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TESTIMONY
OF
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OFFICE OF THE COMPTROLLER OF THE CURRENCY
BEFORE THE
COMMITTEE ON FINANCIAL SERVICES
OF THE
U.S. HOUSE OF REPRESENTATIVES
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Statement Required by 12 U.S.C. § 250:

The views expressed herein are those of the Office of the Comptroller of the Currency and do not necessarily represent those of the President.

INTRODUCTION

Chairman Bachus, Ranking Member Frank, and members of the Committee, I welcome this opportunity to discuss the OCC's supervisory and enforcement authorities and process. In the letter of invitation, the Committee expressed interest in how the OCC has used its enforcement powers to initiate and settle actions against financial institutions and individuals.

The OCC uses its supervisory and enforcement authorities to ensure that national banks and federal savings associations ("banks") operate in a safe and sound manner and in compliance with the law. As described below, the OCC and the other federal banking agencies ("FBAs") have a broad range of supervisory and enforcement tools to achieve this purpose. However, the FBAs are not law enforcement agencies, and do not have authority to conduct criminal investigations or to prosecute criminal cases. Rather, the FBAs ensure that suspected criminal activity is referred to the appropriate criminal authorities for prosecution.

The Committee's interest spans a broad range of topics, involving different types of financial firms and different regulatory regimes. My testimony covers the OCC's activities and perspectives on enforcement in three key areas: 1) our approach to enforcement and how we use different types of enforcement actions; 2) the process we employ to initiate, settle, or litigate enforcement actions; and 3) how we coordinate with other state and federal regulatory agencies and law enforcement agencies. In the course of describing the OCC's settlement practices, I also will address the OCC's practice of allowing a party to settle an enforcement action without admitting or denying wrongdoing.

I. THE OCC'S ENFORCEMENT PHILOSOPHY, AUTHORITY, AND APPROACH

The OCC's enforcement process is integrally related to our supervision of banks. The OCC addresses operating deficiencies, violations of laws and regulations, and unsafe or unsound practices at banks through the use of supervisory actions and civil enforcement powers and tools. The heart of

our enforcement policy¹ is to address problems or weaknesses before they develop into more serious issues that adversely affect the bank's financial condition or its responsibilities to its customers.

Once problems or weaknesses are identified and communicated to the bank, the bank's management and board of directors are expected to correct them promptly.

In addition to the nature and severity of the conduct at issue, the cooperation and capability of bank management in addressing problems is an important factor in determining if the OCC will take enforcement action and, if so, the severity of that action. Banks are subject to comprehensive, ongoing supervision that, when it works best, enables examiners to identify problems early and obtain corrective action quickly. Because of our regular, and in some cases, continuous, on-site presence at banks, we have the power and ability to promptly halt unsafe or unsound practices or violations of law, in many cases without having to take an enforcement action. This approach permits most bank problems to be resolved through the supervisory process of continual comment by the OCC and response by the bank. Relevant written supervisory actions include the issuance of comprehensive Reports of Examination, supervisory letters, and Matters Requiring Attention ("MRAs") tailored to the specific problems existing at the bank.

When the normal supervisory process is insufficient or inappropriate to effect bank compliance with the law and the correction of unsafe or unsound practices, or circumstances otherwise warrant a heightened enforcement response, the OCC has a broad range of potent enforcement tools. For less serious problems, the OCC begins at one end of this enforcement spectrum with informal enforcement actions. Informal actions typically take the form of a

¹ OCC's Enforcement Action Policy, which was publicly released as OCC Bulletin 2011-37, provides for consistent and equitable enforcement standards for national banks and federal savings associations and describes the OCC's procedures for taking appropriate administrative enforcement actions in response to violations of laws, rules, regulations, final agency orders, and unsafe or unsound practices or conditions.

memorandum of understanding (“MOU”) or a safety and soundness compliance plan.² In situations where the OCC determines that significant risks are present that could adversely affect the adequacy of the bank’s capital, the OCC may establish an Individual Minimum Capital Ratio (“IMCR”) requiring the bank to achieve and maintain capital levels higher than regulatory minimums and to submit a capital plan when the bank’s capital levels are below the levels required by the IMCR.

These informal actions frequently involve specific and detailed steps the bank must take before the action is terminated. Informal enforcement actions deal with all aspects of bank operations, ranging from asset quality and credit administration to loan review, underwriting, and consumer compliance. Specific areas that affect a bank’s safety and soundness are often addressed through informal actions including articles relating to: loan documentation, credit underwriting, interest rate exposure, capital adequacy, asset quality, earnings, managerial competence, internal controls and management information systems, audit systems, and employee training and staffing. Informal enforcement actions also often address issues relating to compliance with laws in all areas of bank operations, such as disclosure of loan terms and protection of consumer financial information. Informal actions also can provide for restitution and other relief for bank customers affected by the practices at issue. In the OCC’s experience, banks usually go to great lengths to take the corrective steps necessary to achieve compliance with informal enforcement actions.

In some circumstances, however, informal action is not appropriate, such as when the bank has serious problems coupled with less than satisfactory management; there is uncertainty about the ability or willingness of management and the board of directors to take corrective measures; or the underlying problem is severe and there is a strong agency interest in formalizing the remedial actions required. In such cases, the OCC can and will take formal enforcement action. Unlike informal actions, formal actions are both public and directly enforceable. Section 8 of the Federal Deposit

² Upon determination and notification of a bank’s failure to meet safety and soundness standards, a bank is required to submit a safety and soundness compliance plan to correct the deficiencies. *See* 12 U.S.C. § 1831p-1, 12 CFR 30 and 12 CFR 170.

Insurance Act (“FDI Act”), 12 U.S.C. § 1818, gives the FBAs power to take formal enforcement actions to require correction of unsafe or unsound practices and compliance with any law, rule, or regulation applicable to banks.

For example, in the safety and soundness context, the OCC may issue a Formal Written Agreement or a Cease and Desist Order (“C&D”) requiring the bank to take appropriate corrective actions. These may include raising capital, increasing liquidity, improving internal controls, divesting troubled assets, or restricting the payment of dividends or bonuses. Similarly, in the consumer protection context, the OCC may issue a Formal Written Agreement or a C&D requiring a bank to cease engaging in the activities at issue, and to provide restitution to affected consumers. When the bank does not consent to these actions, the OCC will file a Notice of Charges seeking issuance of a C&D. Where a bank’s capital is impaired, the OCC also may issue a Capital Directive or a Prompt Corrective Action (“PCA”) Directive,³ when authorized by law.

OCC also may impose civil money penalties (“CMPs”) on banks and institution-affiliated parties (“IAPs”).⁴ CMPs may be imposed independent of, or in conjunction with, other supervisory or enforcement actions. In addition, we have the powerful tool of removing and prohibiting individuals from serving as directors, officers, or employees of federally insured depository institutions. Removal and prohibition (“R&P”) authority is our most effective tool in dealing with serious cases of insider abuse and self-dealing because an R&P order is effectively a lifetime ban on the individual working in the banking industry.

³ Under 12 U.S.C. § 1831o, 12 CFR 6, and 12 CFR 165 (Prompt Corrective Action or PCA), insured banks are subject to various mandatory and discretionary restrictions and actions depending upon the bank’s PCA capital category. Mandatory restrictions and actions are effective upon the bank being noticed that it is in a particular PCA category. Discretionary restrictions and actions are imposed on the bank through the issuance of a PCA Directive.

⁴ Pursuant to 12 U.S.C. § 1813(u), an IAP includes directors, officers, employees, or controlling shareholders of, or agents for, an insured depository institution; any other person who has filed or is required to file a change in bank control notice; any shareholder, consultant, joint venture partner, or any other person who participates in the conduct of the affairs of an insured depository institution; and any independent contractor who knowingly or recklessly participates in any violation of law or regulation, breach of fiduciary duty, or unsafe or unsound practice, which caused or is likely to cause more than a minimal financial loss to, or significant adverse effect on, the insured depository institution.

Most bank supervisory issues are resolved informally so the number of formal enforcement actions reported on the OCC's Web site reflects a minority of all types of corrective actions we take.⁵

The following chart reflects the number of formal and informal enforcement actions brought by the OCC against institutions and individuals during the past several years:

OCC Enforcement Actions

Type of Enforcement Action	FY 2008	FY 2009	FY 2010	FY 2011
Bank:				
Cease and Desist Orders	20	41	61	45
Bank Civil Money Penalties	10	11	9	8
Formal Agreements	58	93	118	59
Prompt Corrective Action Directives	1	5	2	3
Capital Directives	0	2	5	3
Bank Individual Minimum Capital Ratio Letters	15	132	130	50
Memoranda of Understanding	17	53	38	16
Commitment Letters	10	15	7	3
Safety and Soundness Plans	6	10	10	3
Personal:				
Personal Cease and Desist Orders	16	15	6	16
Personal Civil Money Penalties	27	17	43	32
Removal/Prohibition/Suspension Orders	33	27	26	36
Notifications of Prohibition, Following Conviction for Crimes of Dishonesty	211	254	152	142
Letters of Reprimand	19	20	23	23
Totals	443	695	630	439

The list of OCC enforcement actions in recent years illustrates the OCC's ability and willingness to take formal actions when warranted to require correction of unsafe or unsound banking practices and violations of law. As the above chart indicates, during the past four years, the OCC has taken over 2200 enforcement actions against banks and their IAPs. These actions address a wide range of issues relating to unsafe or unsound practices or conditions, including capital adequacy, liquidity, asset quality, earnings, loan portfolio management, information technology, audit procedures, internal controls, managerial competence, books and records adequacy, as well as violations of law. During the last several years, the OCC has taken a large number of formal actions

⁵ Formal enforcement actions taken by the OCC are published on a monthly basis pursuant to 12 U.S.C. § 1818(u).

to specifically address the deteriorating financial condition at some banks; to remedy weaknesses to bank programs, operations and performance; to require qualified management; to ensure that bank management follows safe and sound banking practices; and to address unfair treatment of bank customers.

II. ENFORCEMENT ACTION PROCESS

When circumstances warrant enforcement action, the OCC follows a well-established process for initiating and resolving such actions through either settlement or litigation. Through this process, the OCC ensures that its bank supervision and enforcement authorities are applied efficiently, effectively, and consistently, and respect the due process interests of respondents. Our process, in particular our practice of resolving enforcement actions with the consent of the bank or individual, promotes the OCC's supervisory goals. The OCC is best able to address bank operating deficiencies, noncompliance with laws and regulations, unsafe or unsound practices, and unfair treatment of bank customers, at an early stage before those weaknesses or problems become unmanageable and potentially adversely affect the bank's depositors and customers or the deposit insurance fund.

In the initial stages of the enforcement decision-making process, examiners work with legal staff to determine whether there is a legal basis for an enforcement action to address supervisory concerns, unsafe or unsound practices, noncompliance with laws or regulations, or breaches of fiduciary duty. In cases where CMPs are being considered, the appropriate supervisory office issues a "15-day letter" to the bank or individual notifying them that the OCC is considering assessing CMPs and is providing them an opportunity to respond with information pertinent to the OCC's evaluation of the appropriateness of the penalty. In each case, the supervisory office and legal staff prepare a case presentation memorandum with staff recommendations for enforcement action for consideration by an appropriate Supervision Review Committee ("SRC").⁶ The appropriate SRC

⁶ The OCC has several Supervision Review Committees. The Washington Supervision Review Committee ("WSRC") is responsible for reviewing all proposed enforcement actions against non-delegated banks and their

reviews the supervisory and legal support for all proposed enforcement actions and makes a recommendation to the appropriate decision maker.

Once the appropriate decision maker has authorized the enforcement action, it is important that the OCC take enforcement actions as soon as practical. For example, in a case where a bank is engaging in unsafe or unsound practices, or bank customers have suffered harm as a result of the practices at issue, a C&D can require the bank to immediately cease engaging in these practices and take affirmative action to correct the conditions resulting from such practices. To the extent that it is appropriate to assess CMPs against a bank, members of the board of directors, or senior management, assessment of CMPs also encourages the immediate correction of these practices. CMPs serve as an important deterrent to future violations of law, regulation, orders, and conditions imposed in writing, unsafe or unsound practices, and breaches of fiduciary duty, both by the person or bank against which the CMP is assessed and by other bankers and banks.

Recognizing the need for prompt and effective action to ensure that banks take corrective and remedial measures to ensure safety and soundness and protect depositors and consumers, Congress granted the FBAs broad authority to pursue administrative enforcement remedies. In effectuating the intent of Congress, the OCC has an established practice of attempting to resolve enforcement actions with the respondent's consent, usually before the need to serve a Notice of Charges. Formal enforcement actions are ultimately resolved by either the consent of the bank or individual to the enforcement action, or through litigation. The vast majority of OCC enforcement actions are resolved by consent.

IAPs and all non-delegated enforcement actions, and making recommendations to the appropriate agency decision maker. WSRC also considers and makes recommendations on all proposed referrals to other federal agencies, including the Department of Justice ("DoJ"), the Department of Housing and Urban Development ("HUD"), and the Securities and Exchange Commission ("SEC"). The Midsize Supervision Review Committee and the District Supervision Review Committees review and make recommendations on delegated and non-delegated enforcement actions against delegated banks and their IAPs to the appropriate decision maker.

In the process of resolving C&D, R&P, and CMP actions, the OCC communicates each approved enforcement action to the respondent bank or IAP and affords a period for settlement negotiations. The OCC's practice is to present the proposed formal action in the form of a draft order and, in the case of C&Ds, a draft order and a stipulation and consent to the issuance of an order, for consideration by the bank or individual. The OCC's standard form of enforcement order typically contains a plain statement of the Comptroller's factual contentions supporting the action and provides that the bank or IAP does not admit or deny wrongdoing. Once the document has been presented to the respondent, the OCC is willing to consider proposed changes, for example, in the wording of the document or the time frames for compliance, in order to obtain a negotiated settlement.

In those relatively few cases where a negotiated settlement cannot be reached, the OCC initiates an administrative hearing process by filing a Notice of Charges with the Office of Financial Institution Adjudication notifying banks or individuals of charges for issuance of a C&D, issuance of a R&P order, or assessment of CMPs. Litigants are then afforded an adjudicatory hearing on the merits. The FBAs have an established procedure for conducting adjudicatory proceedings pursuant to Uniform Rules of Practice and Procedure.⁷ This procedure affords the bank or individual with extensive due process, including an opportunity to respond to the notice, conduct pre-hearing discovery, and present evidence at the hearing before an administrative law judge ("ALJ"). Following the issuance of a recommended decision by the ALJ, the Comptroller issues his final decision and order based on the entire record of proceeding, which is subject to limited review by an appropriate court of appeals. This entire process typically can take anywhere from two years to five years to complete.⁸

⁷ See, e.g., 12 CFR Part 19, Subpart A.

⁸ The OCC also is authorized to issue interim orders (Temporary Cease and Desist Orders and Suspension Orders) to impose measures that are necessary to protect the bank against ongoing or expected harm during the pendency of an administrative proceeding. An interim order is immediately effective and remains in place until a final order is issued or an appropriate U.S. district court decides to set aside, limit, or suspend the order pending completion of the administrative proceeding. Interim orders require satisfaction of a heightened legal standard and, because they are

The longstanding practice of permitting the bank or individual to neither admit nor deny wrongdoing allows the OCC to get an enforceable order in place at an early stage of the proceeding, and encourages compliance with the enforcement action and immediate correction of any deficiencies that need to be addressed. Because consent orders are made available to the public, requiring an admission of wrongdoing would prolong settlement negotiations and increase the number of respondents who choose to litigate the merits of the action. Given the corrective action and relief that the OCC obtains through the settlement, the OCC has viewed such a statement as a useful factor in obtaining prompt remedial action, and as essentially extraneous to the supervisory objectives that the OCC is able to promptly achieve.

The effectiveness of the OCC's approach can best be illustrated in the context of achieving the agency's primary supervisory goals in dealing with problem banks. In these situations, our primary supervisory goal, which is achieved for most problem banks, is rehabilitation and return to non-problem status. Obtaining an institution's consent to an immediately effective order helps ensure that its problems are addressed at a stage when rehabilitation is still possible, thus helping the bank avoid failure. Where a bank's problems have proved insurmountable, as when the bank has been unable to attract additional capital from private investors, our enforcement actions are designed to prepare the bank for resolution through receivership at the least possible cost to the deposit insurance fund. In these cases, obtaining the bank's consent can be critical to minimizing further losses. Requiring an admission of wrongdoing from an institution will significantly delay the imposition of an order and jeopardize the achievement of these goals.

During the recent economic downturn, the OCC used a combination of enforcement tools to correct problems that resulted in deteriorating financial conditions at banks. Our actions are designed to remedy various unsafe or unsound practices including inadequate capital and liquidity,

almost immediately subject to judicial review, it can also take an extended period of time to resolve these types of enforcement actions.

inappropriate growth, inadequate loan underwriting, a lack of appropriate internal policies and controls, and ineffective management. The various corrective measures incorporated into our enforcement actions have included requiring the bank to raise additional capital, restrict borrowings, eliminate certain activities and even entire business lines, adopt appropriate underwriting standards and policies to govern lending activities, remove senior officers and members of the board of directors, limit the transfers of assets, and eliminate payments of bonuses or dividends.

We have used a variety of enforcement tools, including Formal Agreements, MOUs, IMCRs, and C&Ds to achieve these remedies. Each action has been crafted to deal with the specific problems existing at each bank. In some cases, we have issued multiple enforcement actions to a single bank.

In some problem bank cases, we have used PCA authority in addition to other enforcement tools. PCA capital categories and the restrictions associated with those categories, including the use of PCA Directives, are driven primarily by a bank's capital levels. Because depletion of capital usually occurs as a result of other deficiencies, capital is often a lagging indicator of problems. Consequently, the OCC generally places a problem bank under an enforcement action well in advance of a decline in capital that could trigger either the issuance of a Notice of Intent to Issue a PCA Directive, or a PCA Directive itself. In addition, Formal Written Agreements and C&Ds often contain more restrictions and affirmative obligations than would be prescribed in a PCA Directive.

In many cases, a bank's compliance with a Formal Written Agreement or C&D negates the need for additional enforcement actions while addressing the underlying concerns. In an effort to comply with the enforcement action, banks frequently adopt, fully implement and adhere to all of the required corrective actions set forth in the agreement or order within assigned time frames. In such cases, once sufficient time has passed and the OCC examiners have verified through the examination process that the corrective actions are effective in addressing the bank's problems, the enforcement

action may be terminated. The decision to terminate is subject to the same review and approval process as is applicable to new enforcement actions.

III. OCC COORDINATION WITH OTHER REGULATORY AND LAW ENFORCEMENT AGENCIES

The FBAs regularly share supervisory information and undertake coordinated enforcement actions. As an example, when the OCC issues a remedial enforcement action against a bank, the Federal Reserve Board often will take a complementary action with respect to the bank's holding company. Pursuant to an interagency agreement, the FBAs regularly exchange documents and information concerning unsafe or unsound practices or violations of law and notify each other of significant enforcement actions against banks and individuals.

We also coordinate extensively with other regulatory agencies and with law enforcement authorities. OCC has entered into information sharing agreements with virtually all of the state banking agencies and all 50 state insurance departments, and we regularly share information with the SEC and other Federal agencies. We make enforcement referrals to all of these regulators, as well as to state licensing boards and state professional ethics and responsibility boards, with respect to misconduct by attorneys, accountants, real estate agents, appraisers, and other professionals. We also make enforcement referrals and cooperate in investigations conducted by other Federal agencies, including, for example, the Financial Crimes Enforcement Network ("FinCEN"),⁹ the Department of Labor, the Internal Revenue Service, HUD, the Federal Election Commission, the Federal Trade Commission, and the Consumer Financial Protection Bureau, with whom OCC recently entered into an information-sharing agreement.

When we find suspected criminal violations, including evidence of fraud, we ensure that such matters are referred to the DoJ. We often coordinate with and assist the DoJ, the Federal Bureau of

⁹ Pursuant to an interagency agreement, OCC provides information to FinCEN concerning all significant violations of the Bank Secrecy Act ("BSA") detected during our examinations. In addition, the two agencies coordinate enforcement efforts, and often take simultaneous actions against a bank to impose appropriate CMPs for BSA violations.

Investigation, and the Secret Service in their investigations and prosecutions of fraud and other financial crimes, as appropriate, by providing documents and information to those agencies and, in some cases, by making OCC examiners available to serve as special agents to the grand jury and as expert banking witnesses for the prosecution at trial.

OCC is a member of the Financial Fraud Enforcement Task Force and several of its subgroups. We are an original member of the National Interagency Bank Fraud Working Group (“BFWG”), which is chaired by DoJ, and we participate in various BFWG subgroups such as those covering Mortgage Fraud and Payment Processor Fraud. Additionally, the OCC is a member of the Bank Secrecy Act Advisory Group chaired by the Department of the Treasury.

CONCLUSION

The OCC’s enforcement authority is an integral part of our comprehensive bank supervision process. The primary goal of our enforcement actions is to ensure that national banks and Federal thrifts under our supervision operate safely and soundly, and in compliance with all applicable laws. The OCC has broad and comprehensive enforcement authority to achieve these goals. We also have a well-established process for taking administrative enforcement actions that provides for swift and forceful corrective action at an early stage, while taking into account the due process rights of respondent banks and individuals.