16.603-2(d) states:

> The maximum liability of the Government inserted in the clause at 52.216-24, Limitation of Government Liability, shall be the estimated amount necessary to cover the contractor's requirements for funds before definitization. However, it shall not exceed 50 percent of the estimated cost of the definitive contract unless approved in advance by the official that authorized the letter contract.

48 C.F.R. § 16.603-2(d).

FAR Section 16.603-4 states: "The contracting officer shall insert the following clauses in solicitations and contracts when a letter contract is contemplated: ... (2) The clause at 52.216-24, Limitation of Government Liability, with dollar amounts completed in a manner consistent with 16.603(d)." 48 C.F.R. § 16.603-4.

FAR Section 52.216-24 sets forth the language to be included when a letter contract is contemplated:

> LIMITATION OF GOVERNMENT LIABILITY
>
> (a) in performing this contract, the Contractor is not authorized to make expenditures or incur obligations exceeding _____ dollars.
>
> (b) The maximum amount for which the Government shall be liable if this contract is terminated is _____ dollars.

48 C.F.R. § 52.216-24.

The Antideficiency Act

> An officer or employee of the United States Government ... may not : (A) make or authorize an expenditure or obligation exceeding an amount available in an appropriation or fund for the expenditure or obligation; (b) involve [the United States] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.

31 U.S.C. § 1341(a)(1)(B).

OMB Circular A-11

> Agencies are required to submit to OMB representatives the following types of leasing and other non-routine financing proposals for review of the scoring impact:
>
> Any proposed lease of a capital asset where total Government payments over the full term of the lease would exceed $50 million. ...
>
> Agencies should submit these proposals to OMB during the conceptual, developmental stage.

OMB Circular No. A-11, Appendix B, at 1-2.

> For operating leases, budget authority is required of the first year of the contract in the amount necessary to cover the Government's legal obligations, consistent with the requirements of the Antideficiency Act. This will include the estimated total payments expected to arise under the full term of the contract or, if the contract includes a cancellation clause, an amount sufficient to cover the lease payments for the first year plus an amount sufficient to cover the costs associated with cancellation of the contract.

OMB Circular A-11, Appendix B, at 2.

SEC Administrative Regulation 11-03, "SEC Leasing Program"

"To the extent certain Federal Acquisition Regulation (FAR) provisions are required by law or statute, the SEC will adhere to them to acquire and administer leasehold interests in real property." SECR 11-03 at 1.

"Leasing Branch will: consult with the OGC in the event there is uncertainty as to whether a FAR provision applies to the leasing program; [p]romote the competition requirements of FAR Part 6. ..." SECR 11-03 at 6.

"Leasing Branch will: ... Consult with the SPE and the ED to determine whether to prepare a notification to OMB regarding a project. General guidelines include:

> For ... operating leases, make OMB notifications as follows:
>
> If Full Time Equivalent (FTE), rent, tenant improvement costs and/or design or project management fees associated with increased FTE were included in the approved budget for the fiscal year of the effective date of the lease action, no notification to OMB is required.
>
> If FTE, rent, tenant improvement costs and/or design or project management fees associated with increased FTE were NOT included in the approved budget for the fiscal year of the effective date of the lease action, notification to OMB will be provided using Attachment 2, Notification of Lease Action and Attachment 3, OMB Lease Action Summary to OMB, and the project's leasing acquisition plan will be attached.

SECR 11-03 at 7.

RESULTS OF THE INVESTIGATION

I. Background: The SEC's Leasing and Space Management Programs Have Had a Troubled History

In 1990, Congress provided the SEC with independent leasing authority, which exempted the SEC from General Services Administration ("GSA") regulations and directives. 15 U.S.C. § 78d(b)(3). A House Conference Report for this legislation stated that the legislators intended that "the authority granted the Commission to lease its own office space directly will be exercised vigorously by the Commission to achieve actual cost savings and to increase the Commission's productivity and efficiency." H.R. Conf. Rep. 101-924, attached as Exhibit 30.

Since being granted independent leasing authority, there have been several expensive missteps related to the SEC's leasing actions and management of its space. According to the Government Accountability Office ("GAO"), in May 2005, the SEC disclosed to a House Subcommittee that it had "identified unbudgeted costs of approximately $48 million attributable to misestimates and omissions of budget costs associated with the construction of [Station Place One and Two] and improvements in its new leased facilities" in New York and Boston.[7] October 20, 2005 GAO Report GAO-06-61R ("GAO Report"), attached as Exhibit 31, at 1.

According to the SEC's Executive Director at that time, the SEC's underestimate of build-out costs for Station Place was "based on assumptions related to construction costs provided by [Office of Administrative Services ("OAS")] ... that were no longer accurate and had increased substantially." *See* Exhibit 32 at 4. According to the GAO, the primary causes of the $48 million in misestimates and omissions in the SEC's budget submission for these real estate projects were: "(1) ineffective management controls over budget formulation and review for these projects; (2) an inadequate administrative infrastructure; and (3) the nature of these facilities projects." GAO Report at 2. "[T]he SEC Chairman agreed with the conclusions and recommendations in [a draft of the GAO Report]." *Id.* The GAO report summarized several actions that SEC management represented had been taken to address those conclusions and recommendations, including "Improved communication between [the SEC's Office of Financial Management ("OFM")] and OAS regarding budget formulation." *Id.* at 18.

In 2006, the Commission moved into its new headquarters at Station Place. *See* March 31, 2009 Review of the Commission's Restacking Project, OIG Report No. 461, attached as Exhibit 33, at i. In 2007, the SEC embarked on a major "restacking" project in which various SEC employees were shuffled to different office spaces at a cost of over

[7] In May 2001, the SEC entered into a lease for a new Washington, DC headquarters, known as Station Place One. July 27, 2005 Testimony of James M. McConnell, SEC Executive Director, before the Senate Subcommittee on Federal Financial Management, attached as Exhibit 32, at 4. In November 2002, the SEC exercised its option to lease Station Place Two, a building which is attached to Station Place One. *Id.*

$3 million. *Id.* at ii-iii. The purpose of the restacking project was to arrange offices in a "horizontal" manner so that the agency's divisions and offices would not be split up across multiple floors. *Id.* at iii. The OIG's audit unit conducted a review of the project and found that there were serious questions about whether the restacking project was necessary and whether it had any meaningful impact on communication among or productivity of the staff. *Id.* at iv. The OIG found that there was no record of a cost-benefit analysis having been conducted before embarking on this restacking project. *Id.* at iii. Moreover, an OIG survey of Commission staff found that only 34 percent of staff surveyed believed that the restacking project would improve effectiveness or efficiency of their office or division. *Id.* at iv, 13. This OIG survey also found that 89 percent of the responding staff had been satisfied with the location of their workspace before the restacking project was initiated, and 81 percent of the responding staff did not believe the restacking project benefits were worth the cost and time of construction, packing, moving, and unpacking. *Id.* at 11, 15.[8]

The SEC established a Leasing Branch within OAS in April 2009, approximately 19 years after Congress granted the SEC independent leasing authority.[9] OIG Report No. 484 at 1. In 2010, the OIG audited the SEC's leasing process and, on September 30, 2010, issued an audit report, *Real Property Leasing Procurement Process*, Report No. 484, attached as Exhibit 160. This audit found that the SEC's Leasing Branch did not have adequate policies in place and, until very recently, had no final leasing policies. OIG Report No. 484 at iv. The audit also found the SEC's leasing regulation, SECR 11-03, which was approved by SEC Executive Director Diego Ruiz on August 31, 2010, to be inadequate in several respects. *Id.* The audit further found that OAS did not have sufficient procedures for how leases should be managed and tracked. *Id.*

The actions of the Office of the Executive Director and OAS with regard to leasing space at Station Place Three, a building immediately adjacent to Station Place Two, raised significant questions about the SEC's ability to assess and project space needs at SEC Headquarters. The SEC's leases for Station Place One and Station Place Two guaranteed the SEC the right of first offer for up to 300,000 rentable square feet of space at Station Place Three. Exhibit 34 at 1. Pursuant to that contractual provision, in December 2008, Louis Dreyfus Property Group ("LDPG"), the owner of the Station

---

[8] In an October 2009 OMB Prospectus Report, the SEC's Executive Director, Diego Ruiz, claimed that the restacking project "successfully improved communication and increased work process efficiencies," ignoring the OIG's report and survey results as to the wastefulness of the project. *See* October 16, 2009 Prospectus Report, attached as Exhibit 34, Attachment 1 at 2. The SEC hired a contractor to conduct a second survey regarding the restacking project. *See* April 27, 2010 Post Restacking Survey Results, attached as Exhibit 35. The results of this survey were largely the same as those in the OIG survey as to the wastefulness of the restacking project. *Id.* Only 33 percent of managers and 36 percent of staff responding to the second survey stated that they were better able to perform their mission after restacking. *Id.* at 7, 9.

[9] Agencies without independent leasing authority lease office properties through the GSA. As explained on its website, "GSA leases all types of space for most federal agencies, including offices ... GSA solicits offers on a competitive basis, negotiates with offerors, and for most acquisitions, ... makes awards to the lowest priced acceptable offer." GSA webpage "Negotiation on Federal Leased Opportunities," attached as Exhibit 36.

Place buildings, notified Sharon Sheehan, the Associate Executive Director in charge of OAS,[10] and [redacted], the former Chief of the SEC's Leasing Branch within OAS,[11] that it intended to offer Kaiser Permanente approximately 213,400 rentable square feet of office space at Station Place Three. *See* December 12, 2008 Letter from Robert Braunohler to Sharon Sheehan, attached as Exhibit 37; April 7, 2009 E-mail from Robert Braunohler to [redacted] attached as Exhibit 38.

In May 2009, the SEC submitted to Congress its FY 2011 Authorization Request for $1.24 billion dollars to fund 1,000 new positions nationwide. July 6, 2009 Memorandum from former Chief Financial Officer, Kristine Chadwick, to Division Directors and Office Heads, attached as Exhibit 39. On June 4, 2009, Sheehan sent an e-mail to [redacted] with the subject, "SEC to hire 1,000 employees over next two years" and stated, "We need to get on [Executive Director Diego Ruiz's][12] calendar to explain the impact and need to plan." June 4, 2009 E-mail from Sharon Sheehan to [redacted] attached as Exhibit 40. [redacted] responded, "Definitely. I really think we need to lock on an option on SP3 space while they can still provide ..." *Id.*

On June 8, 2009, [redacted] wrote to Sheehan, "I know I can get about 200K SF at SP-3 and IF we moved fast, I could probably interrupt the Kaiser deal and take the other 200K SF for spill over from this and overrun with [the SEC's Operations Center] and SP1 and 2."[13] June 8, 2009 E-mail from [redacted] to Sharon Sheehan, attached as Exhibit 41. On June 12, 2009, Sheehan emailed Ruiz, "[redacted] and I are scheduled to meet with you on Tuesday ... [redacted] and I are going to recommend that the SEC lease part, and possibly all, of SP3. ... There are many benefits to our

---

[10] Sheehan joined the SEC on September 5, 2006, as a Contracting Officer, after holding various procurement and contracting positions in the Department of Defense. February 8, 2011 Sheehan Testimony Tr. at 9-14. In May 2008, she became the Associate Executive Director for OAS. *Id.*

Sheehan testified that when she was hired as the Associate Executive Director of OAS in 2008, the SEC "didn't really have a leasing program. ... [T]hey didn't have procedures or SOPs. They didn't have employees who specialized in leasing." February 8, 2011 Sheehan Testimony Tr. at 13-15. Sheehan testified that "I moved forward to explain to the Executive Director what I thought should occur in terms of establishing a formal leasing program." *Id.* at 15.

[11] [redacted] was hired in June 2008 to form and manage the SEC's Leasing Branch. January 31, 2011 [redacted] Testimony Tr. at 14-15. Prior to joining the SEC, she performed contracting work at the Department of Defense and real estate work, including leasing, at GSA. *Id.* at 9-12. [redacted] testified that when she was hired in June 2008, the SEC did not have a real estate leasing program. *Id.* at 15-16, 20-21. During the course of this investigation, on April 3, 2011, [redacted] retired from the Federal government.

[12] Diego Ruiz was the SEC's Executive Director at that time. His appointment to that position was announced on August 16, 2006. *See* SEC Press Release 2006-141, attached as Exhibit 43. During the course of this investigation, on February 18, 2011, the SEC announced his departure from the agency. *See* SEC Press Release 2011-48, attached as Exhibit 44.

[13] Station Place Three has a total of approximately 500,000 square feet. At the time [redacted] wrote this e-mail, approximately 100,000 square feet had been leased to the American Chemistry Council ("ACC") and Kaiser Permanente was interested in leasing approximately 200,000 of the remaining 400,000 square feet. *See* Exhibit 42.

recommendation." June 12, 2009 E-mail from Sharon Sheehan to Diego Ruiz, attached as Exhibit 42.

After meeting with Sheehan and OAS Supv. 5 Ruiz decided not to lease the available contiguous space at Station Place Three. February 8, 2011 Sheehan Testimony Tr. at 60-61. The uncertainty surrounding whether the SEC would be appropriated the funding that it had requested in May 2009 was one reason that the SEC initially failed to act on the opportunity in June 2009 to lease contiguous space at Station Place Three. Ken Johnson, the SEC's Chief Financial Officer and the head of OFM, explained that the SEC did not act on the opportunity to lease contiguous space at Station Place Three in June 2009 because at that point it was "so early in the process" of the SEC's FY 2011 budget request "that there would have been no assurances at this point that we would have actually gotten this money. ... this early ... no one would have thought, okay. We now need the space for these thousand people because once we ask OMB[14] for it, we know it's going to happen." Johnson Testimony Tr. at 43. Johnson testified that it "would have been a real leap in logic ... just on what we requested of OMB, to assume that would be what the end of the process would yield." *Id.* at 43. Johnson testified, "I remember conversations about, boy, it would really make a lot of sense, if we knew we could use it, to have all Station Place Three; it's right here, it's part of the same complex ... but we don't have enough assurance that ... we would use it because we're too early in the budgeting process." *Id.* at 45-46.

Although Sheehan and OAS Supv. 5 were confident that the SEC had a need for the space at Station Place Three that justified their recommendation, Sheehan explained:

> Diego [Ruiz] did not feel comfortable that we could justify picking up that space [at Station Place Three in June 2009]. I remember us wanting to pick up the space, but the decision was that we just were not willing to take that risk because we didn't want to be left with redundant space. ... He was very concerned about having redundant space, meaning empty space.

February 8, 2011 Sheehan Testimony Tr. at 60-61, 97.[15]

Uncertainty regarding the SEC's space inventory and needs was another reason that the SEC failed to act on the opportunity in June 2009 to lease contiguous space at Station Place Three. On Thursday, June 25, 2009, a LDPG employee notified OAS Supv. 5 "[Kaiser Permanente] executed the lease." June 25, 2009 E-mail from David Happ to OAS Supv. 5 attached as Exhibit 46. OAS Supv. 5 responded, "Crap. I wanted to take it over."

---

[14] As discussed below in Section II, the SEC must submit its budget request to OMB for approval before it can be included in the President's overall budget request to Congress.

[15] Sheehan also testified that, "Diego [Ruiz] always cautions everyone in the room that [projections of growth from OFM] are only projections and that we can't take it to the bank." *Id.* at 62.

Id. The LDPG employee replied, "You still can we did not sign it yet ... Should be signed Monday morning. ... How much space do you think you might need." *Id.* In response, OAS Supv. 5 confessed, "Off the record, I wish I knew exactly, but we are working it as we speak." *Id.*

On Friday, June 26, 2009, OAS Supv. 5 sent an e-mail to Sheehan and others labeled, "URGENT: OPC Program Numbers," describing "current/projected staffing levels" at the SEC's Operations Center in Alexandria, Virginia. According to OAS Supv. 5 e-mail, there was a need for an additional 90,000 – 100,000 square feet to accommodate those staffing levels at the Operations Center. *Id.* OAS Supv. 5 expressed her hope that, "This information should help you and Diego [Ruiz] make decisions on best utilization of existing space here at OPC, and how the informed and estimated expansion needs [at the Operations Center], combined with expansion needs at [Station Place], may generate a quicker decision to take space at [Station Place Three]."[16] June 26, 2009 E-mail from OAS Supv. 5 OAS Supv. 5 to Sharon Sheehan and OAS Empl. 5 attached as Exhibit 47. However, in June 2009, Ruiz decided to not lease the space at Station Place Three that went to Kaiser Permanente because, according to Ruiz, when LDPG offered the space to the SEC, "we did not have what we perceived as a need for that space, and so we did not act on those offers." Ruiz Testimony Tr. at 13.

Within weeks of the decision to not lease the space that was ultimately leased by Kaiser Permanente, the SEC staff realized its space needs justified leasing that space and scrambled to reverse the decision. On July 31, 2009, OGC Atty 2, Special Trial Counsel in the SEC's Office of the General Counsel ("OGC"), e-mailed LDPG:

> I apologize for the shifting target ... SEC management would like to know what the total costs could be if we were to buy out the [American Chemistry Council ("ACC") and Kaiser Permanente] leases in Station Place Three, as part of potentially leasing all of Building Three. We understand this would entail buying out or condemning the currently signed leases, with potential damages to the lessees for finding new space, etc.

July 31, 2009 E-mail from OGC Atty 2 to David Lennhoff, attached as Exhibit 45.

---

[16] Sheehan testified that when she became Associate Executive Director of OAS in 2008, "I expected to see that someone was taking a physical inventory and keeping a spreadsheet and things you would normally expect to see with any type of inventory ... and that was not occurring." February 8, 2011 Sheehan Testimony Tr. at 18. OAS Supv. 4, Assistant Director of the SEC's Office of Real Property Operations, testified that, when he joined the SEC in July of 2009, OAS "didn't have a system to track offices," and that no such system was in place until "probably in the summer or fall of [2010] when we finally refined it." January 28, 2011 OAS Supv. 4 Testimony Tr. at 14, 18-19.

Ultimately, the SEC did not buy out either the ACC or the Kaiser Permanente leases. On April 16, 2010, Sheehan informed Ruiz that ACC was demanding $10 million for the SEC to buy out its Station Place Three lease. *See* April 16, 2010 E-mail from Sharon Sheehan to Diego Ruiz, attached as Exhibit 164. After a May 6, 2010 briefing on the matter, Ruiz "decided that pursuit of the ACC space would not be prudent." May 11, 2010 E-mail from OAS Supv. 4 to OAS Supv. 5 attached as Exhibit 165.

As discussed above, Sheehan and OAS Supv. 5 had recommended in June 2009 that the SEC lease the approximately 400,000 square feet that remained at Station Place Three at that time. Instead, in August 2009, after Kaiser Permanente leased approximately 200,000 square feet of that space, the SEC decided to move forward and lease the approximately 200,000 square feet that remained. *See* August 6, 2009 E-mail from OAS Supv. 5 to Sharon Sheehan, attached as Exhibit 48; Ruiz Testimony Tr. at 23. On March 23, 2010, after months of additional planning and negotiation, the SEC executed the lease for 201,998 square feet of space at Station Place Three. March 23, 2010 Lease Agreement, attached as Exhibit 49.

II. In May 2010, OAS Began Planning to Lease Approximately 300,000 Additional Square Feet for SEC Headquarters Based on the SEC's FY 2012 Appropriation Request

On May 14, 2010, the SEC submitted an authorization request to the Chairman of the United States Senate Committee on Banking, Housing, and Urban Affairs. May 14, 2010 Letter from Mary Schapiro to Christopher Dodd, attached as Exhibit 50. In this letter, the SEC requested $1.507 billion for FY 2012 in order to fund an increase of 800 positions. *Id.* at 2-3.

An authorization request is the first step in the SEC's lengthy budget process. An authorization request is submitted to Congress in May of the fiscal year two years prior to the fiscal year for which the authorization is requested (*e.g.*, the FY 2012 authorization request takes place in May 2010). OFM Supv. Testimony Tr. at 10. Several months after the authorization request, in September, the SEC submits a proposed budget request to OMB. *Id.* at 14. In November, the next step of the budget request process takes place: OMB replies to the SEC with a "pass-back," usually a lower number than what the SEC requested, and the SEC and OMB then usually negotiate the amount of the budget request. *Id.* at 15-16; Johnson Testimony Tr. at 43-44. Several months later, the President formally submits a budget proposal to Congress. Johnson Testimony Tr. at 44.

The SEC's authorization requests are developed by OFM and the Office of the Executive Director. OFM Supv. Testimony Tr. at 8, 10. OFM Supv., OFM's OFM Supv. Planning and Budget, testified that, in her experience, she has never witnessed the size of the SEC's budget request submitted to OMB in September be the same as the budget request submitted to Congress by the President the following January, and that the size of the budget request submitted to Congress often varies significantly from the size of the SEC's original request to OMB. *Id.* at 16. Johnson testified that it

would have been a "real leap in logic ... just on what we requested of OMB, to assume that would be what the end of the process would yield." Johnson Testimony Tr. at 43.

Once the President makes the budget request to Congress, Congress then begins the decision-making process as to how much money to appropriate the SEC and other agencies. *Id.* at 44. Johnson described the budget request process as follows:

> [F]or each given fiscal year, we start with an authorization. Then we go to a request to OMB ... [T]hen there's a pass-back from OMB. And then, once there's a decision on what [the] President's request will be, then that request is made to Congress, and the congressional justification.
>
> And then there's Congressional hearings. And then ... the House and Senate would start marking up the bill ... and then announcing what they intend to fund ... And then there has to be, you know, agreement among House and Senate, and the President has to sign. And then we get our money.

Id. at 43-44. OFM Empl. a management analyst in OFM, explained that an authorization request is "sort of a fantasy because you don't know what Congress is going to want to do with it, and may completely ignore it." OFM Empl. Testimony Tr. at 15.

Consequently, even if the authorization request is granted, there is no guarantee that the requested funds will ultimately be appropriated at the end of the process. *See* Johnson Testimony Tr. at 18. Johnson acknowledged in testimony that an authorization may indicate an intention for Congress to provide funding, but circumstances could subsequently change, so Federal "agencies understand that until the money is appropriated, they can't count on that money coming to them." *Id.* at 19-20.

When asked in testimony what the SEC actually gets from an authorization, OFM Supv. replied, "[N]ot a whole heck of a lot." OFM Supv. Testimony Tr. at 11. OFM Supv. testified that the agency uses its authorization request as a "ceiling that we could ask for when we go to OMB" to make a budget request. *Id.* at 10. When asked in testimony whether, upon receiving an authorization for a funding amount, an agency knows it is going to be funded for that amount, OFM Supv. replied, "Oh, no, not at all." *Id.* at 12. OFM Empl. testified that "you never know what you're going to get appropriated. ... [I]t's not real until you have the appropriation, and anything can happen." *Id.* at 39-40.

On May 7, 2010, in response to a request from OAS Supv. 4, Assistant Director of the SEC's Office of Real Property Operations,[17] OFM Empl. e-mailed OAS Supv. 4 "estimates of where [the 800 new positions requested by the SEC in its authorization request for FY 2012] would be located." May 7, 2010 E-mail from OFM Empl. to OAS Supv. 4, attached as Exhibit 51. At this time, OFM estimated that 404 of the 800 positions would be located at Station Place; 25 would be located at the Operations Center; and 371 would be located at the SEC's regional offices. *Id.* OFM Empl. explained to OAS Supv. 4 that she "developed the estimate based on ratios of where [the SEC's Division of Enforcement ("Enforcement")] and [Office of Compliance Inspections and Examinations ("OCIE")] said they planned to locate staff in the regions, and based on very general assumptions of what proportion of the total positions would be [Enforcement] and OCIE vs. other divisions/offices." *Id.*

On May 10, 2010, OFM Supv. cautioned OAS Supv. 4 about planning on receiving all 800 of the requested positions: "[E]ven if we ask OMB for 800 new positions, it doesn't mean we will get them. We won't know what they let us go to Congress with until late in November. I would be very surprised if it is truly the entire 800." *Id.* OFM Supv. testified that she wrote this "[b]ecause you don't always get what you ask for, and you know, history is that usually you don't." OFM Supv. Testimony Tr. at 51-52. OAS Supv. 4 responded to OFM Supv. cautionary note, "I understand. With 7 of the leases at our regional offices expiring in the next 4 years, we want to be mindful of the 'potential' growth as space options are considered. Even though your estimates come with caveats, they are helpful in our planning."[18] Exhibit 51.

On May 27, 2010, OAS Supv. 5 sent an e-mail to various persons (copying OAS Supv. 4 and Sheehan) with the subject "IMPORTANT: New Urgent Space Action in DC." May 27, 2010 E-mail from OAS Supv. 5 to OAS Supv. 3 attached as Exhibit 52. According to OAS Supv. 5 e-mail, the SEC needed to lease 250,000 square feet to accommodate its space needs through FY 2012:

> [T]he SEC is requesting for 2012, an additional forecasted 400 Headquarters staff (out of a total of 800 SEC-wide requested) .... Because such an increase in space can take up to 2 years to acquire and build-out ... it is imperative that this project be expedited under an urgent and

---

[17] OAS Supv. 4 began working at the SEC in July 2009, in the position he holds today. January 28, 2011 OAS Supv. 4 Testimony Tr. at 8-9. Prior to joining the SEC, OAS Supv. 4 worked in the Army as a unit commander and worked for two small businesses in Virginia managing government contract projects. *Id.* at 6-8.

[18] On June 3, 2010, OFM Empl. sent another e-mail to OAS Supv. 4, at his request, providing estimates as to which divisions and offices would receive the 800 new positions requested by the SEC for FY 2012. Exhibit 51. As in the May 7, 2010 estimate, 404 of the 800 requested new positions for FY 2012 would work at Station Place, 25 would work at the Operations Center, and 371 would work at the SEC regional offices. *Id.* In this June 3 e-mail, OFM Empl. described the estimates as "very much SWAG projections." OFM Empl. explained in testimony that "SWAG" is an acronym for "stupid wild-ass guess." OFM Empl. Testimony Tr. at 45-46.

> compelling justification in order to acquire sufficient space to accommodate the immediate occupancy need[19] and the forecasted contiguous 2011 and 2012 need as well.

Id. OAS Supv. 5 e-mail described OAS's plan of action as follows:

> **As of yesterday, Sharon [Sheehan] has direction from [Diego Ruiz] to move out quickly on this acquisition.** Market information has been collected in the DC area around the Station Place complex, and 3 properties were found to meet the minimum square footage requirement. Under the urgent and compelling justification that will be documented in a formal [Justification and Approval], the highly expedited acquisition strategy will be to:
>
> 1. **Contact the 3 properties and arrange a survey of the buildings** ...
>
> 2. Prepare an Acquisition Plan, Justification for Urgent and Compelling action,[20] notification to OMB[21] ...
>
> ...
>
> 4. Prepare a Solicitation For Offers ...
>
> 5. Negotiate and award the lease via contract letter if needed to expedite, if the full lease provisions prove to be problematic in any way.

Id. (emphasis in original).

As OAS Supv. 5 explained in her May 27, 2010 e-mail, OAS's original plan was to limit the solicitation for offers to three properties, all within walking distance of Station Place. *Id.*; *see also* Exhibit 60. However, on June 2, 2010, OAS Supv. 5 received an e-mail from the real estate broker for Constitution Center regarding its availability and some of its

---

[19] The "immediate occupancy need" OAS Supv. 5 referred to was related to the fact that "the space in [Station Place Three] will not be available for occupancy until mid September 2010 (one floor only) and the remainder not available until Dec 2010." Exhibit 52.

[20] As explained below in Section VI, the Federal Acquisition Regulation permits other than full and open competition "when the agency's need for the supplies or services is of such an unusual and compelling urgency that the Government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals," and requires that a written justification be prepared if there is not full and open competition. 48 C.F.R. § 6.302.

[21] As explained below in Section VII.A, agencies are required to notify the Office of Management and Budget ("OMB") of leases of over $50 million "during the conceptual, developmental stage" for review of the scoring impact. *See* OMB Circular No. A-11, Appendix B, attached as Exhibit 139.

features. June 2, 2010 E-mail from OAS Supv. 5 to OAS Supv. 4 and Sharon Sheehan, attached as Exhibit 53. Approximately 30 minutes later, OAS Supv. 5 forwarded the broker's e-mail to OAS Supv. 4 and Sheehan and discussed the possibility of expanding the delineated area in the planned solicitation to render it an option as follows:

> We are going to have to visit this building as well I think ..... it wouldn't bode well to not view it. [The broker] called me and said he would offer a shuttle between our facilities if we required it, as well. They have been pushing hard for a long time. The building is seriously secure. If our delineated area is well supported as only being within walking distance, then maybe we could exclude (which was my initial intent), however, given the market and our unusual compelling circumstances, I think this building, if offering shuttles, etc., would be hard to ignore. Please advise.
>
> It is at 7th and D, SW, with its own metro access.

Id. (ellipsis in original).

The 1.4 million square foot Constitution Center had just been renovated in "one of the largest office redevelopment projects in Washington, DC." *See* Constitution Center brochure excerpts, attached as Exhibit 119. Building owner DNA's description of the building included the following:

> Within the 5,000 [square foot] lobby are spacious accommodations for a guard desk(s), security screening room, shuttle elevator lobby, and display space. ... Lobby finishes include Jerusalem limestone floors and marble walls, wood and metal paneling, decorative lighting and a floor-to-ceiling glass wall facing the landscaped courtyard. ... Constitution Center has an entirely new façade composed of a floor-to-ceiling, blast resistant curtain wall. This dramatic feature will provide abundant daylighting, panoramic views of the city and surrounding region ... The open plaza area of the existing building has been transformed into a one acre private garden. ... The [building includes an] auditorium (350+ seats) and conference center (3,000 [square feet]) ... .

Id.

As reflected in an e-mail approximately two weeks later, OAS then decided to solicit offers for 316,000 square feet and expand the delineated area in order to add Constitution Center to the other three buildings that would be included in the solicitation.

See June 11, 2010 E-mail from OAS Supv. 5 to OAS Supv. 4, attached as Exhibit 55. On June 11, 2010, OAS Supv. 5 sent an e-mail to OAS Supv. 4, Sheehan, and Ruiz summarizing the "action items" from a meeting the previous day. *Id.* Those action items included:

> a. Immediate need ... to work up a revised Needs Assessment .... This Needs Assessment is needed to support the Justification for Unusual and Compelling Authority being used for this acquisition and to further support the OMB notification that must go out ASAP.
>
> ...
>
> d. ... [I]mmediately finalize the Request for Proposals (Solicitation) ... for an expected release early next week. Intend to require **the 4 buildings under consideration** only a week or less to respond.

Id. (emphasis added). The last action item listed in OAS Supv. 5 e-mail was, "[E]dit the leasing briefing for Chairman Shapiro [sic] with comments as recommended by Diego [Ruiz] for a reschedule of that briefing." *Id.*

III. In June 2010, OAS Briefed the Chairman on its Expansion Plan for SEC Headquarters and Was Asked to Reassess the Need for Additional Space at SEC Headquarters in Light of the Chairman's Focus on Growth in the Regional Offices

On June 17, 2010, OAS Supv. 5 OAS Supv. 4, Sheehan, and Ruiz met with Chairman Schapiro to discuss several leasing issues, including OAS's immediate expansion plans at SEC Headquarters. *See* June 16, 2010 E-mail from OAS Supv. 5 to OAS Supv. 3 attached as Exhibit 56; June 16, 2010 E-mail from OAS Supv. 5 to Diego Ruiz and Sharon Sheehan, attached as Exhibit 57. At that briefing, OAS Supv. 5 told the Chairman that the SEC needed to immediately lease 280,000 to 315,000 square feet of office space in Washington, DC. *See* Exhibit 57 at 4; Schapiro Testimony Tr. at 11; Gillan Testimony Tr. at 13-14. OAS also identified on a map specific locations that it had identified as candidates for that expansion. Gillan Testimony Tr. at 7, 12-13; Ruiz Testimony Tr. at 43. Those candidates included Constitution Center.[22] Exhibit 57; Gillan Testimony Tr. at 12-13.

---

[22] The three buildings other than Constitution Center (999 North Capitol Street NE, 90 K Street NE, and 1100 1st Street NE) were all within walking distance of Station Place. *See* Exhibit 60. OAS Supv. 5 had first identified Constitution Center as an attractive option for the SEC expansion that, as discussed above, ultimately occurred at Station Place Three. *See* Exhibit 54. In a July 29, 2009 e-mail to Sheehan, OAS Supv. 5 had described Constitution Center as having "[o]bvious Security benefits, as well as quality of life." *Id.* OAS Supv. 5 e-mail referenced a meeting where OAS staff had "[d]iscussed need to compete the acquisition of an expansion of this size (possible 300K sf??) through advertisement of expressions of interest, meaning we couldn't 'zero in' on a particular building; however source selection criteria could get us more of what and where we want." *Id.*

OAS Supv. 5 presentation proposed sending solicitations for offers to those candidates by June 23, 2010, and leasing the space by July 20, 2010. *See* Exhibit 57 at 4.

Kayla Gillan, the Chairman's Deputy Chief of Staff at that time, testified that she recalled that two of the locations on this map were "much closer to Station Place, and those were going to be the focus of effort to lease. [T]he Chairman had expressed a clear preference for those ... buildings that were closer to Station Place Three than was Constitution Center." Gillan Testimony Tr. at 7, 12-13. Chairman Schapiro recalled that at this briefing she expressed a preference for buildings within walking distance of Station Place, in part because "it would cut down on our costs to have these shuttles run, which I understand are very expensive." Schapiro Testimony Tr. at 12-13. Chairman Schapiro also questioned whether the SEC needed 300,000 additional square feet in light of her position, discussed in greater detail below, that the SEC should concentrate its growth in the regional offices. July 2, 2010 E-mail from Sharon Sheehan to OAS Supv. 5 OAS Supv. 5 attached as Exhibit 61; Schapiro Testimony Tr. at 11-12.

A few days after OAS met with Chairman Schapiro, DNA asked for an update about when it would receive a solicitation for an offer. June 23, 2010 E-mail from OAS Supv. 4 OAS Supv. 4 to OAS Supv. 5 attached as Exhibit 59. OAS Supv. 5 forwarded the request to OAS Supv. 4 and asked, "I realize you may not have an immediate answer for this, but we need to get one soonest. . . . Can you get with Sharon [Sheehan] and maybe Diego [Ruiz] and let me know how to advise these folks?" *Id.* OAS Supv. 4 responded, "I'll talk with Sharon about raising the issue but **someone has to convince the Chairman to change position**."[23] *Id.* (emphasis added). OAS Supv. 5 replied, "I didn't really hear a particular position by the Chairman other than she thought new [full time equivalent positions ("FTE")] might be best in [regional offices] in lieu of DC and wanted some research on that (which everyone is doing)." *Id.*

On July 1, 2010, OAS Supv. 5 sent an e-mail to colleagues in OAS and others, titled, "UPDATE: Expedited DC Headquarters Expansion Project." Exhibit 61. In this e-mail, OAS Supv. 5 wrote: "[T]he urgent pace of this project has been suspended in order to further respond to questions about the DC space need posed by the Chairman. . . . OAS Supv. 4 and Sharon [Sheehan] are working to refine the space need to be sure that should we re-engage in this project, that our requirement is firm and reflects the Chairman's vision." *Id.*[24] The next day, Sheehan responded, "We should have this matter resolved by Thursday, July 15, at which point I expect the project to continue at a fast pace." *Id.*

---

[23] In his testimony, OAS Supv. 4 claimed that his statement that the Chairman needed to "change [her] position" "meant [Chairman Schapiro] hasn't committed to anything. We're trying to get her to act or say – give us some direction. ... That's all I'm saying here, change position of not providing us definitive guidance so we can move forward or not." March 29, 2011 OAS Supv. Testimony Tr. at 19.

[24] Sheehan and OAS Supv. 5 both testified that they did not specifically recall what the Chairman's questions were about the DC space need. March 29, 2011 Sheehan Testimony Tr. at 7-8; March 29, 2011 OAS Supv. 5 Testimony Tr. at 215. OAS Supv. 4 testified that his work to refine the agency's space need entailed "[j]ust making sure that the numbers that we presented to Diego were current." March 29, 2011 OAS Supv. 4 Testimony Tr. at 20-21.

IV. In July 2010, OAS Grossly Overestimated the Amount of Space Needed at SEC Headquarters for the SEC's Projected Expansion

Due to several significant management failures, discussed below, OAS's recommendation in mid June 2010 to lease approximately 300,000 square feet for SEC Headquarters morphed into a mid July urgency to lease 900,000 square feet. On July 23, 2010, Ruiz sought and received the Chairman's approval to proceed with lease negotiations for 900,000 square feet at Constitution Center.

As discussed below, on July 28, 2010, OAS signed a two-page letter contract for that space based on the purported need for 900,000 additional square feet at SEC Headquarters. That purported need was based on projected growth that assumed: (1) the SEC would receive more funding than was included in the President's budget request pending before Congress; (2) the SEC would receive all of the funding it had included in its FY 2012 appropriation request;[25] and (3) the SEC would receive all additional funding it deemed necessary to implement Dodd-Frank.[26] These assumptions were speculative and ignored the prospect that the upcoming mid-term elections could impact those hoped-for appropriations.[27]

---

[25] As discussed above, on July 28, 2010, the SEC's FY 2012 authorization request had not yet been submitted to OMB for approval. Furthermore, as discussed below, the OFM staff did not necessarily expect OMB to approve the full amount of the SEC's FY 2012 authorization request.

[26] On December 11, 2009, the financial regulatory reform bill that eventually became the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank") was passed by the U.S. House of Representatives. Brady Dennis, *House Votes 223 to 202 to Approve Sweeping Bill to Overhaul Financial Regulatory System,* Washington Post, December 12, 2009, attached as Exhibit 62. On May 20, 2010, the United States Senate passed a different version of this financial regulatory reform bill, which then led to a reconciliation process between the two bills. Brady Dennis, *Senate Passes Financial Regulation Bill,* Washington Post, May 21, 2010, attached as Exhibit 63. The Senate passed this reconciled version on July 15, 2010, and on July 21, 2010, a reconciled version of these two bills, Dodd-Frank, became law. Brady Dennis, *Congress Passes Financial Reform Bill*, Washington Post, July 16, 2010, attached as Exhibit 64; Brady Dennis, *Obama Signs Financial Overhaul Into Law*, Washington Post, July 22, 2010, attached as Exhibit 65.

Dodd-Frank assigned the SEC additional responsibilities, including the oversight of the over-the-counter derivatives market and hedge fund advisors; registration of municipal advisors and security-based swap participants; enhanced supervision of NRSROs and clearinghouses; greater disclosure and risk retention regarding asset-backed securities; and creation of a new whistleblower program. SEC FY 2012 Congressional Justification In Brief, attached as Exhibit 66, at 2.

The SEC estimated that it would need to add 800 positions in FY 2011 and FY 2012 to implement Dodd-Frank. *See* July 20, 2010 Mary Schapiro Testimony before the United States House of Representatives Financial Services Committee, attached as Exhibit 67, at 15. Dodd-Frank authorized an increase in the agency's budget from the $1.11 billion appropriated in FY 2010 to $1.3 billion in FY 2011, $1.5 billion in FY 2012, and $2.25 billion by FY 2015. Exhibit 66 at 2. Johnson explained that Dodd-Frank "did [not] include any appropriations for the SEC ... It had authorization of appropriations, but ... there's a distinction." Johnson Testimony Tr. at 56.

[27] Johnson testified concerning conversations with Ruiz in July 2010, "I was always cautioning, you know, it's not until we have [funding] in our hands do we really know it." *Id.* at 68. However, Johnson also testified that:

However, as detailed below, even if those assumptions had been well-founded and a reasonable basis for leasing space, justifiable projections for the SEC's expansion at Headquarters based on those assumptions would not have supported leasing 900,000 square feet. In fact, those projections would only have justified leasing approximately 300,000 square feet – one-third of the Constitution Center lease. As discussed below, OAS employed a series of unfounded, egregiously flawed, and irresponsible projections to derive the purported need to lease 900,000 square feet.

A. OAS Employed a 400 Square Foot Per-Position Standard in its Determination that SEC Headquarters Needed to Lease Approximately 900,000 Square Feet

The GSA has determined that for government office space planning purposes, "an appropriate benchmark is 230 rentable square feet per person, including all individual and

---

> Our expectation, and Diego [Ruiz] and I were of the same mind about this, that if there was a change in control of one or both houses to a party that was less favorably disposed to growth or federal spending, still the likely outcome would have been that ... the House and Senate have already agreed on what the [funding] number is in the committees, and that something would have passed in a lame duck session before the next Congress would have taken control.

Id. at 68. Johnson testified that "that was our best guess for 2011. And then certainly all bets are off for 2012, 2013, and that process hadn't played out." *Id.* at 70.

Ruiz acknowledged that he understood that a Congressional authorization was not the same as an appropriation and that the former was no guarantee of the latter. Ruiz Testimony Tr. at 69. However, Ruiz denied being aware in July 2010 "that there was a pretty good likelihood that the Republicans might take over the House and the Senate." *Id.* at 70. In July 2010, that likelihood was the subject of a great deal of media coverage. *See* Rick Klein, *Democrats' Math Problem Complicates Agenda*, ABC News, July 11, 2010, attached as Exhibit 68 ("The stark admission by White House Press Secretary Robert Gibbs today -- that there is 'no doubt' that enough seats are in play to cost Democrats the House -- reflects a reality that will color the national political scene over the next four months"); Jeff Zeleny, *Democrats Sketch Ad Plan for Defending House Seats*, The New York Times, July 22, 2010, attached as Exhibit 69 ("Several incumbent Democrats are bracing for something they have rarely faced: serious competition. Their predicament is the latest sign of distress for their party and underlines why Republicans are confident of making big gains in November and perhaps even winning back the House"); John Whitesides, *Enthusiasm gap could be trouble for Democrats*, Reuters, July 27, 2010, attached as Exhibit 70 ("Republicans still enjoy a big advantage in enthusiasm about November's congressional elections, with their party members far more engaged and more likely to vote in a trend that could spell big trouble for Democrats. ... That could be a decisive factor in dozens of races nationwide that will decide whether Democrats hold their majorities in the House of Representatives and Senate"); Andrea Tantaros, *99 Days to the Election, and the Democrats are in Trouble*, FoxNews.com, July 27, 2010, attached as Exhibit 71 ("If the election were held today, Republicans would have a good chance at capturing the House of Representatives. Generic congressional ballot polls show the GOP with an edge. Numbers by Rasmussen, Fox News and Quinnipiac show the right with a 9, 4, and 5 point lead, respectively").

shared space such as workstations, circulation, storage, and conference rooms."[28] GSA guidance further provides that "Federal agencies that exceed the recommended overall Governmentwide [sic] average for office space use should ensure that agency mission mandates a direct requirement for higher per capita office space allocation. Once this link is established, agencies need to benchmark their office space to the allocation of other Government and private organizations with similar mission and needs."[29]

OAS developed its own, much higher standard of 400 square feet per person for planning its space needs and determining how much space to lease. OAS Empl. 4 Interview Tr. at 3-8.[30] OAS Supv. 4 used this standard when he estimated how much additional space was needed at SEC Headquarters to accommodate his estimates of projected growth. *See* Headquarter Projections Chart, attached as Exhibit 75. OAS characterized its 400 square feet per person standard as an "all-inclusive number" that included common spaces and amenities. Ruiz Testimony Tr. at 37-38.

OAS Supv. 5 testified regarding the development of the 400 square feet per person standard as follows:

> [W]e have taken a look at what our utilization is around the SEC, here at Station Place, out in the regions, to get at what is our overall utilization if you consider everything we

---

[28] See Excerpt from GSA Website, Exhibit 72.

[29] See GSA's 2002 Space Use, Exhibit 73 at 3, ¶ 6 (markups by OAS staff). Several witnesses noted that the SEC warrants a higher space utilization number than most other federal agencies because the SEC has a high percentage of professional staff, such as lawyers and accountants, who have individual offices. *See, e.g.,* Ruiz Testimony Tr. at 39. OAS Supv. 4 testified that the SEC "benchmarked" its 400 square foot per person standard with other agencies, including the Office of the Comptroller of the Currency, the Patent and Trademark Office, and the FDIC, and that "I think we found that our space was right in line with the agencies we looked at ... We're pretty consistent with them." January 28, 2011 OAS Supv. 4 Testimony Tr. at 68. Subsequently, OAS Supv. 2 Space Management & Mail Operations, provided the OIG with a one-page chart, attached as Exhibit 74, that summarized the results of OAS's benchmarking survey. That document did not cite an "all inclusive" rentable square feet per person standard for the other agencies. *Id.* It did compare the size of the SEC's offices for various staff grade levels to the size of the offices at the other agencies. *Id.* According to this document, some of the SEC staff's offices are larger than their counterparts at those other agencies. *Id.*

[30] On April 25, 2011, after Sheehan had testified twice in connection with this investigation, she asserted in an e-mail to the OIG that OAS had hired a consultant, David Guin, who "is working to drive down our allocation of 400 sq ft per person to around 300 per person." *See* April 25, 2011 E-mail from Sharon Sheehan to OIG Empl. 1 attached as Exhibit 76.

However, Guin told the OIG that he is not, and never has worked on such a project. *See* Guin Interview Memorandum. Guin did explain that when OAS was planning on the SEC occupying the space it had leased at Constitution Center, he had briefly worked on developing a "mobile workforce planning" program for SEC contractors at Constitution Center that would have decreased the space occupied by those contractors by eliminating assigned cubicles or stations for contractors. *Id.* Guin emphasized that such a program would not be feasible for permanent staff. *Id.* Guin also explained that, as a result, the program would not have significantly reduced the SEC's 400 square foot utilization standard at Constitution Center. *Id.*

> have, if you take the San Francisco lease "X" divided by "X" people that sit there, it comes out to about 427 square feet per person. And that counts your walking around space, your auditorium if they have one, your child care, your fitness, it is everything, soup to nuts … Here at headquarters it came to like 412 or something … When you take it all in totality and divide it by employees and lay it out, and … I did it out of curiosity. I laid out a Station Place II floor on top of a Station Place II floor and hand counted the offices and stuff, and it comes out to this 400 square feet per person roughly.

January 31, 2011 OAS Supv. 5 Testimony Tr. at 77-78.

OAS Supv. 4 explained his understanding of how the 400 square feet per person standard was developed as follows:

> I think [OAS staff] checked in [the SEC's] Atlanta [Regional Office], and we divided the total number of positions by that total square footage. It came up to a little over 400. I think 424 to be exact. So short of having a program of requirement, we estimated it will be about 400 square feet per person based on our floor plan.

March 29, 2011 OAS Supv. 4 Testimony Tr. at 75.

According to OAS Supv. 4 testimony, OAS Empl. 4 a Realty Specialist in OAS, is the employee most familiar with the development of the 400 square feet standard and what it represents. March 29, 2011 OAS Supv. 4 Testimony Tr. at 100-101. OAS Empl. 4 explained to the OIG that she and OAS Supv. 5 developed the standard by dividing the square footage of office space by the number of people the SEC had authority to hire for the offices in that space at Station Place One, Station Place Two, and several of the SEC's regional offices. OAS Empl. 4 Interview Tr. at 8, 11, 13-15. OAS Empl. 4 described the standard as a "WAG" (wild-ass guess) and a "back of the envelope" calculation, and stated that "we didn't do this scientifically." *Id.* at 4-5, 11.

OAS Empl. 4 explained that OAS used the SEC's "strength reports" to determine the number of people the SEC had authority to hire. *Id.* at 11-12. She explained that the SEC's strength reports only include permanent positions; they do not include the number of contractors, interns, and temporary staff that are associated with those positions. *Id.* at 12, 15-16. OAS Empl. 4 told the OIG that at the SEC offices she looked at to develop the 400 square feet standard, the ratio of contractors, interns, and temporary staff to permanent positions was about 10 percent. *Id.* at 12-16.

OAS Empl. 4 also explained that:

> [T]he 400 also included a small amount of space that represented future growth, so that you could plan for it a little bit better initially ... And so there was a little bit of growth [that] I think [was] being thrown into that 400 square-foot calculation.

Id. at 5-6. Specifically, OAS Empl. 4 explained that "about five percent" was added to the number originally reached by dividing square footage of office space by the number of people the SEC had authority to hire for the offices in that space, "for that growth that we wanted to build in." *Id.* at 13.

Accordingly, OAS Empl. 4 explained that multiplying the number of permanent positions by 400 square feet should result in an estimate of the space needed to accommodate (1) those permanent positions, (2) all of the contractors, interns, and temporary staff that are associated with those permanent positions (assuming the ratio of those positions is about 10 percent),[31] and (3) an inventory of future space equal to five percent of the number of permanent positions. *Id.* at 13-14.

B. Based on the Most Optimistic Projections from OFM, SEC Headquarters Needed Space to Accommodate 886 New Positions

In early July 2010, OFM revised its projections for growth in FYs 2011 and 2012. *See* July 7, 2010 E-mail from OFM Empl. to OAS Supv. 4 and Sharon Sheehan, attached as Exhibit 77. The new projections assumed that Dodd-Frank would pass and that the SEC would need 800 new positions to implement the legislation.[32] *Id.* OFM developed two scenarios for its projections. *Id.* The first scenario assumed that the SEC would receive all of the funding included in the President's FY 2011 request and all the funding included in the SEC's FY 2012 appropriation request to add the 800 Dodd-Frank positions and 380 positions to the SEC's "base programs" for a total of 1,180 positions. *Id.* The second scenario assumed that the SEC would receive funding during FYs 2011 and 2012 to add the 800 Dodd-Frank positions and 630 base-program positions – a total of 1,430 positions. *Id.*

The second scenario assumed that the SEC would actually receive more funding in FY 2011 than had been requested by the President. *See* July 8, 2010 e-mail from

---

[31] Ruiz testified that he believed interns and contractors were included in these OAS surveys of actual usage at Station Place to arrive at the 400 square feet per person standard, but that he was not positive that was the case. Ruiz Testimony Tr. at 41-42.

[32] On July 20, 2010, Chairman Schapiro testified before the House Subcommittee on Capital Markets, Insurance and Government-Sponsored Enterprises, "While the dollar cost of full implementation will depend greatly on the effective date of new rules, the timing of hiring, and other factors, we currently estimate that the SEC will need to add approximately 800 new positions over time in order to carry out the new or expanded responsibilities given to the agency by [Dodd-Frank]." Exhibit 67 at 15.

Kenneth Johnson to OFM Empl. attached as Exhibit 78. That assumption was made by OFM based on discussions in early July 2010 between SEC officials and some Congressional members and staff regarding their intention to provide the SEC with additional FY 2011 funding.[33] *Id.*

When OFM Empl. sent OAS Supv. 4, Sheehan and Ruiz OFM's revised growth projections on July 7, 2010, she emphasized that:

> These spreadsheets do not differentiate between HQ and regions. They only reflect totals for the exam and enforcement programs. A few weeks ago, I provided you the estimated allocations by regional office, based on information provided by OCIE and [Enforcement] for the FY 2012 Authorization Request process and assumed ratios. ... For now, what I provided you previously remains the best estimate for regional allocations we have.

Exhibit 77 (emphasis in original).[34] Subsequently, Ruiz noted that "about 95% of projected 2011 new slots for OCIE, and approx[imately] [50%] for [Enforcement]" would be allocated to the regional offices. *See* August 9, 2010 e-mail from Diego Ruiz to Eric Spitler and Kenneth Johnson, attached as Exhibit 83.[35]

---

[33] On July 29, 2010, the Senate Committee on Appropriations recommended that the SEC be appropriated $1,300,000. Financial Services and General Government Appropriations Bill, attached as Exhibit 80. Also on July 29, 2010, the Chairman of the House Appropriations Subcommittee presented his mark for the Subcommittee's consideration, increasing the SEC's FY 2011 appropriation to $1,300,000, which was $205 million over the SEC's FY10 funding amount. July 29, 2010 Statement of Jose E. Serrano, Attached as Exhibit 81. Johnson testified that SEC officials "had ... decent feelings or hints in talking to congressional staff" in early-July 2010 about receiving an appropriation that would have supported the number of new positions in OFM's second scenario projections. Johnson Testimony Tr. at 75.

However, Johnson acknowledged that "certainly, in advance of July 29th when [the] House mark and Senate mark came through, we didn't know what they would do." *Id.* As late as July 26, 2010, Johnson was instructing SEC officials by memorandum to use the President's FY 2011 funding request for planning the SEC's operating budget. *See* July 26, 2010 Memorandum from Johnson to SEC Division Directors and Office Heads, attached as Exhibit 79. Specifically, Johnson's memorandum stated, "[t]he President's FY 2011 budget request currently pending before Congress for the SEC is $1.258 billion .... Since our actual appropriation will not be known for several more months, we will use the funding ... established in the President's request as guideposts in developing the FY 2011 operating budget." *Id.*

[34] OFM Empl. confirmed in testimony that the numbers in these OFM projection charts are nationwide numbers that include projected new personnel for the SEC's regional offices. OFM Empl. Testimony Tr. at 52-53.

[35] Earlier, on June 18, 2010, Ruiz had met with the Directors of Enforcement and OCIE and Gillan regarding the allocation of future growth to the regional offices. *See* Exhibits 58 and 82. Gillan reported the results of that meeting to Chairman Schapiro as follows:

> OC[IE] is already far along the road in allocating the bulk of new positions to regions (eg, 95 of their 100 tentative 2011 positions were

Using the most optimistic projections for growth (1,430 nationwide positions) provided to OAS by OFM on July 7, 2010, and assuming that 95 percent of the OCIE positions and 50 percent of the Enforcement positions included in OFM's projections would be allocated to regional offices, the OIG calculated 886 new positions at the SEC's Headquarters as the maximum number of positions that could be derived from the OFM projections. The OIG's calculations are illustrated in the following table:

	OFM (Nationwide)[36]	OFM (Headquarters)
FY 2011		
Base Programs	230	134[37]
Dodd-Frank	400	240[38]
FY 2012		
Base Programs	400	272[39]
Dodd-Frank	400	240[40]
TOTAL	**1430**	**886**

As discussed below, OAS used OFM's data and projected growth at SEC Headquarters of 2,449 positions – almost three times the amount of growth at SEC Headquarters that could reasonably be projected from OFM's data and almost double the amount of OFM's projection for nationwide growth.

---

already targeted for the regions). ... Currently, 37 of the 70 2011 [Enforcement] positions for 2011 were targeted for regions ...

June 19, 2010 E-mail from Kayla Gillan to Mary Schapiro and Didem Nisanci, attached as Exhibit 82.

[36] *See* July 7, 2010 E-mail from OFM Empl. to OAS Supv. 4 and Sharon Sheehan, attached as Exhibit 77.

[37] OFM projected that 45 of the 230 new positions for base programs in FY 2011 would be allocated to Enforcement and 77 of the 230 new positions would be allocated to OCIE. *Id.* [(230-45-77) + (.50 x 45) + (.05 x 77)] = 134.

[38] OFM projected that 120 of the 400 new positions associated with Dodd-Frank in FY 2011 would be allocated to Enforcement and 105 of the 400 new positions would be allocated to OCIE. *Id.* [(400-120-105) + (.50 x 120) + (.05 x 105)] = 240.

[39] OFM projected that 85 of the 400 new positions for base programs in FY 2012 would be allocated to Enforcement and 90 of the 400 new positions would be allocated to OCIE. *Id.* [(400-85-90) + (.50 x 85) + (.05 x 90)].

[40] OFM projected that 120 of the 400 new positions associated with Dodd-Frank in FY 2012 would be allocated to Enforcement and 105 of the 400 new positions would be allocated to OCIE. *Id.* [(400-120-105) + (.50 x 120) + (.05 x 105)] = 240.

C. OAS Inflated its Calculation of the SEC's Need for Additional Space by Overestimating the Projected Growth at SEC Headquarters by Approximately 300 Percent

Sheehan testified to the OIG that the determination that the SEC needed 900,000 square feet of space came from agency leadership: "I was told to have space available for 2,300 employees. ... I was asked to get space for 2,300 people. ... [L]eadership was confident that they needed ... space to accommodate approximately 2,300." February 8, 2011 Sheehan Testimony Tr. at 155, 157, 176. The OIG, however, found the opposite to be true – that OAS was the driving force behind the purported need for 900,000 square feet of space. First, as discussed in Section III above, in June 2010, the Chairman had asked OAS to reevaluate its recommendation that SEC Headquarters lease an additional 300,000 square feet because of the Chairman's desire to direct as much of the SEC's growth as possible to the SEC's regional offices. *See* Exhibit 59. Second, as detailed below, it was OAS staff that projected growth of over 2,300 positions and represented to the Executive Director that, accordingly, the SEC needed 900,000 square feet of space. The Executive Director, in turn, represented to the Chairman that there was an urgent need to lease that amount of space at Constitution Center.

As discussed in Section IV.B above, OFM's projections supported, at most, a need for space to accommodate 886 new positions. OAS, however, decided to lease enough space to accommodate 2,499 positions – a difference of approximately 280 percent.[41] OAS grossly inflated the estimates of new positions to be added at SEC Headquarters by employing several artifices discussed in detail below.

1. OAS inflated its calculation of the need for additional space at SEC Headquarters by including positions in its growth projections that were allocated to the SEC's regional offices.

For purposes of its calculations regarding the need for additional space, OAS assumed all of the new positions projected by OFM would be allocated to SEC Headquarters, and none of those new positions would be allocated to the SEC's regional offices. This assumption was contrary to the Chairman's position communicated to OAS at the June 17, 2010 meeting, as discussed above, that as much as possible of the SEC's future growth should occur in the regional offices, not SEC Headquarters.

After that meeting, Ruiz e-mailed the Enforcement and OCIE directors (copying Sheehan) and asked "how much of any future (2011 and beyond) Enforcement or OCIE staffing increases might be directed to the regions vs. DC" and emphasized the requested

[41] The calculation of 2,499 positions was performed by OAS Supv. 4. March 29, 2010 OAS Supv. 4 Testimony Tr. at 26. OAS Supv. 4 prepared a spreadsheet memorializing his calculations. *See* Exhibit 75 OAS Supv. 4 subtracted 164 from this 2,499 total to factor in what OAS Supv. 4 believed to be empty offices in Station Places One, Two and Three that could accommodate 164 SEC employees. *Id.*

information would have a "big impact" on OAS's "space planning." Exhibit 58. Ruiz elaborated as follows:

> In discussions this morning with Mary [Schapiro] concerning office space needs in the regions and the home office, she raised the question of how much of any future (2011 and beyond) Enforcement or OCIE staffing increases might be directed to the regions vs. DC. … The answer to this question will have a big impact on our space planning. Since we are currently in the middle of several lease recompetes in the regions, **and also need to make some fast decisions on additional space needs here in DC**, I'd like us to get together quickly to talk through these issues.

Id. (emphasis added).

On July 6, 2010, Sheehan asked Johnson for "a sense [of] the numbers of positions we might be allocating to the regions … in the next couple of years." *See* Exhibit 77 at 2. In response to Sheehan's request, Johnson sent OFM Empl. the following July 6, 2010 e-mail:

> I just spoke with Sharon [Sheehan], and she needs from us a sense as to the numbers of positions we might be allocating to the regions (read OCIE and [Enforcement]) in the next couple of years. Could you send her today or tomorrow morning the file showing our penciled-in numbers for base responsibilities and [regulatory] reform by office for FY 2011 and FY 2012? … I've explained to Sharon that we haven't shown these to the Chairman's Office yet, **and certainly don't know what we'll ultimately receive**.

Id. (emphasis added).

The next day, OFM Empl. e-mailed OAS Supv. 4 and Sheehan (copying Ruiz) OFM's projections for both of the scenarios described above and explained:

> These spreadsheets do not differentiate between HQ and regions. They only reflect totals for the exam and enforcement programs. A few weeks ago, I provided you the estimated allocations by regional office, based on information provided by OCIE and [Enforcement] for the FY 2012 Authorization Request process and assumed ratios. … For now, what I provided you previously remains the best estimate for regional allocations we have.

Id. (emphasis in original).

On July 9, 2010, Ruiz responded to OFM Empl. e-mail with the following direction to Sheehan:

> Until [Enforcement] and OCIE have their approved positions from the Chairman and they then make allocations to each region, we won't know for sure what the numbers for the regions will be. For planning purposes, I think the best approach might be to take a look at what percentage of total [Enforcement] and OCIE slots each of those regions got this year, and approximate a similar percentage off the 2011 and 2012 [Enforcement]/OCIE numbers. It will be rough, but I think it's what we have now.

Id.[42]

However, no one in OAS, including OAS Supv. 4 or Sheehan, performed the regional office adjustment in calculating the SEC's space needs at Headquarters that Ruiz discussed with Sheehan in his July 9, 2010 e-mail. *See* March 29, 2011 Sheehan Testimony Tr. at 31-32; March 29, 2011 OAS Supv. 4 Testimony Tr. at 33-36. Four days after Ruiz sent that e-mail to Sheehan, OAS Supv. 4 e-mailed his calculations that clearly ignored regional allocations to Sheehan and asked for "a sanity check." *See* Exhibit 87.

Contrary to the evidence discussed above regarding the need to adjust OFM's projected growth estimates for a significant allocation of that growth to the regional offices, OAS Supv. 4 testified that the Chairman had changed her position and decided that "pushing them out to the regions was not going to happen." March 29, 2011 OAS Supv. 4 Testimony Tr. at 23-24. *See also*, *id.* at 31 ("they thought about pushing [the 800 Dodd-Frank positions] out to the regions, but then they said that wasn't feasible"); *id.* ("we were told that -- initially, we were talking about pushing more of them … out to the regions, and then that died off"); *id.* at 32 ("It was our understanding [the 800 Dodd-Frank positions] were all coming [to] headquarters"); *id.* at 33 ("Initially, later on, they were talking about pushing [the 800 Dodd-Frank positions] to [the regions] … and they said that would be impractical at this point"); *id.* at 36 ("I think they determined later that they weren't going to push as many out to the regions as they thought."). OAS Supv. 4 even testified that "it was my understanding [the 630 base program positions projected by OFM] were for D.C." *Id.* at 43-44.

OAS Supv. 4 testimony that he understood that all of the positions in OFM's projections would be located at SEC Headquarters is contradicted by two e-mails he

[42] As discussed above, the data that Ruiz referred to indicated that 95 percent of the projected OCIE positions and 50 percent of the projected Enforcement positions would be allocated to the regional offices.

himself sent in July 2010. First, on July 14, 2010, the day after OAS Supv. 4 had sent Sheehan his chart with the assumption that all FY 2011 and FY 2012 SEC personnel would go to Washington, DC, OAS Supv. 4 wrote in an e-mail, "The Chairman has stated that she is considering pushing more staff to the regions instead of increasing the numbers in Washington. No decision has been made on how the staff would be allocated." July 14, 2010 E-mail from OAS Supv. 4 to former Chief Information Officer, Charles Boucher, attached as Exhibit 84. Second, on July 26, 2010, OAS Supv. 4 sent an e-mail to OAS Supv. 5 discussed in greater detail below, that stated, "OCIE will pick up a total of 201 spaces for [Dodd-Frank]. The assumption is that two thirds of the allocation for OCIE (133) will go to the regions." July 26, 2010 E-mail from OAS Supv. 4 to OAS Supv. 5 attached as Exhibit 85.

Unlike OAS Supv. 4, Sheehan acknowledged in her testimony that some of the positions in OFM's projections would be allocated to the regional offices. March 29, 2011 Sheehan Testimony Tr. at 22. Sheehan also acknowledged in her testimony that she knew OAS Supv. 4 estimate of new positions at SEC Headquarters had actually included positions that would be allocated to the regions.[43] *Id.* at 31-32. Sheehan admitted understanding that including all of the positions projected by OFM in the calculation of a space need for SEC Headquarters "would inflate the number." *Id.* Sheehan defended the decision to "inflate the number" with nationwide projections by asserting that it offset OAS's purported underestimation of the number of contractors that would be hired in connection with those new positions:

> **I remember we made a decision to use the [nationwide projection] for headquarters, knowing that might – that would inflate the number,** but we also talked about the contractors at … 20 percent would probably in reality be closer to 30 percent.

Id. (emphasis added).[44] However, as discussed in the next section, the estimate for contractors OAS used in its space calculation for SEC Headquarters was not an underestimate; it was itself another factor that overinflated the OAS space calculation.

---

[43] Sheehan testified that OAS "had difficulty getting the breakout, so we could not determine how many of the [nationwide positions] would go to the regions … we knew some would go to the regions but we didn't know how many." March 29, 2011 Sheehan Testimony Tr. at 31. According to Sheehan, OAS Supv. 4 "worked with OFM Empl. on [the issue of regional office allocations] for a while, couple weeks, few weeks." *Id.* at 17-19. However, as discussed above, OFM Empl. e-mailed OAS Supv. 4, Sheehan, and Ruiz OFM's projections on July 7, 2010. *See* Exhibit 77. OFM's projections allocated a specific number of the new positions to Enforcement and OCIE. *Id.* In response to OFM Empl. e-mail, on July 9, 2010, Ruiz directed Sheehan, "For planning purposes, I think the best approach might be to take a look at what percentage of total [Enforcement] and OCIE slots each of those regions got this year, and approximate a similar percentage off the 2011 and 2012 [Enforcement]/OCIE numbers. It will be rough, but I think it's what we have." *Id.*

[44] On April 22, 2011, Sheehan made a written submission to the OIG to supplement her testimony. April 22, 2011 Sharon Sheehan Submission, attached as Exhibit 86. In this written submission, Sheehan asserted:

Finally, OAS Supv. 4 testimony that he believed SEC management had decided to allocate all of the new positions in FY 2011 and FY 2012 to SEC Headquarters and Sheehan's testimony that OAS did not have any data that would have allowed it to allocate OFM's projected nationwide growth among SEC Headquarters and the regional offices are contradicted by the fact that in July 2010, OAS was planning for significant growth in several of the SEC's regional offices.

On July 26, 2010, OAS Supv. 4 e-mailed OAS Supv. 5 his projections for growth in various regional offices for the purpose of leasing additional space in those offices. *See* Exhibit 85. Specifically, OAS Supv. 4 explained:

> OCIE will pick up a total of 201 [Dodd-Frank positions]. The assumption is that two thirds of the allocation for OCIE (133) will go to the regions. I'm on the limb on this but **looking at how numbers have been allocated to regional offices during the FY 2012 projections**, I think [the Chicago Regional Office] could pick up and [sic] additional 20 personnel.
>
> General Breakdown for [Dodd-Frank positions]
>
> [New York Regional Office] – 24% (133 x .24 =32)
>
> [Chicago Regional Office] – 14% (133 x .14 = 18.62 or 19) Use 20
>
> [Boston Regional Office] – 11% (133 x .11 = 15)

> In the May-June 2010 timeframe, the Chairman expressed a desire to place a larger percentage of employees in the regional offices than had been done previously. … Diego Ruiz, Kayla Gillan, and I discussed the matter with Robert Khuzami and Carlo di Florio. …
>
> Around July 10, 2010, Diego sent the OAS/OFM team a message explaining that perhaps we should consider using the percentage of ENF and OCIE employees assigned to the regions in 2010 as a basis for projecting numbers for the headquarters and the regions. By Tuesday of the following week, he had changed his direction and asked OAS to assume that all 800 new hires associated with the Dodd Frank mission would be housed in Washington, DC. At this point, OAS Supv. 4 stood down efforts to calculate percentages, and he moved forward to show all 800 new hires as being housed in Washington, DC. Based on discussions with ENF and OCIE leadership around this time, it was clear to me that ENF and OCIE did not plan to place in the regions the 800 employees being hired to support Dodd Frank.

Id. As discussed below, contrary to Sheehan's assertion that after mid-July 2010, OAS Supv. 4 "stood down efforts to calculate percentages, and he moved forward to show all 800 new hires as being housed in Washington, DC," on July 26, 2010, OAS Supv. 4 was planning for significant growth in several regional offices.

> Looking at [Enforcement's] base request for 2012, [the Chicago Regional Office] gets about 7.5% of the total. Enforcement is allocated 240 spaces for [Dodd-Frank]. Again, I out the limb [sic] on this but 7.5% of 240 would equal 18.
>
> With the bold assumptions above, [the Chicago Regional Office] could grow by approximately 40 positions with [Dodd-Frank].

Id. (emphasis added).

OAS Supv. 5 responded to OAS Supv. 4

> Thanks, OAS Supv. 4 .....so, recognizing the "bold assumptions", shall I add more square footage to the Chicago requirement beyond the 2012 numbers and document the file with the below? I haven't added any [Dodd-Frank positions] in (for OCIE or [Enforcement]) to the other regional offices yet either. Would there be any expected additional increases for LA, Denver and Miami?

Id. (ellipsis in original). OAS Supv. 4 responded that OAS Supv. 5 should plan on the Los Angeles Regional Office adding 27 permanent positions, the Miami Regional Office adding 23 permanent positions, and the Denver Regional Office adding 15 permanent positions. *Id.*

As the following table illustrates, by ignoring the fact that many of the new positions projected by OFM would be allocated to the regions, OAS Supv. 4 projected 1,505 new positions in FYs 2011 and 2012 at SEC Headquarters instead of the 886 positions that, as discussed above, he should have projected by accounting for growth in the regional offices:

	OFM (Headquarters)[45]	OAS (Headquarters)[46]
FY 2011		
Base Programs	134	301[47]
Dodd-Frank	240	400
FY 2012		
Base Programs	272	404[48]
Dodd-Frank	240	400
TOTAL	**886**	**1505**

[45] The calculation of the OFM Headquarters numbers is described in Section IV.B, above.

[46] *See* Exhibit 75.

[47] For some reason that OAS Supv. 4 could not explain, he used 301 for the FY 2011 base program positions instead of the 230 nationwide positions projected by OFM. *See* Exhibits 75 and 77. In a chart prepared by OAS Supv. 4 and e-mailed to Sheehan on July 13, 2010, OAS Supv. 4 described the 301 number as an estimate of "FY2011 Budget Request for New FTEs plus." Exhibit 87. During his testimony, OAS Supv. 4 was unable to explain what he meant by "plus." March 29, 2011 OAS Supv. 4 Testimony Tr. at 54-55. OAS Supv. 4 speculated that the additional 71 positions related to "people in Station Place who were going to be moving over here that we didn't account for, OHR, the personnel security group, the labor relations [group], some elements from [the Office of Inspector General]." *Id.* However, OAS Supv. 4 had previously acknowledged that Station Place Three had accommodated all of those employees and still had space available for some of the FY 2011 positions. January 28, 2011 OAS Supv. 4 Testimony Tr. at 84-89, 106-108. Sheehan testified that she did not know why 301 had been used by OAS for the projected FY 2011 base program positions instead of the 230 figure provided by OFM. March 29, 2011 Sheehan Testimony Tr. at 32, 36.

OAS Supv. 4 described his projection of 301 FY 2011 base program positions as "provided by OFM." *See* Exhibit 75. OAS Supv. 4 attempted to explain that error as follows: "I had a previous sheet, and it had 'reg reform budget request plus,' and somehow that got – and I have it on my computer. But I couldn't figure out what that plus [sic], and I deduced that that's what happened." March 29, 2011 OAS Supv. 4 Testimony Tr. at 55.

[48] OAS Supv. 4 could not explain why he used 404 for the FY 2012 base program positions instead of the 400 positions projected by OFM. *See* Exhibits 75 and 77. It appears that OAS Supv. 4 took this 404 figure from a May 7, 2010 e-mail from OFM. *See* Exhibit 51. As discussed above, that e-mail projected the number of **total** new positions at SEC Headquarters for FY 2012 based solely on the SEC's Authorization Request for that year. This projection was superseded by the July 7, 2010 e-mail OFM sent to OAS Supv. 4 that he used for the all of the other numbers in his spreadsheet (except as noted above at n. 37).

2. OAS inflated its calculation of the need for additional space at SEC Headquarters by unnecessarily including an estimate of contractors in its growth projections and then overestimating the number of those positions by 200 percent.

The OAS estimate of new positions that would need space included an estimate of the number of contractors that would be hired in connection with the projected growth in permanent positions. *See* Exhibit 75. The OAS estimate of contractors assumed a ratio of contractors to permanent positions of 20 percent. *Id.* That estimate was a gross overestimate of the number of contractors that needed to be included in OAS's space calculation. As discussed below, the estimate ignored the data from several sources that OAS had gathered that the ratio of contractors to permanent positions was only 10 percent.

Moreover, as discussed above, OAS Supv. 4 estimated the amount of rentable square feet needed for the SEC's projected growth by allotting 400 rentable square feet per position. *See* Section IV.A. The 400 square foot standard itself incorporated a factor of 10 percent for associated contractors and temporary staff. *Id.* Accordingly, there was no justification for adding contractor positions to OFM's projections of permanent new positions for the purpose of calculating the amount of space needed for the SEC's projected growth.

Ruiz testified that, in estimating space needs of 900,000 square feet for the SEC, the SEC kept non-permanent staff categories "kind of low." Ruiz Testimony Tr. at 65-66. Ruiz testified that contractors "have been, in recent years, historically around 30 to 35 percent of agency – of the fed workforce for us. We calculated it at only 20 percent just to be conservative and not assume, you now, a higher number." *Id.* at 66. Similarly, Sheehan testified that OAS's space calculations were "probably underestimating the number of contractors coming in." March 29, 2011 Sheehan Testimony Tr. at 25.

According to Sheehan, OAS Supv. 4 was responsible for the 20 percent estimate. *Id.* at 26-27, 34. She testified that OAS Supv. 4 "actually looked at data, and that's how he came up with the 20 percent." *Id.* at 34. OAS Supv. 4 testified, however, that it was both he and Sheehan who decided to employ the 20 percent ratio for OAS's space calculation. March 29, 2011 OAS Supv. 4 Testimony Tr. at 28, 77-78. OAS Supv. 4 described how he and Sheehan arrived at that estimate as follows:

> Q: [W]here did you determine that 20 percent was the best number to use [for the contractor ration]?
>
> A: I think in a discussion with Sharon …
>
> …
>
> Q: … How did you come up with 20?

A: ... I think Sharon and I came up with the number.

Q: But how, pick the number out of a hat?

A: It was an estimate. It was an estimate.

Q: But how did you estimate it? Why did you pick 20?

A: It was an estimate. That's all I can say.

Q: Well, okay. Did you and Sharon just sit at the table and say, "What do you think the percentage of contractors here is at headquarters?" "Well, I think it's about 20." Or did you look at any actual numbers of current staffing, historical staffing, staffing requests? Nothing was looked at, just "I think it's about 20"?

A: Contractors are driven by dollars.

Q: Okay. Yes or no? Did you look at any numbers, any data to derive the 20 percent, or was it just an estimate that you guys came up with on your own?

A: We knew that OIT had 70 percent of its workforce as being contractors. ... So that's -- that's kind of how we looked at that, saying it's probably about 20 percent.

Q: Because OIT is 70, so that somehow translates to the rest of the divisions are 20?

A: Well -- and then others. And it goes up and down.

Q: Was OIT going to move to Constitution Center?

A: I don't believe so.

Q: So do you recall looking at any data specifically to come up with the 20 percent?

A: I do not. I do not recall.

Id. at 77-78. The OIG found that although OAS Supv. 4 ignored it, there was abundant data that the contractor ratio was 10 percent.[49]

In early June 2010, Sheehan asked OAS Supv. 4 to work with OAS Supv. 2 Space Management & Mail Operations, and "pull together numbers or factors to represent [fellows, contractors, and interns]." *See* June 8, 2010 E-mail from Sharon Sheehan to OAS Supv. 4, attached as Exhibit 88; *see also* OAS Supv. 2 Testimony Tr. at 22. Accordingly, OAS Supv. 2 sought information from various offices and divisions at the SEC regarding the number of contractors that they employed. *See* June 8, 2010 e-mail from OAS Supv. 2 to OAS Supv. 4. Exhibit 89. On June 8, 2010, OAS Supv. 2 forwarded OAS Supv. 4 the information that he had obtained as of that date. *Id.* OAS Supv. 2 reported that the SEC's two largest divisions, Enforcement and OCIE, employed 73 and 10 contractors, respectively. *Id.* In his e-mail, OAS Supv. 2 brought to OAS Supv. 4 attention the fact that the number of Enforcement contractors (73) was less than the initial information he had received (87). *Id.* OAS Supv. 4 responded, "I feel like I'm losing ground with each piece of addition[sic] information. … We may be in trouble with the contractors." *Id.*

OAS Supv. 2 responded to OAS Supv. 4 concern:

> This is a moving target. We just need to figure out the story that you want to tell and focus on that. The basic numbers don't lie. It's only when you start compartmenting that things break down … We can get there, but I feel there is a specific story that you or Sharon [Sheehan] want to tell and I just am not sure what that is.

Id. During his OIG testimony, OAS Supv. 2 explained his e-mail, "[Y]ou can make the numbers say what you want. And it's really just a matter of, okay, what path are we going down here? And you use those numbers to build the statistics." OAS Supv. 2 Testimony Tr. at 29.

On June 10, 2010, OAS Supv. 2 requested from OIT a "worst case" estimate of OIT contractors at Station Place:

> We are looking at space requirements and I need to get a quick count of how many OIT FTE and OIT Contractors you currently have at [Station Place] and how many of each category (FTE and Contractor) you plan to have at SP

[49] The OIG found that Sheehan had wanted to use a ratio of 30 percent for contractors. *See* June 13, 2010 E-mail from OAS Supv. 2 to OAS Supv. 4; Exhibit 90; March 29, 2011 Sheehan Testimony Tr. at 31-32 ("[W]e also talked about the contractors at … 20 percent would probably in reality be closer to 30 percent.") However, OAS Supv. 4 testified that he and Sheehan discussed the issue and "in our discussion, we felt that … 30 [percent] was too high." March 29, 2011 OAS Supv. 4 Testimony Tr. at 28. OAS Supv. 4 did prepare an alternative spreadsheet that assumed a contractor ratio of 30 percent. *See* Exhibit 91.

> between now and 2012. Please provide this to me as quickly as possible as this impacts what I need to brief Diego [Ruiz] on regarding current and future overall space requirements. Give me your worst case numbers please.

June 10, 2010 E-mail from OAS Supv. 2 to OIT Empl. attached as Exhibit 92. OAS Supv. 2 explained that by asking for "worst case numbers," he was seeking the highest possible estimate. OAS Supv. 2 Testimony Tr. at 37.

On June 12, OAS Supv. 2 informed OAS Supv. 4, "Right now, based on the Contractor numbers I have at [Station Place], I can justify us using a 10%, Contractor to Position, factor." June 12, 2010 E-mail from OAS Supv. 2 to OAS Supv. 4, attached as Exhibit 93. Also on June 12, OAS Supv. 2 asked Branch about asking the SEC Security Branch for "information on Contractors who have badge/full-time access." June 12, 2010 E-mail from OAS Supv. 2 to OAS Supv. 4 attached as Exhibit 94. In this e-mail, OAS Supv. 2 queried:

> What are the numbers that OAS Supv. 5 is looking for on the [Needs Assessment]? We came up with a number, but I heard her tell Sharon [Sheehan] she needed it to be larger.

Id.[50] OAS Supv. 2 testified regarding his understanding of why OAS Supv. 5 needed the number to be larger, "[W]hat I understand she was trying to do was to make sure that whatever size lease she entered into was enough to meet our needs. And I think that in this case, if we were going to take the whole building, the numbers needed to be larger." OAS Supv. 2 Testimony Tr. at 56.

The next day, June 13, OAS Supv. 2 e-mailed OAS Supv. 4 about the data and stated:

> I don't know if [the numbers] get you where they need to be .... If Sharon wants us to use a 30% factor for contractors, that will be a larger number than I have used based on the data I've received on HQ, which is 10%. I've tried to grasp the logic used for getting to our immediate need and I'm just not smart enough to grasp it; so, again, I hope this data gets you where you need to be.

June 13, 2010 E-mail from OAS Supv. 2 to OAS Supv. 4, attached as Exhibit 90.

Ultimately, OAS Supv. 4 and Sheehan ignored all of the data that OAS Supv. 2 had gathered during the first two weeks of June 2010 that indicated the correct contractor ratio was 10

[50] As discussed above, the previous day – June 11 OAS Supv. had sent an e-mail regarding the "[i]mmediate need ... to work up a revised Needs Assessment .... to support the Justification for Unusual and Compelling Authority being used for [the contemplated lease] acquisition." *See* Exhibit 55.

percent. Moreover, as discussed above, when OAS Supv. 4 estimated the amount of rentable square feet needed for the SEC's projected growth, he allotted 400 rentable square feet per position. *See* Section IV.A. The 400 square foot standard he used already incorporated a factor of 10 percent for associated contractors and temporary positions. *Id.* Accordingly, there was no need to add an additional number of contractors to the estimate of permanent new positions for the purpose of calculating the amount of space needed for the SEC's projected growth, because they had already been accounted for in the 400 square foot standard.

OAS Supv. 4 further inflated his calculation of space by adding contractors using a 20 percent ratio. By adding contractors at a 20 percent ratio, a figure arbitrarily established by him and Sheehan and double the actual ratio they had been provided, OAS Supv. 4 added 301 contractor positions[51] to his already overinflated estimate of 1,505 permanent positions,[52] for a total of 1,806 positions.

3. OAS inflated its calculation of the need for additional space at SEC Headquarters by unnecessarily including an estimate of interns and temporary staff in its growth projections and then overestimating the number of those positions by approximately 300 percent.

The OAS estimate of new positions that would need space included an estimate of the number of interns and temporary staff that would be hired in connection with the projected growth in permanent positions. *See* Exhibit 75. The OAS estimate of interns and temporary staff assumed a ratio of 16.5 percent (nine percent for interns and 7.5 percent for temporary staff). *Id.* Similar to OAS's unjustified addition of contractor positions, it was not necessary to include an estimate of these temporary positions in OAS's space calculation, and the 16.5 percent ratio ignored the data from several sources gathered by OAS that the actual ratio was approximately five percent.

OAS Supv. 4 testified that he "recommended a certain percent [for interns and temporary staff] when I was briefing Sharon [Sheehan] and Diego [Ruiz]." March 29, 2011 OAS Supv. 4 Testimony Tr. at 84. According to Ruiz, "[O]n interns and temps I think we likewise went a little low there although I can't remember the specific numbers," as part of "our attempt to just be more on the conservative side." Ruiz Testimony Tr. at 66.

OAS Supv. 4 contradicted Ruiz's testimony that the OAS estimate of interns and temporary staff was "a little low ... to just be more on the conservative side." OAS Supv. 4 testified that he based his estimate on data provided by the SEC's Office of Human Resources ("OHR"): "[OHR] gave us the numbers of interns and temps. And then we came up with what we consider an estimated percentage. ... **And I think it probably**

---

[51] OAS Supv. 4 added 60 contractor positions for FY 2011 base programs; 80 positions for FY 2011 Dodd-Frank programs; 81 positions for FY 2012 base programs; and 80 positions for FY 2012 Dodd-Frank programs. *See* Exhibit 75. [60 + 80 + 81 + 80] = 301.

[52] *See* Section IV.C.1, above.

was a little more than what they gave us or ... somewhere in the ballpark." March 29, 2011 OAS Supv. 4 Testimony Tr. at 79-80 (emphasis added). OAS Supv. 4 could not explain why he used an estimate that was higher than the data provided by OHR. *Id.* at 81.

In fact, the OIG found that OAS Supv. 4 estimate of interns and temporary staff positions was not merely "a little more" than what OHR provided; it was approximately 300 percent more. On July 16, 2010, OHR Empl., a management program analyst in OHR, e-mailed OAS Supv. 4 "the [peak] numbers [for interns and temporary staff] we discussed earlier this afternoon" for FYs 2005 to 2010. July 16, 2010 E-mail from OHR Empl. to OAS Supv. 4, attached as Exhibit 95.[53] OHR Empl. told the OIG that she recalled OAS Supv. 4 had called her because "he wanted to know how to come up with the number of interns ... and how many temporaries we had." OHR Empl. Interview Tr. at 4. For the six fiscal years of data that OHR Empl. provided, the ratio of peak interns and temporary staff to permanent staff ranged from approximately four to seven percent.[54] *See* Exhibit 95. The ratio in FY 2010 was approximately five percent of peak staff – less than one-third of the 16.5 percent ratio that OAS Supv. 4 ultimately used. *Id.*

As discussed above, OAS Supv. 4 estimated the amount of rentable square feet needed for the SEC's projected growth by allotting 400 rentable square feet per position. *See* Section IV.A. The 400 square foot standard itself already incorporated a factor of 10 percent for associated contractors, interns, and temporary staff. *Id.* Accordingly, there was no need to add interns and temporary staff positions to the estimate of permanent new positions for the purpose of calculating the amount of space needed for the SEC's projected growth. By doing so, OAS Supv. 4 added 248 positions[55] to his already overinflated estimate of 1,806 permanent positions[56] for a total of 2,054 positions.

4. OAS inflated its calculation of the need for additional space at SEC Headquarters by unnecessarily adding an "inventory" factor to its calculations and then doubling its own standard for that factor.

OAS Supv. 4 space needs chart also increased the amount of space requirement for every person to be hired in FY 2011, FY 2012, and FY 2013 by 10 percent for "inventory." Exhibit 75. OAS Supv. 4 testified that inventory is "vacant offices you have for expansion and unanticipated growth, that kind of thing." March 29, 2011 OAS Supv. 4

---

[53] OAS Supv. 4 testified that he thought Sheehan had directed him to get the data from OHR Empl. March 29, 2011 OAS Supv. 4 Testimony Tr. at 85-86.

[54] The data OHR Empl. provided OAS Supv. 4 was presented in a column titled "Peak Temporaries." *See* Exhibit 95. OHR Empl. told the OIG that the "Peak Temporaries" data included both temporaries and paid interns. OHR Empl. Interview Tr. at 4, 7. OHR Empl. e-mail to OAS Supv. 4 actually referenced "the intern program" (*see* Exhibit 95), and OAS Supv. 4 acknowledged in testimony that he had understood the "Peak Temporaries" data provided by OHR Empl. "probably" included interns. March 29, 2011 OAS Supv. 4 Testimony Tr. at 84-85.

[55] OAS Supv. 4 added 25 intern and 25 temporary staff positions for FY 2011 base programs; 36 intern and 30 temporary staff positions for FY 2011 Dodd-Frank programs; 36 intern and 30 temporary staff positions for FY 2012 base programs; and 36 intern and 30 temporary staff positions for FY 2012 Dodd-Frank programs. *See* Exhibit 75. [25 + 25 + 36 + 30 + 36 + 30 + 36 + 30] = 248.

[56] *See* Section IV.C.2, above.

Testimony Tr. at 69. OAS Supv. 4 described it as "standard for the industry" to add between eight and 13 percent for "inventory." *Id.* at 69-70.

However, as discussed above, OAS Supv. 4 estimated the amount of rentable square feet needed for the SEC's projected growth by allotting 400 rentable square feet per position. *See* Section IV.A. The 400 square foot standard itself incorporated an inventory factor of five percent. *Id.* Accordingly, there was no need to add another 10 percent inventory factor (which was double the five percent factor already included) to the estimate of new positions for the purpose of calculating the amount of space needed for the SEC's projected growth. By doing so, OAS Supv. 4 added 150 inventory positions[57] to his already overinflated estimate of 2,054 positions[58] for a total of 2,204 positions.

5. OAS inflated its calculation of the need for additional space at SEC Headquarters by arbitrarily adding positions for FY 2013 to its growth projections.

According to OAS Supv. 4 and Sheehan, their space calculation was based solely on OFM's projections for growth. January 28, 2011 OAS Supv. 4 Testimony Tr. at 43; February 8, 2011 Sheehan Testimony Tr. at 117. OAS Supv. 4 testified emphatically:

> [W]e didn't act on anything until we got the numbers. ... We planned on the basis of what came from OFM on 2011, 2012, and Dodd-Frank. That's what we acted on. **We didn't act on anything else. We didn't have a basis for acting on anything else.**

January 28, 2011 OAS Supv. 4 Testimony Tr. at 43 (emphasis added). However, the OIG found that the OAS estimate of new positions that would need space included an assumption that, in FY 2013, the SEC's appropriation would increase by 50 percent of the agency's FY 2012 budget request. *See* Exhibit 75.

This assumption was arbitrary and unsupportable. OAS Supv. 4 explained the basis for the assumption as follows: "We were trying to be strategic, and we just basically divided the base year by half just to see if we could project some space requirements." March 29, 2011 OAS Supv. 4 Testimony Tr. at 68. OAS Supv. 4 elaborated:

> Sharon [Sheehan] and I suggested that we look ahead to come up with at least some projection for the future ... I think Sharon and I agreed that we just split the budget year for 2012 in half just as a – just to project – and again, so

---

[57] OAS Supv. 4 added 30 inventory positions for FY 2011 base programs; 40 positions for FY 2011 Dodd-Frank programs; 40 positions for FY 2012 base programs; and 40 positions for FY 2012 Dodd-Frank programs. *See* Exhibit 75. [30 + 40 + 40 + 40] = 150.

[58] *See* Section IV.C.3, above.

> that we would book a little bit more in the future, not be looking for space again.

Id. at 69.

Sheehan, however, testified that she did not know who added the FY 2013 assumption to the OAS projections or their basis for doing so. February 8, 2011 Sheehan Testimony Tr. at 149. Specifically, Sheehan testified:

> Q: And then there's four asterisks, and it said "estimated at half of the budget request for 2012." ... What do you understand to be the reason that that was the methodology used to project for fiscal year 2013?
>
> A: I don't know.
>
> Q: And who –
>
> A: I don't know.
>
> Q: Who came up with that idea?
>
> A: I'm not sure. I -- I think that that would be a question for [redacted]. He runs the numbers and works with [redacted] and OFM.
>
> Q: Okay.
>
> A: They may have had a discussion. I don't know.

Id.

As further evidence of it being arbitrary and unsupported, the OIG found that OAS's inclusion of its FY 2013 assumption was contrary to the SEC's planning and budget process. According to Johnson, the SEC does not plan for personnel growth more than two years ahead. Johnson testified:

> Q: And so, formally speaking, how does the SEC project future growth in its personnel? How does that process work?
>
> A: ... So starting around this time each year, we need to start planning for two years out. And so this is part of what is called our authorization request, which is required by law.

Johnson Testimony Tr. at 13.

More specifically, Johnson testified concerning conversations with Ruiz in July 2010:

> Our expectation, and Diego [Ruiz] and I were of the same mind about this, that if there was a change in control of one or both houses to a party that was less favorably disposed to growth or federal spending, still the likely outcome would have been that ... the House and Senate have already agreed on what the [funding] number is in the committees, and that something would have passed in a lame duck session before the next Congress would have taken control. ...
>
> [T]hat was our best guess for 2011. And then certainly all bets are off for 2012, 2013, and that process hadn't played out.

Id. at 68-70. Similarly, Gillan testified that "we collectively thought that ... our budget outlook looked pretty positive ... for the following fiscal year. We did recognize that it would probably – at some point the pendulum would stop swinging in that direction, but we thought we had at least another fiscal year." Gillan Testimony Tr. at 22.

Based on the FY 2013 assumption, OAS Supv. 4 assumed that the SEC would add another 202 permanent positions that year and again assumed that all of those positions would be allocated to SEC Headquarters. *See* Exhibit 75. After making the same unfounded additions, discussed above, for contractors and other temporary personnel, OAS Supv. 4 added a total of 295 positions[59] for FY 2013 to his already overinflated estimates of 2,204 positions[60] for FYs 2011 and 2012 for a total of 2,499 positions.

D. OFM's Growth Projections Supported a Need to Lease Only Approximately 300,000 Square Feet

As discussed above in Section IV.B, based on OFM's projections for FY 2011 and FY 2012, the SEC may have needed additional space at Headquarters for 886 permanent positions. In July 2010, there was vacant space at Station Place to accommodate 164 of those positions,[61] leaving 722 positions to accommodate by leasing

---

[59] OAS Supv. 4 added 40 contractor positions for FY 2013 base programs; 20 positions for inventory; 18 positions for interns; and 15 positions for temporary staff. *See* Exhibit 75. [202 + 40 + 20 + 18 + 15] = 295.

[60] *See* Section IV.C.4, above.

[61] *See* Exhibit 75.

additional space. Consequently, using the 400 square feet per person standard as it was intended, the SEC had a need for 288,800 square feet.[62]

The 400 square foot standard included a contractor, intern and temporary staff factor of 10 percent based on the staffing in regional offices. As discussed above, OAS data indicated that factor might be as high as 15 percent at Station Place (10 percent for contractors and five percent for interns and temporary staff). Similarly, as discussed above, the 400 square foot standard included an inventory factor of five percent but OAS had decided to employ an inventory factor of 10 percent for SEC Headquarters. Accordingly, it may have been reasonable to adjust the space calculation for Headquarters by 10 percent (an additional five percent for contractors, interns and temporary staff and an additional five percent for inventory). That adjustment would result in a space need of 317,680 square feet.[63]

However, OAS Supv. 4 used his overinflated estimate of 2,499 positions to calculate a space need of 934,000 square feet.[64] OAS Supv. 4 presented his calculations in a spreadsheet that he discussed with Ruiz and Sheehan on July 20, 2010. *See* Exhibit 75; March 29, 2010 OAS Supv. 4 Testimony Tr. at 26. OAS Supv. 4 testified that he used his spreadsheet to brief Ruiz on "the numbers, my methodology, and what the strength requirements were," and that he understood that Ruiz was then going to use this information to brief the Chairman. March 29, 2010 OAS Supv. 4 Testimony Tr. at 26-27.

Ruiz acknowledged that he had reviewed and discussed OAS Supv. 4 spreadsheet and the underlying assumptions. Ruiz Testimony Tr. at 60. Ruiz testified that "we all poked and prodded and tried to get comfortable with the numbers that we used [to arrive at the 900,000 square-foot space need], given the uncertainty inherent in where we were deriving them from. ... We looked at these numbers a lot and kicked them around a lot."[65] *Id.* at 64-65. Sheehan also acknowledged that she had "many discussions" about

---

[62] [(886 – 164) x 400] = 288,800.

[63] [288,800 x 1.1] = 317,680.

[64] *See* Exhibit 75. OAS Supv. 4 subtracted the 164 positions that Station Place could accommodate to arrive at a purported need for space to accommodate the remaining 2,335 positions. [2,335 x 400] = 934,000.

[65] During one meeting in mid-June 2010, attended by Ruiz, Sheehan, OAS Supv. 4 and OAS Supv. 5 OAS Supv. 4 attempted to explain the methodology for his growth projections. *See* Exhibit 96; June 9, 2009 E-mail from OAS Supv. 4 OAS Supv. 4 to OAS Supv. 2 attached as Exhibit 97. During this meeting, OAS Supv. 5 made the following notes regarding Ruiz's reaction:

> -- frustrated still grappling w/ #s
>
> -- don't understand the methodology ...
>
> -- need to be consistent in data
>
> -- don't know what #s to trust?

Exhibit 96.

OAS Supv. 4 spreadsheet and the underlying assumptions.[66] March 29, 2010 Sheehan Testimony Tr. at 20.

OAS Supv. 4 spreadsheet clearly illustrated that the purported need for 934,000 square feet was based on all of the false assumptions discussed above – *i.e.*, that all of the SEC's growth for the next three fiscal years would occur at SEC Headquarters;[67] that there would be 36.5 contractors, interns and temporary staff for every 100 permanent positions, and that each one of them would utilize 400 square feet;[68] that in addition to the five percent inventory factor included in the 400 square foot standard, the SEC needed an additional 10 percent reserved for inventory; and that the SEC would receive an increase in its appropriation for FY 2013 equal to one-half of the FY 2012 increase. *Id.*

E. The Executive Director Used OAS's Grossly Inflated Estimate as the Basis for His Representation to the Chairman that Constitution Center was the Only Building that Could Accommodate the SEC's Projected Growth

On Friday, July 23, 2010, Ruiz met with Chairman Schapiro, Nisanci, and Gillan to recommend that the SEC lease 900,000 square feet of space at Constitution Center.

OAS Supv. 5 testified that Ruiz "was giving OAS Supv. 4 a bit of run for his money, frustrated that the numbers weren't telling him what he needed him to tell him … [I]t was kind of a convoluted presentation as I recall, and Diego [Ruiz] was frustrated." January 31, 2011 OAS Supv. 5 Testimony Tr. at 155-156. Ruiz testified that OAS Supv. 5 notes may have referred to his "uncertainty" in one of his meetings with OAS as to what "the specific source" of the numbers was, "[a]nd it was not clear to me what was being counted and what was not." Ruiz Testimony Tr. at 48. Sheehan testified that Ruiz was concerned "that the numbers continued to move," and that she shared this concern. February 8, 2011 Sheehan Testimony Tr. at 147.

[66] One week before that briefing, OAS Supv. 4 e-mailed Sheehan a chart labeled "Headquarters Projections" with many of the miscalculations and false assumptions used to recommend to the Chairman that the SEC lease 900,000 square feet of space at Constitution Center. July 13, 2010 E-mail from OAS Supv. 4 to Sharon Sheehan, attached as Exhibit 87. In the e-mail accompanying this chart, OAS Supv. 4 asked Sheehan, "Will you have some time tomorrow to help with a sanity check on the attachment? I know time is of the essence." *Id.* OAS Supv. 4 testified that Sheehan and he then met and "[w]e went over the numbers and where they came from and all of that." March 29, 2010 OAS Supv. 4 Testimony Tr. at 87. Sheehan acknowledged that she had reviewed and discussed this chart with OAS Supv. 4 March 29, 2010 Sheehan Testimony Tr. at 35.

[67] Ruiz testified that he understood that some of the numbers being used to calculate the SEC's space needs in Washington, DC were from the OFM nationwide projections. Ruiz Testimony Tr. at 61-63. However, when asked if he understood the space calculation need for 900,000 square feet of space was based in part on the assumption that all 800 Dodd-Frank positions would be located in Washington, DC, Ruiz replied, "I'm not sure. I'm not sure if I did." *Id.* at 63-64.

[68] The assumption in OAS Supv. 4 calculation that each contractor, intern and temporary employee would utilize the same amount of space as a permanent employee was another unfounded and incorrect factor that contributed to the gross overestimation of the SEC Headquarters space needs. Sheehan acknowledged that SEC contractors "aren't in a 150 or 300 square foot office. They're in cubicles, some eight-by-six, some eight-by-eight, some eight-by-tens. … So that 400 [square foot per person standard] may work for FTE, but it may not work for contractors." February 8, 2011 Sheehan Testimony Tr. at 89-90. OAS Supv. 2 testified that "very few" SEC contractors even have offices. OAS Supv. 2 Testimony Tr. at 54. OAS Supv. 4 acknowledged that interns do not use as much office space as professional staff. March 29, 2011 OAS Supv. 4 Testimony Tr. at 81.

July 23, 2010 E-mail From Diego Ruiz to Sharon Sheehan, attached as Exhibit 98; Ruiz Testimony Tr. at 75.[69] The day before Ruiz's meeting with Chairman Schapiro and her staff, Sheehan e-mailed Ruiz, "When you talk with the Chairman, please highlight that we are in a competition with other agencies for [Constitution Center]. It's the only facility on the market in DC that can accommodate our growth." July 22, 2010 E-mail from Sharon Sheehan to Diego Ruiz, attached as Exhibit 99. The day of Ruiz's meeting with the Chairman, OAS Supv. 5 received an e-mail from DNA stating that it expected to submit a Final Revised Proposal to GSA for a possible lease of space at Constitution Center to NASA "not long [after]" August 5, 2010. July 23, 2010 E-mail from OAS Supv. 5 to Sharon Sheehan, attached as Exhibit 100. OAS Supv. 5 forwarded this e-mail to Sheehan and wrote, "Urgency is required." *Id.*

Ruiz testified that at his meeting with the Chairman and her staff, "we went through the numbers for the 2012 request, the projections for the space need, the fact that the buildings that we had been discussing up until that point [other than Constitution Center] were in the 250 to 300,000 square feet range." Ruiz Testimony Tr. at 75. Ruiz also testified that this meeting included a discussion of "the likelihood of the 2011 appropriation, the markup numbers." *Id.* at 75-76.

Ruiz testified that he recommended that the SEC enter into a lease for 900,000 square feet at Constitution Center, and that the Chairman approved this recommendation. *Id.* at 76. Ruiz did not recall Chairman Schapiro or her staff asking any questions at the meeting. *Id.* Ruiz testified that, in this meeting, he conveyed urgency in making a decision quickly because Constitution Center was "the only one in town that had the requisite amount of space, and it was, at the time ... participating in several other leasing competitions with other agencies. And so there was some urgency presented by the fact that it might get snatched up." *Id.* at 77.

Chairman Schapiro testified regarding the July 23rd meeting with Ruiz:

> I remember explicitly being told there really wasn't any other space available that could fulfill our needs and that there was a time – a sense of we were about to lose this. We had lost other space that we had apparently indicated an interest in and that we were about to lose this. So there was a sense of urgency on their part.

Id. at 14.

[69] Sheehan testified, "I told [Ruiz] how much space he would ... have to have to house that many contractors and FTE, explained to him that the only facility in town that could house them all in one location was Constitution [Center]. I gave him the information. He went to [the Office of the Chairman] to brief it." February 8, 2011 Sheehan Testimony Tr. at 168.

Gillan recalled the July 23, 2010 meeting with Ruiz and its genesis as follows:

> Diego [Ruiz] came in to me and said that he needed to see Mary [Schapiro] quickly because he needed to make a quick decision on Constitution Center. That the other possible space opportunities had evaporated, gone to others, were no longer available. And that this one was really all that was left and that we needed to act quickly.
> ...
> I walked him into [Chairman Schapiro's] office to see if she had time. She did, and we had a very brief meeting.

Gillan Testimony Tr. at 13-14.

Gillan estimated that the meeting lasted approximately ten minutes. *Id.* Gillan testified that Ruiz represented in this meeting that there was "an immediate need to make a decision. All the other options that we had previously discussed ... weren't on the table anymore. And [the] representation that he thought [leasing 900,000 square feet of space at Constitution Center] was a good thing that we should do ... quickly." *Id.* at 14-15. Gillan testified that, although Ruiz had documents with him to which he referred in this meeting, Ruiz did not share any of the documents with anyone else at the meeting. *Id.* at 15. Gillan testified that Chairman Schapiro's response to Ruiz's recommendation to lease 900,000 square feet of space at Constitution Center was, in substance, "Well, if that's what we need to do, I guess we need to do it." *Id.* at 27.

Gillan testified that Ruiz did not explain in the July 23, 2010 meeting, or at any other time, that his assertion that SEC Headquarters needed an additional 900,000 square feet was predicated, in part, on the assumption that all of the agency's new positions in FY 2011 and FY 2012 would be allocated to Headquarters. *Id.* at 17. Gillan testified that, "[I]n fact, that's inconsistent with what I had understood, because ... [Chairman Schapiro] specifically said that, to the extent possible, she wanted new hires to go to the regions. *Id.* Gillan explained that Enforcement "was planning to [add] some headquarter employees, but mostly in the region[s]. And OCIE was planning to have almost all of their new hires in the regions." *Id.* at 18.

Gillan also testified that Ruiz did not explain in the July 23, 2010 meeting, or at any other time, that his assertion that SEC Headquarters needed an additional 900,000 square feet was predicated, in part, on OAS's projections of significant growth in FY 2013. *Id.* at 18-19. Similarly, Gillan testified that it was never conveyed to her or, to her knowledge, Chairman Schapiro, that Ruiz's assertion that SEC Headquarters needed an additional 900,000 square feet included a 36.5 percent factor for contractors, interns and temporary positions (although Gillan did understand that the 900,000 square feet was designed to accommodate permanent and contractor positions). *Id.* at 19-20.

Reflecting on the fact that Ruiz's recommendation was predicated on those assumptions, Gillan testified:

> Q: [D]o you think that, if you knew then some of the things that we've talked about today in terms of [OAS and the Executive Director] not taking such a conservative approach, sort of inflating the numbers, assuming all the positions were in Washington, DC. If you ... and the Chairman had been given that information, you might have come to a different decision going forward with the Constitution Center lease?
>
> A: I think it's quite certain that we would have.

Id. at 28-29. Gillan emphasized that, "[W]e relied on the square footage that was being represented as necessary. As truly being necessary, documentable, legitimate. ... We thought that those people whose job it is to do these things were ... taking steps necessary to minimize the risk." *Id.* at 32.

On July 23, 2010, at 3:06 p.m., Ruiz sent an e-mail to Sheehan, OAS Supv. 4 and OAS Supv. 5 stating, "Met with Chairman this morning, and we have her approval to move forward." Exhibit 98.

F. Contrary to Representations Made in the Meeting With the Chairman, There Was No Urgency to Lease Space Sufficient to Accommodate the SEC's Projected Growth

On July 23, 2010, when Ruiz represented to the Chairman that (1) Constitution Center was the only building in Washington, DC that could accommodate the SEC's projected growth and (2) the SEC had to act fast or Constitution Center might soon not have sufficient space because of other agencies' interest in the building, the OIG found there were actually two buildings within walking distance of Station Place that could have accommodated the new positions projected by OFM during FY 2011 and FY 2012. In addition, as discussed below, Constitution Center itself would have remained an option for months to accommodate that projected growth.

As discussed above, the SEC needed 288,800 square feet to accommodate the FY 2011 and FY 2012 growth projected by OFM. In July 2010, there were two buildings within walking distance of Station Place, Sentinel Square and 1100 1st Street, NE, with over 288,800 square feet of available space.[70] Moreover, both of these properties offered the ability to accommodate additional expansion in the future.[71]

---

[70] Both of these buildings had been identified by OAS Supv. 5 in May 2010 as options for SEC expansion. *See* June 2, 2010 Market Survey Information, attached as Exhibit 60. They were two of the four buildings that

Sentinel Square

Sentinel Square is located at 90 K St., NE, three blocks from SEC Headquarters. *See* Exhibit 60. The building has been described as meeting "Level IV security protocols and is expected to get a Gold Leadership in Energy and Environmental Design." Tierney Plumb, *NoMa's 90 K St. NE lands Customs Agency,* Washington Business Journal, June 30, 2010, attached as Exhibit 101.

In June 2010, OAS Supv. 5 and other SEC managers toured the Sentinel Square building with Thomas Finan, the Managing Director of the Trammell Crow Company, Sentinel Square's owner. *See* Finan Interview Memorandum. During this tour, Finan explained to OAS Supv. 5 that the Sentinel Square property included a planned second phase and that, consequently, in addition to the 291,000 square feet of space immediately available to the SEC, there was another approximately 290,000 square feet of space that could be available two years later. *Id.*[72]

On July 7, 2010, Finan wrote in an e-mail to OAS Supv. 5

> I thought I should reach out to you to let you know that you may see some press/ads on two deals at 90 K Street this and next week; specifically, the 85,000 sq. ft. Customs & Border Protection and 36,438 sq. ft. US Parole Commission deals. More importantly, I want to confirm for you that these are the two deals that we discussed as "pending" when we toured the property just after Memorial Day. As such, neither of these deals has reduced the amount of space that I currently have available at 90 K Street for SEC's consideration (still ~292k sq. ft.)

July 7, 2010 E-mail from Tom Finan to OAS Supv. 5 attached as Exhibit 102.

OAS Supv. 5 had presented as options during her June 17, 2010 presentation to the Chairman, discussed above. Also, as discussed above, the Chairman had expressed at the meeting her preference for any expansion at SEC Headquarters to be within walking distance of Station Place.

OAS Supv. 4 testified that Constitution Center was the only feasible option for the SEC because it was the only building identified in the SEC's survey that could deliver the swing space required by the SEC in less than one year. January 28, 2011 OAS Supv. Testimony Tr. at 93-94. OAS Supv. 4 testimony is contradicted by the results of the OAS market survey, which indicated that Sentinel Square and 1100 1st Street, NE could deliver the swing space OAS required immediately or in a matter of weeks. *See* Exhibit 60.

[71] Chairman Schapiro testified that, if she had been aware when she approved Ruiz's recommendation to lease Constitution Center that there were other buildings within walking distance of the SEC where the agency could have leased approximately 300,000 square feet with the option to lease additional space in the future, she "without a doubt" would have considered those alternatives. Schapiro Testimony Tr. at 16.

[72] The planned phase two at Sentinel Square that would create another 290,000 square feet was also noted in a June 30, 2010 *Washington Business Journal* article. Exhibit 101.

Nine days after receiving Finan's e-mail, on July 16, 2010, OAS Supv. 5 e-mailed Sheehan and OAS Supv. 4 that, "We lost most of the other new building downtown at 90 K Street [Sentinel Square]. Customs and Border Control took 85,000 SF." July 16, 2010 E-mail from OAS Supv. 5 to Sharon Sheehan and OAS Supv. 4, attached as Exhibit 103. Then on July 19, 2010, OAS Supv. 5 e-mailed OAS Supv. 2 and OAS Supv. 4 and stated, "We already lost 1100 1st Street and 90 K Street (the two new buildings in the neighborhood)."[73] July 19, 2010 E-mail from OAS Supv. 5 to OAS Supv. 2 attached as Exhibit 104.

On July 21, 2010, Finan reiterated in an e-mail to OAS Supv. 5 that, "The two deals in the press recently were the two I mentioned as 'pending' when we toured the building together – specifically, Customs & Border Protection (85,000 [square feet]) and US Parole Commission (36,000 [square feet]).... this still leaves us with 291,000 [square feet] remaining on floors 1, 2, and 6-12." July 21, 2010 E-mail from OAS Supv. 5 to Tom Finan, attached as Exhibit 105.

OAS Supv. 5 July 16 and 19, 2010 e-mails are puzzling because if she understood the SEC's Headquarters to need an additional 280,000 to 315,000 square feet as she had represented to Chairman Schapiro on June 17, 2010, (*see* Exhibit 57), Finan had clearly told her that the Customs and Border Control's lease did not change the availability of Sentinel Square to meet the SEC's needs. On the other hand, if OAS Supv. 5 understood that the SEC needed approximately 900,000 square feet as OAS Supv. 4 was calculating at that time, (*see* Exhibit 75), then Sentinel Square was not an option regardless of the Customs and Border Control's 85,000 square foot lease.[74]

1100 1st Street, NE

A November 8, 2010 press release described the newly-constructed building at 1100 1st Street, NE as follows:

> Located two blocks from the New York Avenue Metro station on the Red Line, the 12-story building at 1100 First Street has achieved LEED Gold Certification. NoMa's first all-glass building offers floor-to-ceiling glass windows, three levels of below-grade parking, an on-site fitness facility and an outdoor plaza. Designed by Krueck and Sexton, **1100 First Street is the first of a two-phase project that will total approximately 705,000 square**

[73] Also on July 19, 2010, OAS Supv. 5 e-mailed OAS Empl. 2 information regarding the terms of the Custom and Border Control's lease at Sentinel Square and stated, "Looks like a pretty decent deal." Exhibit 106. OAS Empl. 2 responded, "Looks very good!" *Id.*

[74] OAS Supv. 5 may have not wanted to consider Sentinel Square as an option for the agency's expansion due to a personal distaste for the building or Finan. On June 8, OAS Supv. 5 wrote in an e-mail to OAS Empl. 2 "Tom Finan (Trammel Crow) for 90 K Street called to follow up and inquire more into our timing (as he has other proposals). Blech! ... I wouldn't reach out unless we needed something." June 8, 2010 E-mail from OAS Supv. 5 to OAS Empl. 2 attached as Exhibit 107.

> **feet. The second phase will include an identical mirror building on the adjacent parcel.**

"Veterans Affairs Signs Lease with Tishman Speyer in NoMa," November 8, 2010 NoMa Business Improvement District Press Release, attached as Exhibit 108 (emphasis added).

On July 12, 2010, OAS Supv. 5 e-mailed OAS Supv. 4 and Sheehan that 1100 1st Street, NE "is out of the competition for us [due to recent leasing activity for approximately 100,000 square feet] ... rendering it unable to meet our requirement, should we come back on line." July 12, 2010 E-mail from OAS Supv. 5 to Sharon Sheehan and OAS Supv. 4, attached as Exhibit 109. However, according to Daniel Dooley, Managing Director, Tishman Speyer Properties – the owner of 1100 1st Street, NE – there was approximately 320,000 square feet of space available as of July 31, 2010. *See* Dooley Interview Memorandum. Moreover, that amount of space remained available until approximately two weeks after Labor Day. *Id.*

Constitution Center

As discussed below, the SEC negotiated the contract for 900,000 square feet at Constitution Center in three business days, signing the contract on July 28, 2010. On July 27, 2010, the SEC staff involved in that negotiation discussed the fact that they had "no bargaining power" because "Sharon [Sheehan] wants this signed tomorrow." *See* July 27, 2010 E-mail from OAS Supv. 5 to OGC Atty 2 and OGC Atty 1, attached as Exhibit 110. As discussed below, the OAS staff's sense of urgency was due solely to their fear that NASA, which was in discussions with DNA regarding a potential 605,000 square foot lease, would sign such a lease before the SEC, leaving only approximately 800,000 available square feet at Constitution Center. Apparently, that result would have been unacceptable to Sheehan.[75]

However, apparently OAS understood that NASA could not have had signed a lease for space at Constitution Center before September 2010. On July 19, 2010, OAS Supv. 5 e-mailed OAS Supv. 4, "Revised proposals were sent by Constitution [Center] to GSA last week on the NASA deal (605,000 SF), with [Department of Homeland Security] (900,000+ SF) still out there ([solicitations for offers] out). **[Best and final offers] are expected by**

---

[75] On July 2, 2010, OAS Supv. 5 e-mailed Sheehan that "the nicer quadrant" at Constitution Center "is being offered to NASA (they may or may not win)." July 2, 2010 E-mail from Sharon Sheehan to OAS Supv. 5 and OAS Supv. 4 attached as Exhibit 111. Sheehan responded, "This stinks. There's nothing we can do at this point." *Id.* When Sheehan learned in September 2010 that another agency was interested in approximately 225,000 of the remaining 500,000 square feet at Constitution Center and that the SEC might not be prepared to exercise its right of first refusal in order to prevent that development, she chastised OAS Supv. 5 "This absolutely is NOT how it was explained to me at the time we agreed to take [Constitution Center]." September 18, 2010 E-mail from Sharon Sheehan to OAS Supv. 5 and OAS Supv. 4, attached as Exhibit 112. OAS Supv. 5 testified that "Sharon was always hoping that we wouldn't have anybody else in the building. That we would be able to ultimately justify the need for the whole building or something." January 31, 2011 OAS Supv. 5 Testimony Tr. at 178.

mid August on the NASA deal, with award in September."[76] Exhibit 104 (emphasis added). More importantly, if the SEC had been seeking no more space than was reasonably necessary to accommodate the growth projected by OFM for FY 2011 and FY 2012, according to the owner of Constitution Center, the SEC probably had "months" before that space became unavailable at Constitution Center. Jaroch Interview Memorandum at 1.

G. The SEC Signed an "Un-Negotiated" Contract for 900,000 Square Feet at Constitution Center Five Days after Receiving the Chairman's Approval

As discussed above, at 3:06 p.m. on Friday, July 23, 2010, Ruiz informed Sheehan and OAS Supv. 5 that the Chairman had given the staff approval to begin negotiating a lease for 900,000 square feet at Constitution Center. On Sunday, July 25, 2010, OAS Supv. 5 e-mailed OGC Atty 2 "We received Chairman approval for the DC project. ... Need to move really fast. ... My concern is losing the building to GSA for NASA, as [best and final offers] are being requested next week. I feel a strong need to lock it down while our lease details are worked out." July 25, 2010 E-mail from OAS Supv. 5 to OGC Atty 2 attached as Exhibit 113. Negotiations ensued at a rapid pace.

On Tuesday, July 27, 2010, Timothy Jaroch, DNA Managing Partner, e-mailed OAS Supv. 5 "I'll ...email you my draft Term Sheet shortly ... The draft does not have the extensive reference to FAR that your draft Letter Contract does, but that's more a product of my trying to move at warp speed, so please feel free to add in whatever you feel is appropriate." July 27, 2010 E-mail from OGC Atty 1 to OAS Supv. 5 attached as Exhibit 110. OAS Supv. 5 responded, "My draft contract letter at least got me a pretty guaranteed market rate (which I have to have), by referencing the NASA [solicitation for offers]. I would assume you would give me as good of a rate and likely better for taking more space, right?" *Id.*

However, due to the perceived "[n]eed to move really fast" to avoid "losing the building" to NASA, OAS Supv. 5 did not insist that the SEC be given the same terms as GSA had negotiated in connection with a possible NASA lease at Constitution Center. *Id.* On July 27, 2010, OAS Supv. 5 informed OGC Atty 2 and OGC Atty 1 [77] "[DNA is not] going to give me the NASA deal. I can query them about it, but I don't think I have much leverage there. ... How can I get the NASA deal? I don't see it happening and Sharon wants this signed tomorrow." Exhibit 110. OGC Atty 1 responded:

> Just looking for their best price. If we can't get it .... As long as we document it is a fair price. I don't see why we

[76] Timothy Jaroch, DNA Managing Partner, confirmed that in July 2010, there were no other interested agencies, including the Department of Homeland Security, that could have signed a lease before the SEC or NASA. Jaroch Interview Memorandum at 1.

[77] OGC Atty 2 and OGC Atty 1 are the Office of General Counsel attorneys responsible for legal issues relating to SEC leases in the Washington, DC area. *See* July 12, 2010 E-mail from OAS Supv. 5 to OAS Supv. 1 attached as Exhibit 114; OGC Atty 2 Testimony Tr. at 8; OGC Atty 1 Testimony Tr. at 8-10.

> can't finish documents tomorrow their offer isn't that bad but doing deal this quickly with no bargaining power . . . It will be headaches later. Guess it can't be avoided.

(ellipses in original). *Id.* OAS Supv. 5 replied:

> We should discuss how to best mitigate the future headaches. I think it will be a decent deal, given all they have to offer in that building. It far outshines [Station Place], and the offered rent, un-negotiated, is less than what we pay at [Station Place].

Id.

On Wednesday, July 28, 2010, OAS Supv. 5 e-mailed Jaroch, "The term sheet as you provided did not seem to fully bind us and our intent is to fully bind us on this space for the SEC." July 28, 2010 E-mail from OAS Supv. 5 to Tim Jaroch, attached as Exhibit 115. Later that day, OAS Supv. 5 and Jaroch executed the contract committing the SEC to lease 900,000 square feet of space at Constitution Center. July 28, 2010 Letter Contract ("Letter Contract"), attached as Exhibit 116.[78] Johnson testified that when Sheehan informed him that the SEC had signed the Letter Contract, she told him that it was a "very nice building," that "there had been a lot of other bidders," and that "we ... should count ourselves very fortunate and glad to have been the winner." Johnson Testimony Tr. at 63.

OAS Supv. 5 testified that she was "a little bit" concerned at the speed of the contract negotiations, and that "obviously whenever you do a sole source anything, you have less bargaining power than when you have got all kinds of time and competition." January 31, 2011 OAS Supv. 5 Testimony Tr. at 165, 176. Regarding the pace of the negotiations, OAS Empl. 2 testified, "I was concerned. I absolutely was concerned. ... [W]e were moving at like lightning speed for a huge amount of space." OAS Empl. 2 Testimony Tr. at 68. OAS Empl. 2 testified that OAS Supv. 5 "bore the brunt of the pressure ... [v]isibly – I'd go in there, and some days she, you know, either wanted to cry or wanted to pull her hair out or whatever." *Id.* at 70. OGC Atty 2 acknowledged that the speed at which the Constitution Center lease was negotiated was "certainly unusual ... in comparison to a normal fully competed lease ..." OGC Atty 2 Testimony Tr. at 15.

The Letter Contract stated that the SEC has "a requirement of unusual and compelling urgency to obtain approximately 900,000 rentable square feet ... of additional headquarters space in Washington, DC." Exhibit 116 at 1. The contract set a multiphase delivery schedule in which Phase 1, approximately 350,000, would be delivered no later

[78] OGC Atty 2 and OGC Atty 1 testified that they reviewed the Letter Contract before it was signed. OGC Atty 2 Testimony Tr. at 21; OGC Atty Testimony Tr. at 25. Ruiz testified that the Chairman's office was not apprised of the negotiations for Constitution Center. Ruiz Testimony Tr. at 78-79; Gillan Testimony Tr. at 24.

than September 2011; and Phase 2, approximately 550,000, would be delivered no later than September 2012. *Id.*, Attachment 1 at 2. The contract stated that "the SEC's interests require that [DNA] be given a binding commitment so that the space required will be committed to the SEC and initial build out for the Phase 1 space can commence immediately ..." *Id.* at 1. The lease term in the contract was ten years. OAS Supv. 5 estimated the costs associated with leasing and occupying Constitution Center would be $556,811,589.[79] *See* July 21, 2010 E-mail from OAS Supv. 5 to Diego Ruiz, attached as Exhibit 117.

The Letter Contract also granted the SEC the right of first refusal for the remaining approximately 500,000 square feet of space at Constitution Center until December 15, 2010. Exhibit 116, Attachment 1 at 2. If the SEC had exercised this option, it would have leased the entire 1,400,000 square feet of space at Constitution Center. OAS Supv. 5 testified that OAS wanted a right of first refusal on all of the remaining space at Constitution Center "because the Congress was throwing money at us" and "Sharon [Sheehan] was always hoping that we wouldn't have anybody else in the building. That we would be able to ultimately justify the need for the whole building or something." January 31, 2011 OAS Supv. 5 Testimony Tr. at 168, 178.

In connection with the SEC's right of first refusal, Jaroch notified OAS Supv. 5 on September 18, 2010, that the Federal Housing Finance Agency ("FHFA") had approached DNA about leasing 225,000 square feet at Constitution Center and predicted that FHFA would select a building by the end of October 2010. September 18, 2010 E-mail from Sharon Sheehan to OAS Supv. 5 and OAS Supv. 4, attached as Exhibit 112. OAS Supv. 5 forwarded that information to Sheehan, OAS Supv. 4, OGC Atty 1 and OGC Atty 2 and explained, "FHFA has issued a [request for proposals] for 225K SF at [Constitution Center]. We will have to be prepared to accept that deal or lose it." *Id.* Sheehan reacted to the news as follows, "I'm getting frustrated. As it has been explained to me, we have until mid-Dec to make a decision." *Id.*

OAS Supv. 5 responded to Sheehan and explained her understanding of the SEC's right of first refusal:

> [T]he right is not a priced option.....remember we talked about that we would have to pay to keep it "off the market" with a shell rent, and we were'nt [sic] wanting to do that. We agreed to a Right of First Refusal, as we thought we would be refining our overall numbers to see if we could justify more space. The data center or business center options (or associated studies) for going [to Constitution Center] weren't even being discussed back when we did the

[79] The Letter Contract set the annual base rent at $44.80 per square foot, escalating to $47.00 for years six through ten of the lease, and included a Tenant Improvements Allowance of $46.00 per usable square foot. *See* Exhibit 116, Attachment 1 at 4-5.

> deal in July. We still had both Alexandria projects going on for those needs.[80]

Id. (ellipsis in original). Sheehan responded, "This absolutely is NOT how it was explained to me at the time we agreed to take [Constitution Center]. And this is NOT how Diego [Ruiz] understood the terms." *Id.*

The Letter Contract required DNA to provide 60,000 square feet of "swing space" furnished with work stations, by October 2010, for the 10-month period until Phase 1 space would be ready. *See* Exhibit 116, Attachment 1 at 3. The contract stated that the use of the swing space will be "rent free," but that the SEC will pay DNA $60,000 per month "as an agreed payment toward Landlord's increased operating expenses (including security services and utility costs) during the period of use of the swing space." *Id.*

---

[80] Since 1991, the SEC has leased space in Alexandria, Virginia, known as the Operations Center, occupied primarily by SEC employees who work in an administrative or support capacity, including OAS. *See* August 19, 2010 Lease Summary, attached as Exhibit 159. An OAS project manager testified that Sheehan is "really into the way things look; and that's a driving force. ... She wants upscale. I don't think she really liked the [O]perations [C]enter. She was pushing to move out of the [O]perations [C]enter. It wasn't upscale enough for her." Unidentified Program Manager Testimony Tr. at 12.

In March 2010, the SEC issued two solicitations for space in Northern Virginia, one for approximately 150,000 square feet of space for a Business Center, and the other for a Data Center, purportedly in order to ease overcrowding and anticipated expansion at the Operations Center. *See* March 31, 2010 Solicitations, attached as Exhibit 161; February 8, 2011 Sheehan Testimony Tr. at 90-91, 101.

In June 2010, Sheehan and OAS Supv. 5 discussed cancelling the Northern Virginia Business Center plan and relocating their operations to Constitution Center. *See* June 14, 2010 E-mail from OAS Supv. 5 to Sharon Sheehan, attached as Exhibit 118. Specifically, on June 14, 2010, OAS Supv. 5 e-mailed Sheehan:

> How serious are you about considering a larger consolidated effort in DC vs. the dual offices in Alexandria?
>
> Should we add that square footage in and abandon? One thought is that if that is our real requirement, then the other buildings being offered downtown go away, absent a phased occupancy for the other 150,000 [square feet] at a later date, of which 2 of the new buildings can build another building (already permitted), and of course Constitution Center can house now.

Id. An OAS employee testified that at some point he saw plans for senior OAS managers, including Sheehan, to move to a 10th floor office at Constitution Center with what was described in a meeting as a "great view" of the Potomac River. Unidentified Employee 1 Testimony Tr. at 14-15.

On January 6, 2011, after DNA had found new tenants for approximately 550,000 square feet that the SEC had contracted for at Constitution Center, Ruiz wrote in a memorandum that, "From February through September 2011, we will relocate approximately 740 employees and contractors from [the Operations Center and another building the SEC had leased in Northern Virginia] to" Constitution Center and Station Place. January 6, 2011 Memorandum from Diego Ruiz, attached as Exhibit 162. To date, the SEC has not leased any new space in Northern Virginia pursuant to its earlier solicitations, and no SEC employees have moved into the approximately 350,000 square feet that the SEC still has under contract at Constitution Center. Jaroch Interview Memorandum at 1.

V. The SEC's Constitution Center Contract May Not Adequately Establish the SEC's Limitation of Liability

Section 16.603-4 of the Federal Acquisition Regulation ("FAR")[81] requires that letter contracts include a particular limitation of government liability clause. 48 C.F.R. § 16.603-4. The required clause states:

> LIMITATION OF GOVERNMENT LIABILITY
>
> (a) in performing this contract, the Contractor is not authorized to make expenditures or incur obligations exceeding _____ dollars.
>
> (b) The maximum amount for which the Government shall be liable if this contract is terminated is _____ dollars.

48 C.F.R. § 52.216-24.

The required limitation of liability must include "dollar amounts" and those dollar amounts "shall be the estimated amount necessary to cover the contractor's requirements for funds before definitization. However, [those dollar amounts] shall not exceed 50 percent of the estimated cost of the definitive contract unless approved in advance by the official that authorized the letter contract." 48 C.F.R. § 16.603-2(d).

[81] There is confusion among the SEC staff responsible for leases as to whether the FAR applies to leasing activity. [redacted]
AC, DP
[redacted]

The SEC's Administrative Regulation for its leasing program, SECR 11-3, adopted in August 2010, provides little clarity on this point. The regulation states, "To the extent certain Federal Acquisition Regulation (FAR) provisions are required by law or statute, the SEC will adhere to them to acquire and administer leasehold interests in real property." SECR 11-3, attached as Exhibit 120, at 1. The regulation also states that the leasing branch will "Consult with the OGC in the event there is uncertainty as to whether a FAR provision applies to the leasing program." *Id.* at 6. The regulation does provide that the leasing branch will "[p]romote the competition requirements of FAR Part 6." *Id.*

The Letter Contract for Constitution Center does not adhere to the FAR requirements regarding limitations of the government's liability. Instead, the Letter Contract provides:

> 2. FAR 52.216-24 LIMITATION OF GOVERNMENT LIABILITY (Modified)
>
> In performing this letter contract prior to definitization, no Government funds are authorized to be expended other than rent due upon acceptance of space in accordance with the Lease.

Exhibit 116 at 2.

Thus, the Letter Contract's limitation of liability clause does not include a dollar amount as required by the FAR.[82] *Id.* Moreover, the generalized description of the limitation of liability in the Letter Contract is the "rent due upon acceptance of space," and may effectively be no limitation at all. OGC Atty 2 acknowledged in his testimony that, "[O]nce [DNA] delivers the space then the obligation to pay rent starts. That's really what that clause is saying." OGC Atty 2 Testimony Tr. at 24.

Accordingly, the letter contract may also violate FAR Section 16.603(d)'s requirement that the maximum liability be the estimated amount necessary to cover the contractor's requirements for funds before definitization (since presumably definitization would take place before rent was due in FY 2012) and Section 16.603(d)'s requirement that the maximum liability not exceed 50 percent of the estimated cost of the definitive contract since the maximum liability here, "rent due upon acceptance of space," appears to be close to the entire cost of the contemplated lease. Thus, the Letter Contract's limitation of liability clause can reasonably be interpreted as essentially stating that the SEC is responsible for the entire amount that would be owed pursuant to the eventual lease under the terms as agreed upon by OAS.

VI. The Justification and Approval for the Constitution Center Sole-Source Contract was Inadequate and was Backdated by One Month

The Competition and Contracting Act ("CCA") and the FAR provide that "except in the case of procurement procedures otherwise expressly authorized by statute, an executive agency in conducting a procurement for property or services shall obtain full and open competition through the use of competitive procedures." 41 U.S.C. § 253; *see*

---

[82] OGC Atty 1 testified that he reviewed the language in the limitation-of-government-liability clause before the SEC signed the Letter Contract. OGC Atty 1 Testimony Tr. at 25. OGC Atty 1 initially testified that the SEC's limitation-of-government-liability clause came "straight out of the FAR as to what is to be included in letter contracts." *Id.* at 24. Upon reviewing the clause in the SEC's contract for Constitution Center, OGC Atty 1 testified that he recalled there being a dollar amount in the letter contract, and that he was "not sure why I don't see it there." *Id.* at 29.

also, 48 C.F.R. § 6.3 ("requir[ing], with certain limited exceptions, that contracting officers shall promote and provide for full and open competition in soliciting offers and awarding Government contracts").[83] However, Subpart 6.3 of the FAR outlines some limited exceptions to that requirement. Specifically, Subpart 6.3 "prescribes policies and procedures, and identifies the statutory authorities, for contracting without providing for full and open competition." 48 C.F.R. § 6.3.

The FAR exception that was cited as justification for the sole-source Constitution Center Letter Contract was Subpart 6.302-2. *See* Justification and Approval for Other than Full and Open Competition ("Justification and Approval"), attached as Exhibit 121, at 4. FAR 6.302-2 permits other than full and open competition "when the agency's need for the supplies or services is of such an unusual and compelling urgency that the Government would be **seriously injured** unless the agency is permitted to limit the number of sources from which it solicits bids or proposals." 48 C.F.R. § 6.3202-2 (emphasis added).

The Justification and Approval described the additional responsibilities assigned to the SEC under the Dodd-Frank Act, and then stated:

> To fulfill these new responsibilities it is necessary to significantly increase full-time staff and supporting contractors by approximately 2,335 personnel to be located at the SEC's headquarters in Washington, DC. However, the SEC's current headquarters is full. Accordingly the SEC has a requirement of an unusual and compelling urgency to obtain approximately 900,000 [square feet] of additional headquarters space in the Washington, D.C. Central Business District, as this is the amount of space required to accommodate the approximately 2,335 new staff and contractors in headquarters.

Exhibit 121 at 2-3. The Justification and Approval asserts that the 900,000 square feet "must be in a single building or integrated facility to support the SEC's functional requirements and operational efficiency." *Id.* at 3.

OAS Empl. 1 OAS Management and Program Analyst, signed the Justification and Approval as the SEC's Competition Advocate.[84] *Id.* OAS Empl. 1 testified that she reviewed the Justification and Approval, but that "I don't believe I had any burning questions and I know I signed it fairly forthrightly." OAS Empl. 1 Testimony Tr. at 42. OAS Empl. 1 testified that she did not take any steps to verify that the information in the

[83] The SEC's own leasing regulation, adopted in August 2010, provides that the Leasing Branch will "Promote the competition requirements of FAR Part 6." SEC-R 11-3.

[84] The FAR requires that "the justification for other than full and open competition shall be approved in writing [by the agency's competition advocate] [f]or a proposed contract over $650,000." 48 C.F.R. § 6.304. OAS Empl. 1 serves as the SEC's Competition Advocate. OAS Empl. 1 Testimony Tr. at 12.

Justification and Approval was accurate "[o]ther than asking OAS Supv. 5 the contracting officer, you know, just general questions, 'Is this indeed urgent and compelling.'" *Id.* at 42-43.

When she signed the Justification and Approval, OAS Empl. 1 believed that all 2,335 of the projected future SEC personnel referenced in the Justification and Approval were related to fulfilling the requirements of Dodd-Frank. *Id.* at 50. At that time, she was not aware that funding for that projected growth had not been appropriated. *Id.* at 44. OAS Empl. 1 testified that she did not have an understanding of when the projected 2,335 personnel were expected to be hired. *Id.* at 49. OAS Empl. 1 acknowledged in testimony that the timing of the projected growth was relevant to the question of whether there was an "unusual and compelling urgency" that justified signing the Letter Contract without full and open competition. *Id.* at 49-50.

More importantly, OAS Empl. 1 also acknowledged in testimony that the SEC would not be "seriously injured" if it lost the opportunity to rent one contiguous building and had to rent multiple buildings to fill its space needs. *Id.* at 54-57.

The FAR requires that a Justification and Approval for Other than Full and Open Competition be posted publicly "within 30 days after contract award." 48 C.F.R. § 6.305. The Letter Contract was signed on July 28, 2010. *See* Exhibit 116. Accordingly, the deadline for publication of the Justification and Approval was August 27, 2010. That deadline passed, and on September 3, 2010, the SEC publicly posted the Justification and Approval on the Federal Business Opportunities website. *See* Federal Business Opportunities webpage printout, attached as Exhibit 122. The document was signed by OAS Supv. 5 OAS Supv. 4, OAS Empl. 1 and Sheehan. *See* Exhibit 121. All four signatures were dated August 2, 2010. *Id.*

As discussed below, in actuality, the Justification and Approval was not finalized until September 2, 2010, and substantial revisions were being made up to that date. OAS Supv. 5 OAS Supv. 4, and Sheehan executed a signature page for the document on August 2, 2010, before a draft even remotely close to the final version existed. The OIG found that OAS Empl. 1 executed the signature page on August 27, 2010, but subsequently whited-out the "7" on the date to make it appear that she also had signed the document on August 2, 2010. The actions of the signatories to the Justification and Approval gave the public the false impression that the document was finalized a few days after the Letter Contract was signed, and there was only a delay in its publication to the Federal Business Opportunities website.[85]

[85] The FAR permits Justifications and Approvals for Other than Full and Open Competition to be prepared and approved "within a reasonable time after contract award when preparation and approval prior to award would unreasonably delay the acquisitions," when "the agency's need for the supplies or services is of such an unusual and compelling urgency that the Government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals." 48 C.F.R. §§ 6.302-2, 6.303-1(d). Thus, the signature dates on this publicly posted Justification and Approval may have given the

The OIG found as follows. On July 28, 2010, the same day that the Letter Contract was signed, OGC Atty 1 e-mailed Sheehan:

> The next step is to finalize the current draft Justification and Approval in support of the deal. If we could get two or so hours of your time tomorrow morning, I think we can help you and OAS Supv. 5 finish that up. It is important to complete that because we anticipate requests for it shortly.

July 28, 2010 E-mail from OGC Atty 1 to Sharon Sheehan, attached as Exhibit 123.

On Friday, July 30, OAS Supv. 5 wrote in an e-mail to OGC Atty 1 and OGC Atty 2

> I came in this afternoon to see if we couldn't arrange for a signature page to be initiated (starting with me I guess), so that once the Justification and Approval is a "go", you will have my signature on it (while I am on leave next week).
>
> I understand Sharon [Sheehan] to be out today and Monday [August 2], as well, but Sharon did say that OAS Empl. 1 does have a signature stamp for Sharon if needed. I am not sure how soon we want to have the document finalized, but I would like to sign a sheet today perhaps and pdf it to you all for the 'record' should you need it.

July 30, 2010 E-mail from OAS Supv. 5 to OGC Atty 1 and OGC Atty 2 attached as Exhibit 124. OGC Atty 1 responded, "Here is the execution page if you want to do executions and leave to marry up with the final Justification and Approval on Monday when OAS Supv. 5 [OAS Supv. 5 is out." *Id.*

On August 2, 2010, OGC Atty 1 raised a concern with OAS Supv. 4, OAS Supv. 5 and Ruiz that the numbers on a growth projection spreadsheet previously prepared by OAS Supv. 4 did not match the projected growth numbers discussed in the draft Justification and Approval. August 2, 2010 E-mail from OGC Atty 1 to OAS Supv. 4, attached as Exhibit 125. OAS Supv. 5 responded, "I did sign a signature page for while I'm out, so when the numbers get put in, absent any other terminology revisions, it could be signed and completed while I'm out."[86] *Id.*

---

false impression that it was prepared and approved "within a reasonable time" after the July 28, 2010 execution of the Letter Contract rather than over a month after that date.

[86] OAS Supv. 5 initially testified that she signed the signature page on August 2, 2010. March 29, 2010 OAS Supv. 5 Testimony Tr. at 249. When she was shown the above e-mails, OAS Supv. 5 acknowledged, "I do remember signing the signature page in advance because the Justification and Approval was being reviewed by so many people, and everybody was adding tweaks to it." *Id.* at 252.

Later that day, Ruiz commented on another draft of the Justification and Approval, "I will have edits to this – some inaccuracies in the budget related info, and I'm still uncomfortable with stating so definitively how many people we will be hiring, when we haven't used those numbers publicly before." August 2, 2010 E-mail from Diego Ruiz to OGC Atty 1, attached as Exhibit 126.

Two days later, on August 4, 2010, Sheehan informed OAS Supv. 5 and Ruiz via e-mail, "The signature page of the Justification and Approval was executed. OGC Atty 1 is going to incorporate Diego [Ruiz's] changes." August 4, 2010 E-mail from Sharon Sheehan to OAS Supv. 5 and Diego Ruiz, attached as Exhibit 127. On August 5, 2010, further revisions were made to the Justification and Approval after an effort to understand inconsistencies in OAS Supv. 4 calculations of the SEC's purported space needs. August 5, 2010 E-mail from OGC Atty 1 to OAS Supv. 5 attached as Exhibit 128; August 5, 2010 E-mail from OGC Atty 1 to OAS Supv. 5 and OAS Supv. 4, attached as Exhibit 129.

On August 11, 2010, the SEC was still gathering important information necessary for the Justification and Approval. In an e-mail that day from OGC Atty 1 to OAS Supv. 5 and OAS Empl. 2, OGC Atty 1 wrote:

> When you meet with Tim [Jaroch], note to him that the SEC has to prepare a Justification and Approval establishing that the price is reasonable. It is required by FAR. There is a section on price reasonableness required by FAR. We have to know the price and terms that he offered in the other deals. Otherwise, we can't certify in the Justification and Approval that the price is reasonable. . . . Without this we are going to be in a pickle stating the price is fair and reasonable, and at risk it was not as good as what he offered the other agencies.

August 11, 2010 E-mail from OGC Atty 1 to OAS Supv. 5 and OAS Empl. 2 attached as Exhibit 130.

On August 12, 2010, OGC Atty 1 circulated another draft of the Justification and Approval to Sheehan, OAS Supv. 5 Ruiz, OAS Supv. 4, OGC Atty 2 and OAS Empl. 1 August 12, 2010 E-mail from OGC Atty 1 to OAS Supv. 5 attached as Exhibit 131. This draft differed significantly from the August 2, 2010, and August 5, 2010 drafts. *Id.*; Exhibits 125, 126, and 129. OAS Empl. 1 responded to receiving the August 12, 2010 draft, "Is this now final? I still have the signature page, but want to be sure I'm signing the final version." Exhibit 131.

Almost three weeks later, on August 30, 2010, OGC Atty 1 wrote in an e-mail to OAS Supv. 5 Sheehan, and OAS Empl. 1

> This is a reminder that the SEC is supposed to publish the executed Justification and Approval for Constitution Center on [the Federal Business Opportunities website] within 30 days of contracting. FAR 6.305(b). The letter contract was executed July 28, 2010, and 30 days thereafter is Friday August 27, 2010.
>
> I attach the last draft version of the Justification and Approval from August 12, which was OK by us in OGC. OAS Supv. 5 already did a signature page. We are ok with this going up.

August 30, 2010 E-mail from OGC Atty 1 to OAS Supv. 5 attached as Exhibit 132.

OGC Atty 1 e-mail prompted OAS Supv. 5 to ask OAS Empl. 1 "Do we have a fully executed version we can get posted? Not sure who still needed to sign." *Id.* The next day, OAS Empl. 1 responded to OAS Supv. 5 "I will sign today, however I don't see an estimated value in para. 2 which is a requirement of the Justification and Approval.[87] I am assuming it's greater than $10m and therefore needs [the Senior Procurement Executive's, *i.e.* Sheehan's] signature?" *Id.*

On August 31, 2010, OAS Empl. 1 e-mailed OAS Supv. 5 an executed signature page attached to a draft of the Justification and Approval. August 31, 2010 E-mail from OAS Empl. 1 to OAS Supv. 5 attached as Exhibit 133. The signatures of OAS Supv. 4, OAS Supv. 5 and Sheehan on the signature page were all dated August 2, 2010. *Id.* OAS Empl. 1 signature was dated August 27, 2010. *Id.* As discussed above, OGC Atty 1 had informed OAS Empl. 1 on August 30, 2010, that the deadline for publication of the Justification and Approval had been August 27, 2010. It is evident from these e-mails that OAS Empl. 1 executed the signature page on August 31, 2010, and in fact she was out of the office on August 27, 2010. August 27, 2010 E-mail from OAS Empl. 1 OIG Empl. 2 attached as Exhibit 134; OAS Empl. 1 Testimony Tr. at 80.

---

[87] Section 6.303-2 of the FAR states: "Each justification shall contain sufficient facts and rationale to justify the use of the specific authority cited. As a minimum, each justification ... shall include ... [a] description of the supplies or services required to meet the agency's needs (including the estimated value)." 48 C.F.R. § 6.303-2. Nowhere in the published Justification and Approval for Constitution Center was there an estimated value of the lease to which the SEC committed. *See* Exhibit 121 OGC Atty 1 testified that, although the estimated value of the Constitution Center lease is not explicitly in the Justification and Approval, the estimated value is "derivable" by computing other data in the Justification and Approval. OGC Atty 1 Testimony Tr. at 52.

After receiving the signature page from OAS Empl. 1 on August 31, 2010, OAS Supv. 5 observed, "OAS Empl. 1, I noticed that you signed on the 27th ..... is it ok that Sharon [Sheehan] signed before you?" August 31, 2010 E-mail from OAS Supv. 5 to OAS Empl. 1 attached as Exhibit 135 (ellipsis in original). OAS Empl. 1 responded, "Thanks – I corrected the original so it shows the 2nd for my signature." *Id.* On September 1, 2010, OAS Empl. 1 e-mailed OAS Supv. 5 a copy of the signature page she had sent to OAS Supv. 5 the previous day with the date of her signature altered. September 1, 2010 E-mail from OAS Empl. 1 to OAS Supv. 5 attached as Exhibit 136; *see also* Exhibit 133. Specifically, the "7" in what had been "8/27/10" was whited-out so that OAS Empl. 1 s signature date appeared as "8/2/10." Exhibit 136; *see also* Exhibit 133.

OAS Empl. 1 initially testified that she signed the Justification and Approval on August 2, 2010. OAS Empl. 1 Testimony Tr. at 59. However, after being shown the documents described above, OAS Empl. 1 acknowledged that she signed the Justification and Approval signature page on August 31, 2010, backdated her signature to August 27, 2010, and subsequently altered that date to make it appear that she had signed the document on August 2, 2010. *Id.* at 80 and 85. When asked in testimony why she originally signed the document with an August 27, 2011 date if she actually signed it on August 31, 2010, OAS Empl. 1 replied, "I don't know. That makes no sense to me either." OAS Empl. 1 Testimony Tr. at 80-81. OAS Empl. 1 testified that she subsequently altered her signature date to August 2 "probably to be consistent with the dates that were presented there by the other signatures." *Id.*

On September 1, 2010, OAS Supv. 5 sent OGC Atty 1 and OGC Atty 2 additional, significant revisions to the Justification and Approval.[88] *See* September 1, 2010 E-mail from OAS Supv. 5 OAS Supv. 5 to OGC Atty 1, attached as Exhibit 137. The next day, September 2, 2010, OAS Supv. 5 e-mailed OAS Empl. 1 "I reviewed my latest clarification edits with OGC Atty 2 this morning and we have accepted the changes. Attached is a clean version for the final Justification and Approval. Could you include the latest signature page you sent yesterday with it and perhaps coordinate ... on how/where this gets posted?" September 2, 2010 E-mail from OAS Supv. 5 to OAS Empl. 1 attached as Exhibit 138. OAS Empl. 1 responded by sending the latest revised version of the Justification and Approval, along with the signature pages containing the signatures of OAS Supv. 4, Sheehan, OAS Supv. 5 and OAS Empl. 1 – all dated August 2, 2010 – to OAS Supv. 5 *Id.* The Justification and Approval was

---

[88] On September 1, 2010, OAS Supv. 5 sent OGC Atty 1 revisions to the Justification and Approval and explained:

> I was a bit concerned that the CoStar description was not fully accurate, and we visited these buildings (which is publicly known). All my backup reflects 6 buildings, of which 2 of them we ruled out do to proximity to SP, so I wanted to be sure that got mentioned. ... I also added in the statement about the free turn-key swing space, which I think is significant, IF we are going to publicize our deal as a comp through this Justification and Approval.

September 1, 2010 E-mail from OAS Supv. 5 to OGC Atty 1, attached as Exhibit 137. CoStar is a commercial real estate database used to identify properties available for leasing. *See* Exhibit 121 at 3.

posted publicly on September 3, 2010. Exhibit 122. This not only violated the FAR requirement that a Justification and Approval for Other than Full and Open Competition be posted publicly "within 30 days after contract award," but also, as discussed above, gave the false impression that the Justification and Approval was finalized just a few days after the July 28, 2010 signing of the Letter Contract when, in reality, the document had been changed substantially and repeatedly for over a month after the signing of the Letter Contract. 48 C.F.R. § 6.305.

OAS Supv. 4 acknowledged in testimony that, if there are revisions to a document that he has signed, he "should" go back and sign the document again with the correct date. March 29, 2010 OAS Supv. 4 Testimony Tr. at 96-97. OAS Supv. 5 testified, "I think probably we should have re-dated the signature page." March 29, 2010 OAS Supv. 5 Testimony Tr. at 271. In a written statement to the OIG, Sheehan admitted, "Looking back I see that we needed better version control of the Justification and Approval, and a new signature page should have been generated." Exhibit 86 at 3. Sheehan also wrote in her statement that, after her OIG testimony on this issue, she asked two of her subordinates "to establish guidance and procedures for OAS employees regarding the various aspects of version control. They are well on their way to completing such guidance, including a requirement for each Justification and Approval to be numbered and logged in a newly-established Justification and Approval Log ..." *Id.*

VII. There is Significant Uncertainty Among the SEC Staff Regarding Important Requirements in Connection with Government Leasing

A. OMB Notification

Appendix B of the United States Office of Management and Budget ("OMB") Circular No. A-11 states:

> Agencies are required to submit to OMB representatives the following types of leasing and other non-routine financing proposals for review of the scoring impact:
>
> Any proposed lease of a capital asset where total Government payments over the full term of the lease would exceed $50 million. ...
>
> Agencies should submit these proposals to OMB during the conceptual, developmental stage.

Exhibit 139.

The OIG investigation found that the SEC did not submit to OMB written notification of the Constitution Center lease, notwithstanding the fact that the total Government payments committed for the full term of the lease amounted to

$556,811,589. We found that there was discussion about providing this written notice, but confusion about whether it was required and whose responsibility within the SEC it was to provide it. [89]

Shortly after signing the Letter Contract, the SEC staff began drafting the written notification for OMB that they believed to be required. On August 9, 2010, OAS Supv. 5 e-mailed OGC Atty 2 and OGC Atty 1

> Attached is a red-line (my comments/changes) to a draft version of the OMB Notification … The other outlying issue is whether Ken Johnson and Diego [Ruiz] want to go formal to OMB on this project, given all the press it has received already, but that is a relationship I don't have privy to [sic], so I would leave that to the ED and OFM as to whether or not this should go out. Be mindful that we did put in our leasing regulation that we would do this type of notification for our projects that happened out of the normal budget cycle, but given the way our appropriations will be handed down without having to go to OMB in the future, perhaps Diego or Ken would prefer a different route. Let me know.

August 9, 2010 E-mail from OAS Supv. 5 to OGC Atty 2 and OGC Atty 1, attached as Exhibit 140. Approximately one month later, on September 7, 2010, OAS Supv. 5 asked OGC Atty 1:

> What should we do about the OMB notice and formal Acquisition Plan, etc., while we work to definitize the lease? OAS Empl. 2 and I worked up an OMB notification but I don't know if he has sent it to you yet or if we should be doing it "post award." I think I was going to draft it up and send it through OAS Supv. 4 and Sharon to see if Diego/Ken Johnson wanted to get with OMB on it.

September 7, 2010 E-mail from OAS Supv. 5 to OGC Atty 1, attached as Exhibit 141.

On October 5, 2010, OAS sent OGC Atty 2 a draft "Lease Action Summary to OMB." October 5, 2010 E-mail from OGC Atty 2 to OAS Empl. 2 attached as Exhibit 142. On the same day, OGC Atty 2 sent a revised draft back to OAS. *Id.* However, no one at the SEC ever sent any written notification to OMB regarding the Letter Contract. *See* April 29, 2011 OMB Response to OIG, attached as Exhibit 143; March 29, 2011 Sheehan Testimony Tr. at 37-39.

---

[89] Because of the complexity of this issue, the OIG has not made a final determination as to whether written notification was required. The OIG sought the assistance of OMB on this question but was not able to obtain a definitive answer from OMB.

On November 2, 2010, OAS Supv. 5 e-mailed OGC Atty 2 and OGC Atty 1: "OGC Atty 2, after review of our reg, it looks like as long as we put the funding for the lease in our budget submission, we don't need to formally notify OMB in any other way (according to our own reg)."[90] November 2, 2010 E-mail from OAS Supv. 5 to OAS Empl. 2, attached as Exhibit 144.

Sheehan testified that whether, and how, OMB should be notified was discussed at a meeting with Ruiz, OGC Atty 1, OGC Atty 2 and OAS Empl. 4 prior to OAS signing the Letter Contract. March 29, 2011 Sheehan Testimony Tr. at 36-37, 39. Sheehan testified that it was decided that Ruiz and Johnson would contact OMB "to see what we needed to do." *Id.* at 37. Sheehan testified that eventually the SEC decided not to provide OMB with a written prospectus concerning Constitution Center because rent payments were not due until FY 2012, and Ruiz and Johnson had a discussion with the OMB resource manager that served as notification.[91] *Id.* at 37-39. Johnson, however, testified that he did not know whether the SEC ever notified OMB about the Letter Contract, and that he did not recall participating in any discussions about notifying OMB about the Letter Contract. Johnson Testimony Tr. at 77-78. Johnson testified that OFM was not responsible for notifying OMB, and that the responsibility was either Ruiz's or Sheehan's. *Id.* at 78.

---

[90] SECR 11-03, an administrative regulation that became effective on August 31, 2010, states that the leasing branch will:

> Consult with the SPE and the ED to determine whether to prepare a notification to OMB regarding a project. General guidelines include: ...
>
> For ... operating leases, make OMB notifications as follows:
>
> If Full Time Equivalent (FTE), rent, tenant improvement costs and/or design or project management fees associated with increased FTE were included in the approved budget for the fiscal year of the effective date of the lease action, no notification to OMB is required.
>
> If FTE, rent, tenant improvement costs and/or design or project management fees associated with increased FTE were NOT included in the approved budget for the fiscal year of the effective date of the lease action, notification to OMB will be provided using Attachment 2, Notification of Lease Action and Attachment 3, OMB Lease Action Summary to OMB, and the project's leasing acquisition plan will be attached.

SECR 11-03. Sheehan and OAS Supv. 5 testified that they were not aware of OMB being consulted in the preparation of SECR 11-03. March 29, 2011 Sheehan Testimony Tr. at 41; March 29, 2011 OAS Supv. 5 Testimony at 238.

[91] By contrast, in October of 2009, Sheehan and Johnson sent a detailed Lease Prospectus to OMB concerning its intent to lease space at Station Place Three. October 19, 2009 E-mail from Kenneth Johnson to OMB Empl. 4 and OMB Empl. 3 attached as Exhibit 145. Ruiz testified that he was not sure whether the SEC was required to provide a prospectus to OMB concerning the Station Place Three lease, or whether the SEC decided to do so simply to keep OMB informed. Ruiz Testimony Tr. at 30-31.

The OIG found that Ruiz did have a conversation with OMB Empl. 3 the OMB budget examiner assigned to the SEC, regarding Constitution Center. However, according to OMB Empl. 3 that conversation was initiated by her, not Ruiz, after OMB became aware that the SEC entered into a lease agreement for Constitution Center. OMB's Office of General Counsel provided a written statement to the OIG on behalf of OMB Empl. 3 that stated:

> OMB Empl. 3 first became aware of the Constitution Center in August 2010 when another OMB examiner reached out to OMB Empl. 3 to ask whether OMB Empl. 3 had any information on the Constitution Center lease.
>
> At the time of the phone call with the OMB examiner, OMB Empl. 3 did not have information on the Constitution Center lease. OMB Empl. 3 then reached out – also in August 2010 – to [Diego Ruiz] for information.

April 29, 2011 OMB Response to OIG, attached as Exhibit 143.

OGC Atty 1 testified that he recalled "being concerned" about whether to notify OMB in connection with Constitution Center, and that he recalled "raising it as a subject that needed to be investigated and handled by OFM and ED, you know, coordination with … OMB, assurance of meeting the scoring requirements, you know, for capital versus operating leases. I know we raised that with OAS Supv. 5 and Sharon [Sheehan] too." OGC Atty 1 Testimony Tr. at 32-33. OGC Atty 1 testified that he could not recall whether the SEC decided that OMB needed to be advised of the SEC's Constitution Center lease. *Id.* at 33, 35. OGC Atty 2 testified that the SEC needs "to square away with OMB and OFM as to – that they have approval concerning the action. … [T]here would need to be comfort as to … consultation with OMB in any lease action." OGC Atty 2 Testimony Tr. at 43-45.

B. The Antideficiency Act

The Antideficiency Act prohibits officers or employees of the government from involving the government "in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." 31 U.S.C. Sec. 1341(a)(1)(B). Incurring an obligation in excess or advance of appropriations violates the Act, and this is not affected by the agency's failure to record the obligation. *E.g.,* 71 Comp. Gen. 502, 509 (1992); 65 Comp. Gen. 4, 9 (1985); 62 Comp. Gen. 692, 700 (1983); 55 Comp. Gen. 812, 824 (1976); B-245856.7, Aug. 11, 1992. (GAO Redbook at 6-47). Although the SEC has been granted independent leasing authority statutorily and is generally granted authority to enter into multiyear leases in its annual appropriations, the GAO has found that "[t]he existence of multiyear leasing authority by itself does not necessarily tell you how to record obligations under a lease." (GAO Red Book, 13-127.) Agencies such as the GSA which have "specific statutory direction" to obligate funds for multiyear leases one year a time have been distinguished by GAO from agencies such as the Federal

Emergency Management Agency ("FEMA") which do not have such explicit direction. Because the SEC, like FEMA, does not have specific statutory direction to obligate funds for its multiyear leases on an annual basis, its lease obligations may have to be obligated in their entirety at the time they are incurred, and the SEC may thus have violated the Antideficiency Act in connection with its commitment to lease space at Constitution Center.[92]

The OIG investigation found that the SEC discussed this issue and eventually decided that a violation had not occurred. On February 26, 2010, OAS Empl. 3, a Budget Analyst in OAS, expressed concern about whether the SEC was complying with the Antideficiency Act in connection with its leases.[93] February 26, 2010 E-mail from OAS Empl. 3 to OAS Supv. 5 attached as Exhibit 146. OAS Empl. 3 e-mailed OAS Supv. 5 excerpts from *Principles of Federal Appropriations Law*, a multi-volume treatise published by GAO concerning federal fiscal law, commonly referred to as the "Red Book." *Id.* Specifically, OAS Empl. 3 sent OAS Supv. 5 the following excerpt:

---

[92] Because of the complexity of this issue, the OIG has not made a final determination as to whether the Antideficiency Act was violated. The OIG sought the assistance of GAO on this question and was informed that it was a matter that required significant review by GAO and could be analyzed if brought to GAO's attention formally. Accordingly, we are recommending that the SEC request a formal opinion from the Comptroller General on this issue.

[93] The OIG found that the SEC's internal procedures for approving the obligation of funds in connection with leases were informal and ad hoc. In a discussion regarding obligating funds for the SEC's lease of Station Place Three, OAS Empl. 3 wrote to OFM Supv. and Sheehan:

> I think OAS Supv. 5 is looking for financial approval to proceed with a lease that will cost the SEC $134.5M over the 10 year term. There doesn't seem to be a financial approval process to incur this type of obligation. The response from OGC was basically this is the way it's always been done.

February 2, 2010 E-mail from OAS Empl. 3 to OFM Supv. and Sharon Sheehan, attached as Exhibit 147. During her OIG testimony, OAS Empl. 3 explained her e-mail as follows:

> Q: And so when you say, "The response from OGC is basically, 'This is the way it's always been done,'" what does that mean?
>
> A: There is another email that -- it's not this one-- that OGC -- where we had asked that question. And OGC had responded. ... [B]asically -- that's the way we've always done it is that we've always -- OFM has always made the money available but there doesn't seem to be a formal process for saying, you, "Yes, we understand that we will be incurring this obligation, and that's what we want to do."
>
> Q: And did you think that was a good process, the way it was for leases at this time as far as approval?
>
> A: No. I mean who is designated in the agency to approve that?

OAS Empl. 3 Testimony Tr. at 55-56. Sheehan testified that she thought it would be "very beneficial" to have a practice in which there is a written obligation approval process for leases. March 29, 2011 Sheehan Testimony Tr. at 48-49.

> The existence of multiyear leasing authority by itself does not necessarily tell you how to record obligations under a lease. Some agencies have specific statutory direction. For example, the General Services Administration is to obligate funds for its multiyear leases one year at a time. 40 U.S.C. § 585(a)(2). So are the military departments with respect to leases in foreign countries. 10 U.S.C. §§ 2675 (leases for military purposes other than family housing) and 2828(d) (military family housing). Absent such authority, you fall back on the general rule that **obligations are chargeable in full to appropriations current at the time they are incurred**. Thus, in B-195260, July 11, 1979, GAO advised the Federal Emergency Management Agency, which had no-year appropriations but no statutory direction comparable to 40 U.S.C. § 585(a)(2) or 10 U.S.C. § 2675, that **it could enter into a multiyear lease under its no-year appropriation but that it had to obligate the full amount of its obligations under the lease at the time the lease was signed**. Actual payments, of course, would be made periodically over the term of the lease.

Id. (quoting GAO Red Book, 13-127) (emphasis added). OAS Supv. 5 forwarded OAS Empl. 3 e-mail to OGC Atty 2 and OGC Atty 1, and asked, "Trying to figure out where the SEC financial authority is for my leases." *Id.*

OGC Atty 2 responded:

> I know this is "weird" (and somewhat confusing) …
>
> The fact that you have specific statutory and budget authority to sign multi-year leases (per the appropriations and Exchange Act authority …) means you are not violating the Anti-Deficiency Act by signing a multi-year lease … You are authorized to enter a multi-year lease within the context of year to year funding. But Congress is not under any obligation to fund the SEC or anyone else beyond the current year. So OFM cannot obligate money it does not have and hasn't been appropriated yet. OFM can only certify the money they currently have.
>
> If in the future for some reason Congress were not to fund us or prohibit the payment of money for the leases, the landlord would have a claim based upon the lease. But that

> is not your problem. You are authorized by statute to sign the lease. Per your cite to the Red Book ..., we **are** an agency that has **"specific statutory direction"** (the annual appropriation and Exchange Act).

Id. (emphasis in original).

The OIG found that the Red Book gives several examples of agencies, such as GSA and the Department of Defense, that have "specific statutory direction." *See* GAO Red Book at 13-127, excerpts attached as Exhibit 148. GSA's leasing authority states that "The Administrator of General Services may enter into a lease agreement ... for the accommodation of a federal agency ... However ... the obligations of amounts for a lease under this subsection is limited to the current fiscal year for which payments are due without regard to [the Antideficiency Act]." 40 U.S.C. § 585(a). A statute governing the Department of Defense states that a military department may lease properties in foreign countries for purposes other than military family housing, and that "the rental for each yearly period may be paid from funds appropriated to that military department for that year." 10 U.S.C. § 2675. The Red Book states further that absent such specific statutory direction, "you fall back on the general rule that obligations are chargeable in full to appropriations current at the time they are incurred." Exhibit 148.

The statute granting the SEC independent leasing authority states: "Notwithstanding any other provision of law, the Commission is authorized to enter directly into leases for real property for office, meeting, storage, and other space as necessary to carry out its functions, and shall be exempt from any General Services Administration space management regulations or directives." 15 U.S.C. § 78d. Unlike the GSA and DOD leasing authority statutes, nothing in the SEC's leasing authority statute states in substance that "the obligations of amounts for a [multi-year] lease [are] limited to the current fiscal year for which payments are due without regard to [the Antideficiency Act]." *Id.*; 40 U.S.C. § 585(a). Similarly, although the SEC's appropriation from Congress for FY10 states that the money being appropriated is, among other things, for "the rental of space (including multiple year leases) in the District of Columbia and elsewhere," nothing in this appropriation gives the SEC specific authority to obligate the funds on an annual basis, or in any manner other than that permitted by the Antideficiency Act. *See* August 6, 2010 E-mail from OGC Atty 1 to OAS Supv. 5 and OGC Atty 2 attached as Exhibit 149.

The Red Book cites a GAO decision in which the Federal Emergency Management Agency ("FEMA") was found not to have been given the "specific statutory direction" referenced in the GAO Red Book at 13-127. *See* Exhibit 148. FEMA, like the SEC, was given independent statutory authority to lease property, which, in FEMA's instance was described as the authority to "purchase, lease, or otherwise acquire ... any property (real, personal, or mixed ...)." 15 U.S.C. § 2218(b)(3). Also like the SEC's authorizing statute, this statutory authority did not address how FEMA could or could not obligate funds for these leases. Like the SEC, FEMA was given a "no-year"

appropriation by Congress for its activities, and the language in the appropriation similarly did not address how FEMA could or could not obligate funds for leases. In its decision, GAO found that, although FEMA could enter into multi-year leases:

> Upon entering into the multi-year lease, however, FEMA must obligate out of its no-year funds the rental changes **for the full term of the lease**. In the absence of specific statutory authority (like that available to [GSA]) to enter into multi-year leases and liquidate the obligation out of annual appropriations, an agency must obligate the full amount of its contractual obligations from currently available funds. The obligation arises at the time the debt is incurred – in this case, at the time the lease is signed – and must therefore be recorded promptly in accordance with 31 U.S.C. Sec. 200.

Decision of the Comptroller General, B-195260, July 11, 1979, attached as Exhibit 150 (emphasis added).

The OIG investigation found that OGC attorneys considered this question and determined that it need not obligate funds for the full term of the lease and, thus, there was no violation. OGC Atty 1 wrote in a November 2010 document that he sent to Sheehan and OAS Supv. 5 concerning Constitution Center:

> Despite the risk of this space being excess, there was no Anti-Deficiency Act problem with acquiring it. The SEC's independent leasing authority and its annual appropriation authorized entry into multiple year leases in a fiscal year in advance of the fiscal year in which the lease payments would be coming due. OAS calculated using the OMB/GSA model that Constitution Center is an operating lease under which funds are only required to be available on an annual basis.

Attachment to November 9, 2010 E-mail from OGC Atty 1 to OAS Supv. 5 and Sharon Sheehan, attached as Exhibit 163.[94]

---

[94] According to OMB guidance, if a contract for an operating lease "includes a cancellation clause, [the agency should obligate in the first year] an amount sufficient to cover the lease payments for the first year plus an amount sufficient to cover the costs associated with cancellation of the contract." OMB Circular A-11, Appendix B ("Appendix B"), attached as Exhibit 139, at 2. The only funds that the SEC obligated in FY 2010 in connection with the Letter Contract were a September 22, 2010, obligation of $180,000 for the SEC's operating expenses associated with swing space at Constitution Center. *See* September 22, 2010 Miscellaneous Obligating Document, attached as Exhibit 151; March 29, 2011 OAS Supv. 5 Testimony Tr. at 243. The SEC did not obligate either the estimated total payments under the full term of the lease or an amount

VIII. In October 2010, Merely Three Months After Signing the Constitution Center Letter Contract, the SEC Realized that it Could Not Use the Space

On October 6, 2010, approximately one month before the mid-term elections, Sheehan sent an e-mail to OAS Supv. 4, OAS Supv. 5 and OAS Supv. 2 with the subject "Private" and stated:

> Diego [Ruiz] and I were with the Chairman for sometime [sic] this morning. Kayla [Gillan], Didem [Nisanci], and Eric [Spitler] were there. It sounds as though the budget is going to flat line for the next couple of years. The Chairman directed me to try and find substitute agencies to take approximately 600,000 sf of our 900,000 sf at Constitution. … I hope you folks are having a better time than what I'm experiencing back here.

October 6, 2010 E-mail from Sharon Sheehan to OAS Supv. 4, attached as Exhibit 153. Sheehan testified that she was surprised to hear that the budget was going to "flat line," and that the Chairman had changed her mind about leasing all of the 900,000 square feet at Constitution Center. February 8, 2011 Sheehan Testimony Tr. at 182-83. Sheehan testified that she explained in this meeting:

> It's a lot of space. It's a lot of money, and that the landlord was in competitions, and he withdrew from those competitions based on our taking the space, and that we need to understand that, and that we need to do everything we can to work with him to resolve the matter for both parties; that it's not a matter of me telling him we no longer need the space and that's it.

---

sufficient to cover the lease payments for the first year plus an amount sufficient to cover the costs associated with cancellation of the contract. *Id.*

On January 3, 2011, OMB Empl. 1 a Budget Examiner at OMB, contacted the SEC with a question regarding a lease cancellation clause and OMB Circular A-11. *See* January 5, 2011 E-mail from OAS Supv. 5 to OGC Atty 1 attached as Exhibit 152; OMB Empl. 1 Interview Memorandum. OAS Supv. 5 forwarded the question to OGC Atty 1 for guidance, acknowledging that she was unfamiliar with Appendix B and stating, "Sure hope we comply!" *Id.* OGC Atty 1 responded, AC AC AC *Id.* OGC Atty 1 testified that, AC AC AC Testimony Tr. at 44. Similarly, when OGC Atty 2 reviewed Appendix B during his testimony, he stated, AC OGC Atty 2 Testimony Tr. at 66.

Id. at 179. OAS Supv. 5 responded to Sheehan's e-mail:

> I hope the chairman's office understands that it we offload any space at all, it will be forever. We will not have any expansion in our headquarters buildings for 10+ years, and perhaps beyond. Any future growth will be in piecemeal fashion as the market may offer. I believe this to be a major, ill-advised mistake of catastrophic proportions for the SEC.

Exhibit 153. Sheehan then responded, "You're preaching to the choir." *Id.*

Sheehan testified that she believed that "they were moving too quickly to offload the space." February 8, 2011 Sheehan Testimony Tr. at 185. OAS Supv. 5 testified, "[W]e fought and fought and fought, and Sharon [Sheehan] fought to get – to be proactive, to get strategic, to get our growth plans. … And now, after this big, huge deal, and really executed to save the SEC and to all being in little buildings all over town, now we are going to offload it." January 31, 2011 OAS Supv. 5 Testimony Tr. at 184-85.

Jaroch told the OIG that, in early October 2010, the SEC informed him that it could not use approximately 600,000 of the 900,000 square feet of space at Constitution Center and asked for DNA's assistance in finding other tenants for that space. Jaroch Interview Memorandum at 1. On October 14, 2010, OAS Supv. 5 e-mailed OGC Atty 1 and OGC Atty 2 regarding the prospect of assigning some of the SEC's space at Constitution Center to other federal agencies. October 14, 2010 E-mail from OAS Supv. 5 to OGC Atty 1 and OGC Atty 2 attached as Exhibit 154. OAS Supv. 5 stated:

AC, DP

AC, DP [redacted]

Id. (emphasis added).

In November 2010, DNA began negotiations with the FHFA and the Office of the Comptroller of the Currency ("OCC") to lease the approximately 500,000 square feet at Constitution Center that was not the subject of the Letter Contract[95] and some of the SEC's 900,000 square feet. November 11, 2010 E-mail from Timothy Jaroch to Sharon Sheehan, attached as Exhibit 155.

OAS Supv. 5 [redacted] wrote in an e-mail concerning the negotiations with OCC, "Tim may be setting the stage for our absorbing the cost of the swing and broker fees associated with his OCC deal. . . . [I]f this all plays out, it looks like we can be free from the obligation but not from potential expense." *Id.* On November 19, 2010, Jaroch sent an e-mail to OAS Supv. 5 [redacted] and others at the SEC, asking:

> Is the SEC prepared to reimburse DNA for the brokers commissions involved in leasing the difference between 900,000 rsf and the rentable square footage ultimately occupied by the SEC . . . the cost of building out the tenant amenity spaces that were to be part of the SEC's tenant space and paid for by the agency . . . and the costs associated with the Swing Space if the SEC doesn't ultimately occupy the Northwest quadrant?

November 19, 2010 E-mail from Timothy Jaroch to OAS Supv. 5 [redacted] attached as Exhibit 156.

In January of 2011, OCC and FHFA leased approximately 1,050,000 square feet at Constitution Center. Jaroch Interview Tr. at 33-34; Jaroch Interview Memorandum at 1; February 8, 2011 Sheehan Testimony Tr. at 185-86; January 5, 2011 E-mail from Timothy Jaroch to OAS Supv. 5 [redacted] attached as Exhibit 157. On January 18, 2001, DNA's counsel sent a demand letter to the SEC asserting that the SEC's actions had caused DNA to incur $93,979,493 in costs at Constitution Center.[96] January 18, 2011 Letter from

---

[95] According to Jaroch, the SEC forfeited its right of first refusal for the 500,000 square feet when it notified him that it could not use 600,000 square feet of the space it had contracted. Jaroch Interview Memorandum at 2.

[96] According to DNA's counsel, DNA incurred: (1) $19,000,000 in brokerage commission payments for leasing space to FHFA and OCC; (2) an additional $20,160,000 financial obligation, in the form of a tenant improvement allowance, incurred in order to achieve the leasing deal with FHFA and OCC; (3) up to $43,800,000 in additional borrowing costs in order to pay the brokerage commission and greater tenant improvement allowance; (4) $16,408,480 for constructing and delivering Constitution Center amenity spaces, which DNA expects the SEC to pay for jointly with FHFA and OCC; and (5) $5,550,000 for building, equipping, and furnishing swing space that the SEC never occupied. *See* Exhibit 158. The total

Robert C. MacKichan, Jr., to [OGC Atty 1], attached as Exhibit 158. [OGC Atty 1] described DNA's claim as a "matter that's under potential dispute between us and the landlord." [OGC Atty 1] Testimony Tr. at 63. [OGC Atty 1] testified that the SEC disputes that DNA has suffered any damages as a result of the SEC's relinquishment of space at Constitution Center. *Id.* at 63-64.

On February 15, 2011, Jaroch hand-delivered to [OAS Supv. 5] a definitized lease for the approximately 350,000 square feet that the SEC still has pursuant to the Letter Contract. Jaroch Interview Memorandum at 1. As of May 6, 2011, according to Jaroch, the SEC had not signed that lease. *Id.* In March 2011, the SEC told Jaroch that it was hoping to sublease some or all of its space at Constitution Center. *Id.* As of the date of this report, the OIG is not aware of the SEC locating a candidate for the remaining space.[97] *Id.*

IX. A "Rigid" and "Closed" Atmosphere within OAS Where Senior Management is Surrounded by "Yes Men" May Have Contributed to the Irresponsible Decisions Made with Respect to the Constitution Center Lease

In the course of this OIG investigation, several witnesses who sought to remain anonymous came forward to provide information concerning the environment and the decision-making processes within OAS. One witness, a project manager in OAS with 20 years of private-sector experience in construction and almost 20 years of government experience in facilities management, described the environment in OAS as "very tense." Unidentified Program Manager Testimony Tr. at 6-7. Another OAS employee, with 20 years of experience at architectural firms and 20 years of government experience as a space management specialist and architectural technician, described the current management environment as "very hostile in the construction branch and … the next steps up to [OAS Supv. 4] and Sharon Sheehan." Unidentified Employee 1 Testimony Tr. at 6-7. Still another OAS employee, with 20 years of private-sector experience and an additional 17 years of government experience in construction and facilities, described the current management environment as:

> [A] lot more rigid than [it was] originally when I came here. … Once [a] decision is made, there's a reluctance on anyone's part to bring up concerns or objectives, because we were told our job is to carry out management's decisions. Decisions have already been made by management; and they're basically not open for

---

of these costs is $104,918,480. Assuming that the SEC is only expected to pay for one third of the amenity space costs, the total damages asserted by DNA is $93,979,493. *Id.*

[97] [OGC Atty 1] testified in March 2011 that the SEC recently had met with the Transportation Security Administration and GSA to discuss the possibility of these agencies taking the SEC's remaining space at Constitution Center [OGC Atty 1] Testimony Tr. at 62-63; [OGC Atty] Testimony Tr. at 94. Jaroch stated to the OIG on May 6, 2011, that the SEC had not yet been successful in leasing its remaining space at Constitution Center to any other agencies. Jaroch Interview Memorandum at 1.

> rediscussion. ... It seems to be a lot of people are afraid ... even at the manager's level to express concerns or question how things are going. ... [A]lmost everyone shakes their head yes. And if you raise your hand up for a question, I think even at the management level it's just not done. ... [G]enerally what happens if you question [a] management decision more than once, you're spoken to. And, again, it's reinforced that your job is not to question decisions that are made ...

Unidentified Employee 2 Testimony Tr. at 6-7, 9. This witness testified that, "[T]he culture was you don't say no. You don't say no to [Sheehan] ... if she thinks [it is] a good idea." *Id.* at 29.

OAS employees testified that this refusal on management's part to take advice was in spite of the lack of experience in government leasing among the OAS managers above OAS Supv. 5 An OAS project manager described OAS upper management in testimony as "inexperienced." Unidentified Program Manager Testimony Tr. at 7. This witness testified that "it's fairly obvious that" Sheehan "has very little experience" in facilities and construction. *Id.* at 8. Although Sheehan had some experience with capital leases while working at the Department of Defense, she had no experience with operating leases. February 8, 2011 Sheehan Testimony Tr. at 12. Another OAS witness testified, "I don't see OAS Supv. 4 having any real experience in construction or space management." Unidentified Employee 1 Testimony Tr. at 8. OAS Supv. 4 acknowledged in testimony that he had no government leasing experience prior to joining the SEC. January 28, 2011 OAS Supv. 4 Testimony Tr. at 8.[98] Ruiz had no government leasing experience prior to joining the SEC.[99] Ruiz Testimony Tr. at 10. Sheehan's experience before joining the SEC was in various procurement and contracting positions in the Department of Defense. February 8, 2011 Sheehan Testimony Tr. at 9-13.

The OAS project manager testified that some of upper management's leasing and construction decisions were:

> ... questionable. But what we were most upset about was the fact that we were not brought into the loop at all. It's a very closed group, the upper management. ... [T]hey go behind closed doors. They make decisions. They come out, tell us what those decisions are that they make, and on

[98] Prior to joining the SEC, OAS Supv. 4 worked in the Army as a unit commander and worked for two small businesses in Virginia managing government contract projects. January 28, 2011 OAS Supv. 4 Testimony Tr. at 6-8.

[99] Ruiz's prior experience included general and operational management positions at Univision, a policy position at the Federal Communications Commission, and a legislative assistant position for then-United States Congressman Christopher Cox, who later, as Chairman of the SEC, appointed Ruiz to be the SEC's Executive Director. Ruiz Testimony Tr. at 7-11.

> occasions we'll raise issues. 'Are you sure you want to do it that way? I mean have you thought about this?' And we're very to the point. ... [T]hey just say the decision's been made. That's it. This is what we're going to do. They do not want to hear any differing opinions.

Unidentified Program Manager Testimony Tr. at 7-8, 17. Another OAS employee testified that, as far as:

> [A] lot of securing of space, we're actually left out of the loop, and I feel it's deliberate. ... I think with the experience that I have and others in the section have, they don't want to hear ... questioning. ... [The] Miami [Regional Office] is an example where, when I did the analysis based on allowable square footage and that type of thing, I came up with 75,000, and that was generous. But leasing and OAS Supv. 4 had already decided to put it out at 85,000 square feet. And I don't have a clue where they got those numbers from, but ... 75,000 was very generous. ... [A]nd the more we were left out, when we do question it, the retaliation is there.

Unidentified Employee 1 Testimony Tr. at 7-8.

The OAS project manager testified that questioning upper management decisions by the staff is "not allowed." *Id.* at 9. The witness testified:

> I believe that the branch chiefs and above are afraid of Sharon [Sheehan]. ... We raise issues with them. They will not allow us to go directly to [Sheehan]. We have to raise the issues with them. They either accept them or reject them, but most of the time they do not make it to [Sheehan]. There is a fear there.

Id. at 10. This project manager testified that he believes that Sheehan surrounds herself with "yes-men," and that senior management does not rely on experienced staff, which may be a reason why questionable decisions are made at OAS. *Id.* at 10-11. Another OAS employee testified that Sheehan "does not want to hear what [experienced staff] will tell her." Unidentified Employee 1 Testimony Tr. at 9. This employee testified that he believed that he was reassigned from his position because he "spoke out and didn't agree with certain [OAS management] decisions." *Id.* at 11.

The project manager testified that Sheehan would focus on superficial issues such as "a stain on the carpet," but that she "didn't know that she had to be working on policies and procedures, which are sorely lacking throughout the whole organization; and

she doesn't know enough that those things are not in place and causing a problem." Unidentified Program Manager Testimony Tr. at 11. Another OAS employee testified that there are not sufficient policies and procedures in place in OAS for staff members to "know how to appropriately go about making decisions." Unidentified Employee 1 Testimony Tr. at 13-14.

The project manager testified that, upon learning of the SEC's decision to lease 900,000 square feet of space at Constitution Center, he and other staff members "just couldn't understand how they could justify that amount of space ..." Unidentified Program Manager Testimony Tr. at 11-12. Another OAS employee testified that he was "flabbergasted" by the decision to lease 900,000 square feet of space at Constitution Center. Unidentified Employee 2 Testimony Tr. at 11-12. He testified that OAS management had "grandiose plans." *Id.* at 29. Still another OAS employee testified that when OAS management was "asking the Constitution Center to build a swing space, they didn't have a clue who was going to go there. Nobody wanted to go there. ... [I]t's all a reaction to whatever's happening that particular day." Unidentified Employee 1 Testimony Tr. at 26-27.

The project manager also testified that there have been situations in which OAS has decided to use contractors to do work that employees could do, and that the agency could have saved money if they used employees more than contractors. Unidentified Program Manager Testimony Tr. at 19-20. Another witness testified that OAS hires contractors to perform functions that employees could perform, and observed, "Contractors don't ask questions, and it also builds your empire." Unidentified Employee 1 Testimony Tr. at 18.

OAS Empl. 2, whose experience prior to joining the SEC included eight years at PII working on lease procurements, testified:

> In my opinion, [OAS] as a whole could perhaps use a little bit more assistance with in terms of evaluating and looking long-term at ... space planning ... And that's something that I think is ... not perhaps a forte of theirs or as good as it could be. In my own experiences at GSA and other agencies where that really is ... part of their mission and they have a much stronger grasp of how to look at that and project and so on. ...
>
> I initially questioned ... who's overseeing space planning here. ... I mean it was never a hundred percent clear who was actually saying, 'Okay. That's the number it's going to be, and that's – and this is why.'

OAS Empl. 2 Testimony Tr. at 17, 24. OAS Empl. 2 also testified that he has observed a "disparity in the consistency of some of the documentation" kept by the SEC concerning

its leases, in contrast to his experience at GSA. *Id.* at 111. Other witnesses in OAS also testified that they did not think that there was master planning or long-range planning at OAS, but rather a reactionary approach to decision-making. Unidentified Employee 1 Testimony Tr. at 12; Unidentified Employee 2 Testimony Tr. at 11.

CONCLUSION

The OIG investigation found that based upon estimates of increased funding primarily to meet the requirements of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), between June and July of 2010, the SEC Office of Administrative Services ("OAS") conducted a deeply flawed and unsound analysis to justify the need for the SEC to lease 900,000 square feet of space at the Constitution Center facility. We found that OAS grossly overestimated the amount of space needed at SEC Headquarters for the SEC's projected expansion and prepared a faulty Justification and Approval to support eliminating competition. In addition, OAS backdated the Justification and Approval, thereby creating the false impression when it was released to the public that it had been prepared only a few days after they entered into the lease contract.

The OIG investigation also found that there is significant uncertainty among the SEC staff regarding important requirements in connection with Government Leasing and serious questions as to whether the SEC complied with several requirements in connection with its leasing of Constitution Center. In addition, there is a possibility that the SEC violated the Antideficiency Act in connection with its lease of Constitution Center.

The OIG investigation found further that a "closed" and "rigid" atmosphere within OAS may have contributed to the irresponsible decisions made with respect to the Constitution Center Lease. In the course of this OIG investigation, several witnesses who sought to remain anonymous came forward to provide information concerning the environment and the decision-making processes within OAS. These witnesses described an environment in which inexperienced senior management make unwise decisions without any input from employees with significant knowledge and experience.

The OIG's findings during this investigation raise significant concerns about the SEC's Office of Administrative Services and Office of Executive Director, including their recommendations and representations to the Chairman, with respect to the Constitution Center lease.

In addition to the numerous complaints received by the OIG with regard to the Constitution Center lease, the OIG has received a multitude of allegations from within and outside the Commission concerning waste and mismanagement in OAS resulting from a myriad of recent decisions made or contemplated by OAS and the Office of Executive Director.

The OIG understands that subsequent to the events described in this report of investigation, there has been new leadership installed in the Office of Executive Director.[100] Accordingly, this report is being provided to Chairman Mary Schapiro; the Deputy Chief of Staff, Office of the Chairman; Commissioner Kathleen Casey; Commissioner Elisse Walter; Commissioner Luis Aguilar; Commissioner Troy Paredes; the General Counsel; the Chief Operating Officer/Executive Director; the Chief Financial Officer; and the Associate Executive Director, Office of Human Resources, with the recommendation that the Chief Operating Officer/Executive Director carefully review the report's findings and conduct a thorough and comprehensive review and assessment of all matters currently under the purview of OAS including, but not limited to:

(1) The adequacy of written policies and procedures currently in place for all aspects of the SEC's leasing program, including, but not limited to, putting in place written procedures for leasing approvals;
(2) The methods and processes utilized to accurately project spacing needs based on concrete and supportable data;
(3) The determination to employ a standard of 400 square feet per person for planning Agency space needs;
(4) The necessity of retaining architects, furniture brokers, or other consultants to assist in the work generally performed by OAS officials; and
(5) All pending decisions in which OAS is committing the SEC to expend funds, including decisions relating to regional office lease renewals.

We further recommend that the Chief Operating Officer/Executive Director, upon conclusion of such review and assessment, determine the appropriate disciplinary and/or performance-based action to be taken for matters that are discussed in this report of investigation, as well as any other issues identified during the review and assessment, including, at a minimum, consideration of disciplinary action against Sharon Sheehan and [OAS Supv. 4], up to and including dismissal; and consideration of disciplinary action against [OAS Empl. 1] for their actions in connection with the gross overestimation of the amount of space needed at SEC Headquarters for the SEC's projected expansion, failures to provide complete and accurate information to the Chairman's office, and the preparation of a faulty and back-dated Justification and Approval to support eliminating competition.

[100] Diego Ruiz has decided to leave the Agency and his duties as Executive Director recently have been transferred to the Chief Operating Officer.

Finally, we recommend that the Office of Financial Management, in consultation with the Office of General Counsel, request a formal opinion from the Comptroller General as to whether the Commission violated the Antideficiency Act by failing to obligate appropriate funds for the Constitution Center lease.

PII [redacted]

Date: 5/16/11

Date: 5/16/2011

Approved: H. David Kotz

Date: 5/16/2011