

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES ACT OF 1933
Release No. 10286 / January 23, 2017

SECURITIES EXCHANGE ACT OF 1934
Release No. 79857 / January 23, 2017

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3855 / January 23, 2017

ADMINISTRATIVE PROCEEDING
File No. 3-17807

In the Matter of

**OVERSEAS SHIPHOLDING
GROUP, INC.**

and

MYLES ROBERT ITKIN,

Respondents.

**ORDER INSTITUTING CEASE-AND-
DESIST PROCEEDINGS PURSUANT TO
SECTION 8A OF THE SECURITIES ACT
OF 1933 AND SECTION 21C OF THE
SECURITIES EXCHANGE ACT OF 1934,
MAKING FINDINGS, AND IMPOSING A
CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission (“Commission”) deems it appropriate that public cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 8A of the Securities Act of 1933 (“Securities Act”) and Section 21C of the Securities Exchange Act of 1934 (“Exchange Act”) against Overseas Shipholding Group, Inc. (“OSG” or “the Company”) and Myles Robert Itkin (“Itkin”) (collectively “Respondents”).

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the “Offer”) which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission’s jurisdiction over them and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondents

consent to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 8A of the Securities Act of 1933 and Section 21C of the Securities Exchange Act of 1934, making findings, and Imposing a Cease-and-Desist Order (“Order”), as set forth below.

III.

On the basis of this Order and Respondents’ Offers, the Commission finds¹ that:

SUMMARY

1. This matter concerns the failure of OSG to record material federal income tax liabilities in its financial statements from 2000 through the second quarter of 2012. The tax liabilities, reportable under Internal Revenue Code Section 956, which provides that when a “controlled foreign corporation” guarantees the debt of its U.S. parent company, the amounts borrowed by the parent are, in effect, “deemed dividends” and taxable to the parent. During the relevant period, OSG’s credit agreements contained a provision making its controlled foreign subsidiary, Overseas International Group, Inc. (“OIN”), and another subsidiary “jointly and severally” liable for OSG’s debt, thereby triggering Section 956 current tax liability for those amounts that OSG borrowed, and deferred tax liabilities for amounts not borrowed but available under the credit agreements. From 2000 to the second quarter of 2012, OSG failed to record and report these federal income tax liabilities in various annual and quarterly reports and earnings releases filed with the Commission. Certain of these nondisclosures constituted violations of Section 17(a)(2) and (3) of the Securities Act.

2. During the relevant period, OSG failed to recognize its tax liability despite significant indicia that the structure of its credit agreements, in effect, made OIN a guarantor and could trigger tax consequences, including tax memos from outside counsel and communications with the banks during the negotiation phase of the credit agreements. Despite these indicators, OSG failed to disclose the issue to its outside auditors and ascertain whether the credit agreements impacted its financial reporting. Moreover, OSG had inadequate internal accounting controls over its accounting for income taxes and had deficient controls over the impact of the credit agreements on its financial reporting process.

3. As a result of its misconduct, OSG restated its financial results for all annual reporting periods in fiscal years 2000 through 2011, as well as the results for the quarterly reporting periods in the first half of 2012. For example in 2000, by failing to record the deferred tax liability related to the prospective drawdowns under the first credit agreement to contain the “jointly and severally” language, OSG understated the deferred federal tax income tax liabilities in its financial statements by \$122.5 million, or approximately 10% of its total liabilities. The failure to record the related income tax expense resulted in OSG recognizing a profit that year when it would have otherwise recognized a loss. By 2011 the cumulative failure to record the current and deferred income tax liabilities arising from the Section 956 issue resulted in an understatement of OSG’s income tax liabilities by approximately \$512 million, or 17% of its total liabilities. Had OSG recorded the related income tax provision in that period, its net loss

¹ The findings herein are made pursuant to Respondents’ Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

would have increased by approximately 265%, from \$193 million to \$705 million. In November 2012, following the discovery of the issue, OSG filed for bankruptcy protection.

4. Myles Robert Itkin (“Itkin”), the chief financial officer (“CFO”) for OSG and its foreign subsidiary during the relevant period, who participated in the negotiation of and was the signator to OSG’s credit facilities, oversaw OSG’s financial reporting function, and became aware of significant red flags indicating tax consequences from the credit agreements, caused OSG’s Securities Act Section 17(a)(2) and (3) violations from 2011 through the second quarter of 2012 and caused the company’s reporting, books and records and internal accounting controls failures going back to 2009. Itkin also negligently misled OSG’s auditor by representing that OSG had not received any written tax advice concerning income tax issues and signed false certifications under Sarbanes-Oxley for filings in 2011 and 2012.

RESPONDENTS

5. ***Overseas Shipholding Group, Inc. (“OSG” or the “Company”)***, is a Delaware corporation incorporated in 1969, and its wholly owned subsidiaries own and operate a fleet of oceangoing vessels engaged primarily in the transportation of crude oil and petroleum products in the international and domestic markets. OSG managed its international and domestic operations through its wholly owned subsidiaries, OIN, a Marshall Islands corporation, and OSG Bulk Ships, Inc. (“OBS”), a New York corporation, respectively. OBS’s vessel-owning and vessel-leasing corporations conduct OSG’s US shipping operations, and OIN’s vessel-owning and vessel-leasing corporations conducted OSG’s international shipping operations. OSG, OBS, and OIN were the key corporations of the OSG corporate group. During the relevant time, OSG had a class of securities registered under Section 12(b) and a reporting obligation under Section 13(a) of the Exchange Act. In November of 2012, OSG and 180 subsidiaries filed for bankruptcy protection under Chapter 11 of the US Bankruptcy Code in the US Bankruptcy Court for the District of Delaware (all of which proceedings were jointly administered under Case No. 12-20000 (MFW)), and its shares were delisted. In July of 2014 the bankruptcy court confirmed a plan of reorganization that provided for a rights offering sponsored by certain of OSG’s equity holders, pursuant to which they purchased shares in the reorganized Company. In October 2014, OSG’s Class B common stock became listed on the NYSE MKT. OSG’s Class A common stock became listed on the NYSE MKT in November 2015, and its listing was moved to the New York Stock Exchange in June 2016. OSG’s Class A common stock is registered with the Commission pursuant to Exchange Act Section 12(b). There are no outstanding shares of OSG’s Class B common stock.

6. ***Myles R. Itkin (“Itkin”)***, age 68, was OSG’s Chief Financial Officer from June 1995, to April 12, 2013, when he was terminated from the Company. Itkin is not a CPA. Itkin had primary responsibility overseeing OSG’s taxes, accounting, and financial statement preparation and reporting and participated in the negotiation of and was the signator to the credit agreements at issue. He was also the senior vice president and CFO of the Company’s subsidiaries, OIN and OBS, and sat on the board of OIN. As an OIN director and officer, Itkin made and implemented decisions concerning OIN’s assets, liabilities, transactions, including debt incurrence, and transfers, including distributions of assets to OSG or OBS. Since October 2006, Itkin has served as a director of Danaos Corporation, a Marshall Islands company, whose

securities trade on the New York Stock Exchange under the symbol “DAC,” and serves on its audit committee. Itkin is not otherwise currently employed.

FACTS

Background on Relevant Tax Provisions

7. From 1987 to 2004, OSG was required to pay U.S. income taxes on current offshore shipping income of its foreign subsidiaries, including OIN, whether it was distributed or not. However, after the passage of the American Jobs Creation Act of 2004 (the “Jobs Creation Act”), OSG was no longer required to pay taxes on undistributed foreign shipping income earned by its offshore subsidiaries or controlled foreign corporations (“CFC”) so long as the income remained offshore. OSG, thus, could only make tax-free distributions of foreign shipping income up to the amount previously subject to income taxation that had not been distributed. Over time the amount of deferred taxes for undistributed foreign shipping income became quite substantial because OIN was the primary source of income for the Company.

8. Under Sections 956(c) and (d) of Subpart F of the Internal Revenue Code (“Section 956”) when a foreign subsidiary guarantees the loans of a U.S. parent company, the untaxed “accumulated ‘earnings and profits’ of that subsidiary are deemed to have been distributed to the U.S. parent company” in amounts equal to average quarterly loan balances. Specifically, the deemed dividends in this scenario under the Code arise from “investments in United States property” and includes types of property a CFC could purchase with its untaxed retained earnings to provide an economic benefit — the functional equivalent of a dividend — to its US parent corporation without having transferred title in such assets to its US parent corporation. Such property can include real assets in the United States, tangible or intangible, or financial assets, such as its US parent corporation’s equity, called “stock,” or debt, called an “obligation.” To capture circuitous attempts of economic benefit from the CFC to its US parent corporation, Section 956(d) expands the meaning of “obligation” to include a CFC’s guarantee of its US parent corporation’s debt obligations to a third-party lender. Accordingly, Subpart F treats such earnings *as if* the CFC had distributed them as a distribution or dividend to its US parent corporation or as “deemed dividends.” The parent company is therefore subject to United States federal income taxation on the amount of the deemed dividend (subject to certain offsets available to the company).

OSG’s Pre-2000 Credit Facilities and Understating of Section 956 Tax Implications

9. As early as 1990, OSG, which in some years did not generate significant cash-inflows or profits, relied on large credit facilities with lending banks to sustain its operations. The facilities typically had credit limits in the hundreds of millions of dollars and terms of five or seven years. When a credit facility period ended, the balance under the credit facility became due as a “balloon” payment. Given the lengthy terms of the facilities and the extended negotiation period preceding a credit facility, OSG often had more than one revolving credit facility available at any given time.

10. By the late 1990s, OSG's lenders, aware of OSG's financial results, sought greater credit enhancement on the revolving credit facilities. OSG's downstream guarantees of loans made to its subsidiaries, OBS and OIN, were not optimal given that OSG's income was limited to dividends from its subsidiaries and earnings on its securities investments. Also, OSG was a significant borrower under the facilities. The banks sought to obtain, as security, direct access to the significant current and retained earnings of OIN. To obtain this direct access, the banks sought to make OIN a guarantor of payment on loans made to OSG and OBS under the facilities, using "joint and several" language that joined the entire facility balance into a single debt on which OIN would be obligated to pay. With regard to the credit facilities, as early as 1997, the income tax implications from OIN guaranteeing OSG's debt was discussed among certain OSG management and resulted in a decision that OSG could not accept the language 'jointly and severally' in a credit facility because of the possible adverse tax consequences.

11. In 1997, OSG negotiated a credit facility specifically to avoid including a "joint and several" provision because it would make OIN, OSG's foreign subsidiary, a guarantor of OSG's loans under these credit facilities and trigger tax consequences under Section 956. OSG's credit facilities from 1990 through 1997 did not provide for such a guarantee, but only a "downstream guarantee," meaning that OSG's subsidiaries would not be required to pay OSG's debt in the instance of OSG's debt default.

12. Consistent with this understanding, in connection with negotiating a \$600 million credit facility in 1997, OSG specifically rejected an attempt by the lending banks to include a provision that OSG, OBS, and OIN be "jointly and severally liable" for all advances on the credit facility regardless of which of the corporations received the funds from the drawdowns. OSG also rejected the lending banks' request that all three corporations, OSG, OBS, and OIN, co-sign all promissory notes for loans made under the 1997 credit facility.

13. In response, as reflected in draft credit facilities, OSG crossed out the provision that OSG, OIN, and OBS would be "jointly and severally" liable for any drawdown on the credit facility, and changed it to "each borrower severally but not jointly" being liable, meaning that OSG would be solely liable for its drawdowns on the 1997 credit agreement. As understood by the then OSG treasurer, who negotiated approximately \$10 billion in financing for OSG from 1988 to 2001, OSG modified the "joint and several" language proposed by the banks because it could make OIN potentially responsible for the obligations of OSG under the credit facilities, which would trigger possible federal tax liability under Section 956.

14. In connection with the proposed 1997 credit facility, OSG's longtime outside counsel ("Outside Counsel") also identified the potential tax consequences of the "joint and several" language in the 1997 credit facility. In an August 13, 1997 fax from Outside Counsel to the lending bank, copying OSG's then general counsel and controller, Outside Counsel specifically stated: "If OSG International [OIN] were to pay or guarantee obligations of OSG or OSG Bulk [OBS], it could be argued that OSG is liable for income tax on previously undistributed, untaxed earnings of OSG International [OIN] and its subsidiaries."

15. In response to OSG's objections, the lending bank ultimately acquiesced to OSG's demands and the parties executed the 1997 \$600 million credit facility without the "joint

and several” language. Pursuant to what OSG advocated, the 1997 credit facility made OSG the sole guarantor of amounts borrowed by OBS and OIN, and promissory notes executed under the 1997 credit facilities were signed solely by OSG as the borrowing corporation. As a result, the terms of the 1997 credit agreement did not trigger federal income tax consequences for OSG under Section 956.

Deteriorating Financial Conditions of OSG and Post-2000 Credit facility

OSG’s 2000 Credit facility

16. By 1999, OSG’s financial condition had deteriorated, and OSG needed to raise capital. In April 1999, one of OSG’s U.S. bank creditors downgraded OSG’s debt from BB3 to BB1, noting that the Company had “reported lower revenues and earnings during FY1998 and operating results show no signs of improving given the current poor fundamentals in the bulk ocean shipping industry.”

17. In 1999, OSG and Itkin, who joined the company as CFO in 1995, started negotiating a new \$300 to \$400 million credit facility with two European banks. Given OSG’s deteriorating financial condition, OSG’s United States bank arrangers were no longer willing to negotiate a new credit facility without enhanced credit protection through a “joint and several” liability provision requiring OIN and OBS to guarantee repayment of OSG’s borrowings.

18. During this time, the European banks inserted the “joint and several” provision, which OSG, through Itkin, agreed to in a term sheet dated December 12, 1999. As reflected in drafts of the 2000 credit facility, both OSG’s internal and external counsel tried to reject the provision. In one draft, OSG’s then general counsel, crossed out the “joint and several” provision, writing “no” to the “joint and several” clause being “together” and noted in a comment to its then treasurer that OSG should reject the “joint and several” language because it involved “different accounting/tax treatment.” In another draft, OSG’s then general counsel proposed the language “severally and not jointly” just as the Company had done in connection with the 1997 credit agreement. The then general counsel made these notations out of concern that the “joint and several” language could create potential tax problems for OSG.

19. OSG’s Outside Counsel also noted their concern in drafts of the proposed agreement that the “joint and several” provision would create an “upstream guarantee.” In one draft, an attorney for Outside Counsel noted to the banks’ counsel, that “[a]s we discussed at the commitment letter stage we can’t give legal, valid and binding opinion with respect to an ‘upstream’ guarantee.” The attorney for Outside Counsel, in fact, circled the “joint and several” language several times in the draft where it appeared and wrote “legal issue.”

20. Although OSG had not entered into any prior credit facility with the “joint and several” provision, it accepted this structure in its 2000 credit facility.

21. Itkin signed the credit agreement with the “joint and several” language for the 2000 credit facility on behalf of OSG, OIN, and OBS. In a departure from prior practice, Itkin also co-signed a series of promissory notes on behalf of all three entities.

22. For all ensuing revolving credit facilities of OSG, the credit agreements included the “joint and several” provision, and OSG, OBS, and OIN co-signed promissory notes for the agreements. The joint and several provision triggered tax consequences under Section 956, which OSG failed to report and record in its books and records.

OSG’s 2006 Credit facility

23. In 2005, OSG management began negotiating with banks in an effort to combine its previous credit facilities into one giant \$1.5 billion credit facility. As reflected in the drafts exchanged between OSG management and the banks, tax implications arising from a guarantee provision in the credit agreement were discussed among the parties. In this regard, an early draft term sheet, which was shared with Itkin, reflect footnote comments from bank counsel in connection with the “guarantors” provision stating, “[d]iscuss tax implications of guarantees from non-US subsidiaries.”

24. As part of these negotiations, the lending banks attempted to expand the scope of the guarantee provision beyond OIN and OBS and include all of OSG’s subsidiaries. The draft term sheet, for example, stated that all of OSG’s “direct and indirect” subsidiaries would be “guarantors” of OSG’s debt. OSG management, however, rejected this notion. Instead, as reflected in a December 22, 2005 email from OSG’s then general counsel to Itkin and a new law firm that OSG had hired (“Outside Counsel #2”), OSG wanted to “limit subsidiary guarantors” to OIN and OBS only (the same structure of the 2000 credit agreement), as opposed to all of its subsidiaries.

25. As a result of the negotiations, on February 9, 2006, OSG and the lending banks entered into a \$1.5 billion credit facility, which left intact the provision from the 2000 credit facility that made OIN and OBS “jointly and severally liable” for OSG’s borrowings. Itkin, again, signed on behalf of all three entities. The joint and several provision triggered tax consequences under Section 956, which OSG failed to recognize or report and record in its books and records.

Additional Economic Benefits from OIN to OSG Triggering Tax Consequences

26. By the end of 2008, OSG learned that it had exhausted its \$548 million in “previously taxed income” (“PTI”), which up until this point operated as a tax shield from the income tax liability triggered by the credit agreements.

27. By this time, Itkin understood that the PTI allowed OSG to receive an economic benefit from OSG’s foreign subsidiary and recognize taxable income—either in the form of a deemed dividend or direct dividend—only to the extent it exceeded such PTI, and that utilizing PTI in this way could reduce or eliminate PTI available in the future.

28. In early 2008, OSG wanted to repatriate approximately \$500 million in cash from OIN to OSG so that OSG could pay down certain debt. OSG, through Itkin, asked Outside Counsel (the company’s longstanding counsel that advised on the 1997 and 2000 credit agreements) to prepare a memorandum concerning the tax impact of the proposed repatriation

and whether it made a difference whether it took the form of a distribution or loan by OIN to OSG.

29. In response, Outside Counsel prepared a March 14, 2008 memorandum, directed to Itkin and the OSG Controller, advising that either a direct distribution, which would be a direct dividend, or a loan, which would be a deemed dividend, of \$500 million from OIN to OSG would not give rise to taxable income to OSG *to the extent that the amount was covered by OSG's PTI*. The memo further noted that a repatriation of this magnitude would wipe out OSG's PTI and reduce it to a zero balance, and the Company would no longer be able to shield tax liabilities resulting from future repatriations through PTI offsets.

30. Rather than repatriating through a distribution or loan, OSG, under Itkin's authorization, directed a net cash transfer of \$607 million from OIN to OSG through numerous inter-company transfers. In February 2009, OSG's outside tax advisor discovered the \$607 million cash transfer in its yearly tax memo and informed the company that the cash transfer not only wiped out OSG's PTI, but also resulted in an additional \$53 million (the amount in excess of the PTI offset) that OSG was to include as part of its taxable gross income for 2008, which the Company then paid.

31. Once OSG's PTI was eliminated, OSG no longer had the ability to offset OIN's earnings and profits includable in OSG's taxes pursuant to Section 956(c).² At this point, based on outside counsel's memo of March 14 2008, Itkin and other members of OSG management knew that a cash transfer in the form of an actual dividend or a loan in the form of a deemed dividend under Section 956(c) constituted economic benefits to OSG and would create taxable income to OSG.³

32. In 2010, OSG and Itkin were presented with additional indicia that economic benefits, such as constructive dividends, from OIN to OSG trigger tax liabilities. By October 2010, in connection with a Department of Justice proceeding in which OSG was subject to a \$37 million criminal penalty and plead guilty to 33 criminal counts for certain of its ships discharging oil into the ocean, the IRS discovered that OIN had paid the OSG penalty. As reflected in IRS Forms 5701 and 886-A, the IRS claimed that OIN's payments of OSG's debt constituted a constructive dividend, triggering tax liability.

OSG's Receipt of the 2011 Tax Memorandum

² It was only after 2008, when the PTI balance had been exhausted with no "automatic" replenishment that the loan amounts from credit agreements that were previously not included as gross income became taxable income to OSG with no offset.

³ In March 2010, OSG conducted both a \$300 million debt offering and a \$159 million common stock offering pursuant to the Company's previous shelf registration of the securities on Form S-3. Both registration statements incorporated by reference OSG's 2009 Form 10-K, which contained material misrepresentations and omissions. Also, during the period March 31, 2009 through the first two quarters of 2012, OSG sold securities to employees through Form S-8 stock offerings, and the Forms S-8 incorporated by reference the false statements OSG made in its relevant periodic filings with the Commission.

33. By April 2011, OSG was close to finalizing a new \$900 million credit facility, called the Forward Start Credit facility (“FSF”), to refinance a balloon payment on the 2006 \$1.8 billion credit facility that would be due on February 8, 2013. Under the FSF, OSG would be able to begin drawdowns on and after this due date.

34. While reviewing a draft for the FSF, a tax attorney for longstanding Outside Counsel identified to Itkin and other members of OSG management that the “joint and several” liability provision in the draft could create potential Section 956(c) and (d) income tax liabilities for OSG and asked whether the provision had been included in prior credit facilities. Outside Counsel further noted that the provision could be interpreted as an “upstream guarantee” by OIN of OSG’s indebtedness, which could trigger a 956 liability.

35. After confirming to Outside Counsel that the “joint and several” provision had been included in the 2006 credit facility, Itkin, among other OSG management, requested that Outside Counsel analyze the Section 956 tax implications arising from the “joint and several” provision in the 2000 through 2006 credit agreements.

36. As Outside Counsel further examined the issue, the firm realized that, under a tax law analysis, the IRS could interpret the “joint and several” liability provision, if enforceable, in the credit facilities as triggering tax liabilities under Section 956(c) and (d). Outside Counsel then noted that the “joint and several” provision in the credit agreements were arguably ambiguous and analyzed the issue from the standpoint of determining the original intent of the parties concerning that provision. In this regard, Outside Counsel advised OSG and Itkin that if the Company did not intend for OIN to be a guarantor of OSG’s loans and thus trigger tax consequences, then OSG could argue under commercial law doctrines that the provision should be set aside and rendered unenforceable by the IRS in a court proceeding.

37. In determining the intent of the parties, Outside Counsel repeatedly asked OSG for contemporaneous documents that would shed light on the original intent of the parties, including draft term sheets and communications surrounding the 2000 and 2006 credit facilities, but were told by certain OSG management that no documents existed.

38. Despite receiving at least two documents that discussed subsidiary guarantees in connection with the 2006 credit facilities (the December 2005 memo and the draft term sheet referencing “tax implications of guarantees from non-US subsidiaries”) during the time that Outside Counsel #2 advised OSG, OSG management and Itkin did not disclose the documents to Outside Counsel. Itkin also did not disclose that he had signed promissory notes on behalf of all three entities in connection with the 2000 and 2006 credit facilities.

39. Outside Counsel also requested permission to reach out to individuals who were involved in the earlier negotiations or term sheet review process for the earlier credit facilities, but Itkin and other members of OSG management did not authorize Outside Counsel to contact these individuals.

40. In May 2011, Outside Counsel memorialized its tax analysis in a memorandum to OSG senior management, including Itkin, providing an IRS tax analysis and a commercial law

analysis—to the question of whether the “joint and several” provisions in the 2006 credit facility created taxable income to OSG. With respect to the tax analysis, the memorandum concluded that there was a “significant risk” that the IRS would construe the “joint and several” provision, if enforceable, as a guarantee under the Internal Revenue Code, triggering significant unpaid tax liabilities under Section 956. Under the commercial law analysis, the memorandum stated that *if* OSG did not intend OIN to be a guarantor under the credit facilities, OSG “should” prevail in a litigated proceeding by the IRS against OSG for unpaid tax liabilities under Section 956, and that a court should not enforce “joint and several” liability against OIN. Outside Counsel’s factual foundation of its commercial law analysis was premised, among other factors, on the representations of Itkin and OSG management that OSG did not intend to make OIN a guarantor of OSG’s loans and thus trigger tax consequences and the apparent absence of relevant documents on the issue of intent.

41. Notwithstanding the fact that the May 2011 memo noted that if the “joint and several” provision made OIN a co-borrower or co-obligor with OSG and OBS, then it “would create a significant risk that a substantial portion of OIN’s deferred earnings would be taxable to OSG, and were taxable to OSG” as a consequence the application of Section 956(c) and (d) to the credit agreements, OSG and Itkin failed to disclose the memo to the Company’s outside auditor, its internal auditor, or its board of directors.

42. On February 29, 2012, and again in August 2012, Itkin signed management representation letters for the Company’s outside auditor confirming that the Company had provided the auditor with all written tax advice, even though Itkin and the Company had obtained a May 2011 tax memorandum from Outside Counsel, which he had not provided to the auditor.

43. OSG continued to not recognize any tax liabilities under Section 956 from its drawdowns on loans that its foreign subsidiary, OIN, had guaranteed.

Events Leading Up to OSG’s Board of Directors Discovering the Company’s Tax Liabilities

44. By February 2012, while OSG was trying to convince the lending banks to expand the credit limit of the FSF, OSG’s management identified the tax consequences of making OIN “jointly and severally” liable for OSG’s loans and discussed the issue with the lending banks.

45. An internal memo by a loan officer of one of OSG’s key lenders to other bank officials, dated February 12, 2012, memorialized subjects that were discussed during a recent meeting between the banks, Itkin, and OSG’s then CEO. The memo noted that OSG’s “preferred recapitalization continues to be to obtain \$350mm-\$400mm of additional capital for both survival and growth.” The memo further noted that the “current FSF is structured with OSG Inc., OSG International Inc., and OSG Bulk Ships, Inc. as “joint and several” borrowers. The deemed dividend classification would mean such a distribution or benefit would be subject to U.S. corporate income tax of 35% without repatriation.” The memo specifically highlighted Section 956 and highlighted that “a tax issue arises if the FSF is granted security due to section 956 of the Internal Revenue Code.”

46. By May 2012, Itkin had a lead role in negotiating with lending banks in order to secure additional financing for OSG. The Company's presentation materials to banks, for example, referenced that "Myles Itkin, OSG's CFO, will discuss the Company's thoughts on both amending certain terms of the FSF plus launching a new secured debt credit facility at Overseas International, Inc. that will assist the Company with enhancing its liquidity position and maintaining its leading position in the tanker industry."

47. By this time, OSG and Itkin were presented with further evidence that OIN's guarantee of OSG's loans under credit facilities triggered tax consequences for OSG. Attached to an email dated May 25, 2012, from OSG's vice president of corporate development and finance to Itkin, among others at OSG, and to various bankers, was an "OSG Presentation to Lenders" concerning a meeting to be held with the FSF lenders to discuss the presentation. In the presentation, OSG highlighted precisely the Section 956(c) and (d) tax consequences identified in the May 2011 memo from Outside counsel and near-certain tax obligations for the Company. Specifically, OSG's presentation pointed out:

"Due to OIN's status as a controlled foreign corporation and OSG's status as a "United States shareholder" of OIN, under the U.S. tax code, certain actions by OIN (including guaranteeing or providing security for OSG's outstanding debt) will trigger immediate taxable income for OSG with respect to some of all of the \$2.2 billion in earnings that have not yet been subject to U.S. federal income taxation. This is true even without an actual distribution of cash by OIN to OSG....

"If OIN were to lend \$100 million to OSG, \$100 million of OIN's currently untaxed earnings (\$2.2 billion) would be accelerated and would produce taxable income for the U.S.

"If OIN guarantees OSG's obligations on the \$900 million Forward Start Agreement, it would create \$900 million of taxable income and approximately \$300 million of cash taxes for OSG."

"The assets of a controlled foreign corporation serve at any time, even though indirectly, as security for the performance of an obligation of its U.S. shareholder. The controlled foreign corporation will be considered a pledgor or guarantor of that obligation. Income tax inclusion would equal the amount of the obligation and not the value of CFC's pledged assets." (Underscore in original.)

48. Despite acknowledging to its prospective bankers the tax consequences from OIN's guarantees of OSG's drawdowns through the "joint and several" provision in any future FSF and the tax consequences under Section 956 under prior credit facilities, OSG and Itkin did not disclose the "joint and several" issue to the Company's outside auditor, nor did OSG recognize any tax liability arising from prior credit facilities in OSG's publicly filed financial statements.

49. By September 2012, OSG was still unable to secure the financing it needed through the FSF and was faced with a massive debt obligation of \$1.49 billion from the 2006 credit facility that was due by February 8, 2013.

50. Left with no other choice and faced with the possibility of defaulting on its debt obligations, OSG management, including Itkin, finally disclosed the Section 956 issue to OSG's board of directors during a meeting held on September 20, 2012. During the meeting, which was attended by OSG management, including Itkin, OSG's financial advisor, and attorneys from Outside Counsel, OSG's financial advisor made a presentation to the board on a potential bankruptcy filing by the Company. That presentation disclosed that OSG's potential Section 956 past-due tax liabilities (which the Company had not yet recognized), could result in a bankruptcy filing if recognized. As one board member understood it, such a situation would impair the banks' ability to recover on OSG's debt under the credit facilities because the IRS would stand in front of the banks as a secured creditor in bankruptcy and, thus, the banks may be more willing to negotiate the FSF on more favorable terms and provide funding.

51. OSG's board member expressed surprise that management, including Itkin, had not disclosed the Section 956 tax liability issue to the board before. Itkin told the board member at the meeting that OSG was advised by Outside Counsel that the issue need not be disclosed to the board, Audit Committee or OSG's auditors—advice that Outside Counsel confirmed at the meeting—and, as such, the inner circle of people who knew about this issue had been kept small. The board member also specifically asked to speak with OSG management who were involved in the negotiations of the earlier credit facilities, including the 2000 agreement that first included the joint and several provision, but was told that “[t]hose parties are no longer in this room, meaning former executives of the company.” Itkin, however, did not disclose that he was involved in the negotiations for the 2000 credit facility or that he had signed the promissory notes on behalf of OSG, OIN and OBS.

52. The board member was also troubled by the fact that OSG management had failed to disclose the 956 issue to the Company's outside auditor, but OSG management, along with Outside Counsel, continued to hold the view that such disclosure was not needed. The board member urged OSG management to disclose immediately the Section 956 issue to OSG's outside auditor and bring in an independent outside law firm to investigate the full scope of the issue. OSG did not immediately disclose the Section 956 issue, but the board scheduled a follow-up meeting for October 4 to more fully discuss the issue with its Outside Counsel before making any disclosure.

53. Following the board meeting, the board member pleaded with his fellow board members to engage OSG's outside auditors and an independent law firm immediately. On September 25, 2012, the board member sent a letter to OSG's chairman of the board and audit committee insisting that the tax issue be presented to OSG's outside audit firm and another independent law firm be retained to provide “input on any financial statement implications.” Two days later, on September 27, 2012, the board member submitted a resignation letter. The board member believed that his resignation would, in effect, force OSG to immediately disclose the Section 956 issue to OSG's outside auditor because the Company was required to publicly

disclose the board member's resignation. As anticipated, on October 3, 2012, OSG filed a Form 8-K announcing the board member's resignation and attaching his letter.

54. The resignation led to a cascade of events, including immediate disclosure to OSG's outside auditor, OSG's retention of an independent law firm, and the subsequent reporting that OSG had approximately \$463 million in unpaid taxes arising from the Company's Section 956 liabilities. As a result, OSG restated its financial statements from 2000 through the second quarter of 2012 and ultimately filed for Chapter 11 bankruptcy in November 2012. The Section 956 issue resulted in OSG materially understating its cumulative deferred tax liability and/or current tax liability by the following material amounts and percentages of total liabilities per year:

\$123M in 2000 (10%)	\$519M in 2006 (20%)
\$159M in 2001 (12%)	\$558M in 2007 (20%)
\$146M in 2002 (10%)	\$513M in 2008 (20%)
\$169M in 2003 (14%)	\$476M in 2009 (17%)
\$173M in 2004 (12%)	\$464M in 2010 (16%)
\$187M in 2005 (11%)	\$512M in 2011 (17%)

55. In a Form 8-K filed on December 19, 2013, the Company reported that the IRS had amended and reduced its claim for past taxes from about \$463 million to approximately \$264 million. OSG subsequently paid this latter amount to the IRS.

OSG'S Improper Analyses Under ASC 740

OSG's Failure to Recognize Deferred Tax Liabilities Under Accounting Principles Board Statement 23 ("APB 23")

56. The Financial Accounting Standards Board's ("FASB") Accounting Standards Codification ("ASC") 740-30-25-3, formerly Accounting Principles Board Statement No. 23 ("APB 23"), paragraph 10, sets forth an accounting presumption that all undistributed earnings of a subsidiary will eventually be transferred to the parent entity.⁴ This presumption results in a temporary difference between when the parent entity recognizes the subsidiary's earnings for accounting purposes (when it's earned) and for tax purposes (when it's distributed). For example, OSG recognized its foreign source income when earned for financial reporting, but after the Jobs Creation Act it deferred recognizing its foreign source income for tax reporting because the IRS rules allowed for deferred taxation until the income was repatriated. To account for this temporary difference, the parent is required to record a deferred tax liability and corresponding expense. Pursuant to ASC 740-30-25-17, the presumption in ASC 740-30-25-3 can be overcome, however, and no temporary difference recorded, if sufficient evidence shows that the subsidiary has invested or will invest the undistributed earnings indefinitely. In general,

⁴ References are to the ASC for interim and annual periods ending after September 15, 2009. For prior periods, the authoritative literature in this area, including Financial Accounting Standards Board Statement No. 109 ("SFAS 109"), was substantially similar. SFAS 109, as supplemented by FIN 48 in 2007, established the accrual basis of accounting for income tax liabilities and expenses and explains temporary differences that gave rise to the financial statement misstatements discussed below.

the parent must show it has both *the intent and the ability* to indefinitely reinvest these earnings in order to overcome the presumption.

57. From 2000 to the second quarter of 2012, OSG inappropriately relied upon this exception pursuant to ASC 740-30-25-17, and thus avoided recognizing deferred tax liabilities on untaxed earnings and profits of its CFC, OIN, up to the maximum borrowing capacity of the agreements. Because the “joint and several” language created the possibility of deemed repatriations under Section 956, OSG did not have the ability to indefinitely reinvest all of OIN’s earnings and profits.

58. In each of its Forms 10-K for 2000 to 2011, OSG reported the amount of its foreign shipping companies’ untaxed and undistributed earnings, as well as a statement that no provision for U.S. income taxes was required in relation to these earnings because the earnings would be reinvested indefinitely. For example, OSG’s 2009 Form 10-K, filed on March 1, 2010, specifically, Note L (Taxes) to the financial statements contained the assertion that was used in 2010 and 2011:

The Company intends to permanently reinvest these earnings [OIN’s untaxed past earnings], as well as the undistributed income of its foreign companies accumulated through December 31, 1986, in foreign operations. Accordingly, no provision for U.S. income taxes on the shipping income of its foreign subsidiaries was required in the three years ended December 31, 2009 and no provision for U.S. income taxes on the undistributed income of the foreign shipping companies accumulated through December 31, 1986 was required at December 31, 2009.

59. These disclosures were false because OSG was in fact required to provide for deferred U.S. income taxes in each of these years due to the “joint and several” language in the credit facilities. During this period, the amount of deferred income taxes OSG failed to report grew from \$165 million in 2000 to \$525 million by the second quarter of 2012.

60. OSG restated its assertion under ASC 740-30-25-17 in its 2013 financials statements “to the extent these earnings could be deemed repatriated as a result of OIN’s joint and several liability.”

OSG’s Failure to Disclose, Analyze, and Document Requirements of ASC 740-10-25-5

61. From 2000 through early 2011, OSG created no documentation about the tax consequences of “joint and several” language despite the significant discussion that took place surrounding the issue in connection with both the 1997 and 2000 credit facilities. During this period, OSG also did not obtain any written tax or attorney opinion about the tax implications of the “joint and several” language. In fact, there was no acknowledgement of a tax position by OSG, even though the decision to exclude from OSG’s gross income the amounts borrowed by OSG under the credit facilities, in effect, created a “tax position.”

62. OSG routinely documented the Company’s “uncertain tax positions” and understood the requirements of the accounting principle that required analysis under ASC 740-

10-25-5.⁵ For example, on January 8, 2007, OSG’s outside tax adviser sent the Company a memo asking OSG “to confirm that none of the CFC’s [*sic*] made an investment or deemed investment in U.S. property resulting in a deemed dividend under Section 956.” It continued: “Section 956(d) provides that for purposes of Section 956(a), a CFC shall be considered as holding an obligation of a U.S. person if such CFC is a pledgor or guarantor of such obligation.”

63. In May 2011, despite OSG receiving Outside Counsel’s tax memo, the Company failed to recognize the “joint and several” provision in the 2006 credit facility as creating an uncertain tax position. However, OSG failed to perform any analysis concerning the Company’s uncertain tax position or record any related reserve.

* * * * *

64. OSG, with Itkin as the CFO, maintained deficient or non-existent internal accounting controls, including processes to identify the tax consequences, if any, of intercompany transactions between OSG and its foreign subsidiary, OIN. OSG and Itkin understood that the terms of the credit agreements for hundreds of millions of dollars were complex and its key terms had business, legal, and often tax significance, but agreed to the joint-and-several provision. Further, OSG did not have an adequate process in place to identify and evaluate its income tax liabilities pursuant to the Internal Revenue Code stemming from OSG’s relationship with OIN and the related effects those liabilities would have when accounting for income taxes in its financial statements. Specifically, OSG had no controls to identify the interplay between the credit agreement structures, Sections 956(c) and (d), and FIN 48. OSG’s head of taxation and financial reporting who reported to Itkin who had some understanding of the IRS Code, did not understand Section 956 and was not involved in the underlying negotiations of the credit agreements. Despite the limitations of its internal knowledge in negotiating and accounting for these revolving credit agreements--critical to OSG’s liquidity—OSG and Itkin failed to implement proper internal accounting controls designed to ensure that OSG properly reported its tax liabilities.

Violations

65. Section 17(a)(2) prohibits any person from directly or indirectly obtaining money or property in the offer or sale of securities by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, and Section 17(a)(3) prohibits any person from directly or indirectly engaging in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser in the offer or sale of

⁵ ASC 740-10-25-5 requires businesses to analyze uncertain income tax positions to determine whether the positions are more likely than not to be sustained upon examination. Companies are only permitted to recognize the associated benefits from an income tax position to the extent it believes it is more likely than not entitled to the benefits. As a result of this analysis, the amount of benefit recognized for financial reporting purposes may differ from the benefit taken for tax purposes. This difference should be recognized as a liability in the company’s balance sheet and disclosed in the footnotes. For implementation guidance, refer to ASC 740-10-55-3.

securities.

66. Section 13(a) of the Exchange Act requires issuers to file such periodic and other reports as the Commission may prescribe and in conformity with such rules as the Commission may promulgate. Exchange Act Rules 13a-1, 13a-11, and 13a-13 require the filing of annual, current, and quarterly reports, respectively. In addition to the information expressly required to be included in such reports, Rule 12b-20 of the Exchange Act requires issuers to add such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made not misleading. “The reporting provisions of the Exchange Act are clear and unequivocal, and they are satisfied only by the filing of complete, accurate, and timely reports.” *SEC v. Savoy Industries*, 587 F.2d 1149, 1165 (D.C. Cir. 1978) (citing *SEC v. IMC Int’l, Inc.*, 384 F. Supp. 889, 893 (N.D. Tex. 1974)). A violation of the reporting provisions is established if a report is shown to contain materially false or misleading information. *SEC v. Kalvex, Inc.*, 425 F. Supp. 310, 316 (S.D.N.Y. 1975).

67. Section 13(b)(2)(A) of the Exchange Act requires issuers to “make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer.” Section 13(b)(2)(B) of the Exchange Act requires issuers to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are recorded as necessary to permit the preparation of financial statements in conformity with generally accepted accounting principles.

68. As a result of the conduct described above, OSG violated Securities Act Sections 17(a)(2) and 17(a)(3) and Exchange Act Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder.

69. To establish that a respondent caused a violation of the securities laws, the Commission must show that: (1) a primary violation occurred; (2) an act or omission by the respondent was a cause of the violation; and (3) the respondent knew or should have known that his or her conduct would contribute to the violation. *Robert M. Fuller*, 56 S.E.C. 976, 984 (2003), *pet. denied*, No. 03-1334 (D.C. Cir. 2004).

70. Exchange Act Rule 13b2-1 prohibits any person from directly or indirectly falsifying, or causing to be falsified, any book, record, or account subject to Exchange Act Section 13(b)(2)(A). No showing of *scienter* is required to establish a violation of Rules 13b2-1 and 13b2-2 (described below). *World-Wide Coin Investments*, 567 F. Supp. 724, 749 (N.D. Ga. 1983).

71. Exchange Act Rule 13b2-2(a) prohibits an officer or director of an issuer from making materially false statements or omissions to an accountant in connection with an audit or review of the issuer’s financial statements. In addition, Rule 13b2-2(b) prohibits an officer or director of an issuer from taking actions to mislead an accountant engaged in the performance of an audit if that person knew or should have known that such action could render the issuer’s financial statements materially misleading.

72. Exchange Act Rule 13a-14, among other things, requires a principal financial

officer to certify in each quarterly and annual report filed or submitted under Exchange Act Section 13(a) that he or she has reviewed the report and to certify that he or she had designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under [their] supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with Generally Accepted Accounting Principles.

73. Itkin, in his role as CFO of OSG, had responsibility for the financial and accounting operations of the company, served on the board of directors for OIN and OBS, negotiated the credit agreements, signed promissory notes on behalf of all three entities and directed the draw down of advances on behalf of OSG under the revolving credit facilities. In carrying out these actions, Itkin had indicated that the credit agreements triggered tax consequences but did not take steps to make sure OSG was recognizing and report tax liabilities arising from the credit agreements. Itkin also was negligent in allowing internal accounting controls deficiencies at the company during the relevant period including processes to identify the tax consequences of intercompany transactions between OSG and its foreign subsidiary, OIN. Further, Itkin signed management representation letters for the Company's outside auditor confirming that the Company had provided the auditor with all written tax advice, even though Itkin knew that the Company had obtained a May 2011 tax memorandum from Outside Counsel, which he had not provided to the outside auditor.

74. Accordingly, Itkin was a cause of the company's negligence-based fraud violations under Securities Act Sections 17(a)(2) and (3) from 2011 through the second quarter of 2012. By engaging in the foregoing conduct, from 2009 through the second quarter of 2012, Itkin also directly violated Exchange Act Rule 13b2-1 by causing to be falsified various books and records of the company and acted as a cause of the company's reporting, internal accounting controls, books and records, and related rule violations under Exchange Act 13(a), 13(b)(2)(A), and 13(b)(2)(B) and Rules 12b-20, 13a-1, 13a-11, and 13a-13. During the same period, Itkin violated Exchange Act Rule 13b2-2(a)-(b) by his failure to disclose the May 2011 tax memorandum or its analysis to OSG's outside auditor and Exchange Act Rule 13a-14 when he signed false certifications as the CFO of OSG that were included in OSG's Forms 10-Q and Forms 10-K filed with the Commission.

Findings

75. Based on the foregoing, the Commission finds that Respondent OSG violated Securities Act Sections 17(a)(2) and 17(a)(3), Exchange Act Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B), and Exchange Act Rules 12b-20, 13a-1, 13a-11 and 13a-13.

76. Based on the foregoing, the Commission finds that Respondent Itkin violated Exchange Act Rules 13b2-1, 13b2-2, and 13a-14, and caused OSG's violations of Securities Act Sections 17(a)(2) and 17(a)(3), Exchange Act Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B), and Exchange Act Rules 12b-20, 13a-1, 13a-11 and 13a-13.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondents OSG and Itkins' Offers.

In determining to accept OSG's Offer, the Commission considered OSG's cooperation afforded to the Commission staff, including OSG's implementation of remedial measures and improvements to internal accounting controls over its tax reporting function and changes to the senior management and directors of OSG since 2012.

Accordingly, it is hereby ORDERED that:

A. Pursuant to Section 8A of the Securities Act and Section 21C of the Exchange Act, Respondents OSG and Itkin cease and desist from committing or causing any violations and any future violations of Securities Act Section 17(a)(2) and 17(a)(3), and Exchange Act Sections 13(a), 13(b)(2)(A), 13(b)(2)(B) and Rules 12b-20, 13a-1, 13a-11, and 13a-13 thereunder, and Itkin cease and desist from committing or causing any violations or any future violations of Exchange Act Rules 13a-14, 13b2-1, and 13b2-2.

B. Respondent OSG shall, subject to the approval of the bankruptcy court in the above-described bankruptcy proceedings, within ten (10) days of such approval and entry of a final order by the bankruptcy court, pay a civil money penalty of \$5,000,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

C. Respondent Itkin shall, within ten (10) days of the entry of this Order, pay a civil money penalty of \$75,000 to the Securities and Exchange Commission. If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. § 3717.

D. Respondents' payments must be made in one of the following three ways:

1. Respondents may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;
2. Respondents may make direct payment from a bank account via Pay.gov through the SEC website at <http://www.sec.gov/about/offices/ofin.htm>; or
3. Respondents may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341

6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying OSG and Itkin as Respondents in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to Gerald W. Hodgkins, Associate Director, Division of Enforcement, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-5720.

E. Amounts paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondents agree that in any Related Investor Action, it shall not argue that it is entitled to, nor shall it benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondents' payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondents agree that it shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondents by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

By the Commission.

Brent J. Fields
Secretary