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The Special Counsel

February 14, 2019

The President
The White House
Washington, D.C. 20500

Re: OSC File No. DI-14-1216

Dear Mr. President:

I am forwarding to you reports from the Department of the Treasury (Treasury), based on disclosures of wrongdoing in the Office of the Comptroller of the Currency (OCC), Law Department, Washington, D.C. The whistleblower, who chose to remain anonymous, disclosed that OCC officials knowingly failed to enforce ethics regulations. I have reviewed the agency reports and whistleblower comments and, in accordance with 5 U.S.C. § 1213(e), provide the following summary of the reports, whistleblower comments, and my findings.¹

The whistleblower alleged that for over a decade OCC ethics officials failed to enforce 5 C.F.R. § 2640, which prohibits Treasury employees from participating in an official capacity in certain matters in which they had a personal financial interest, commonly known as particular matters of general applicability (PMGA), resulting in numerous ethics violations. The whistleblower also alleged that OCC officials failed to fully disclose the ethical lapse to employees and the public. The whistleblower specifically cited OCC's ethics review of employee [REDACTED] appointment to a senior policymaking position as an example of OCC's failure to properly interpret and implement PMGA.

The agency substantiated that some OCC employees should have been prohibited from participating in certain matters in which they had a personal financial interest but did not find that this oversight was part of a coordinated effort to subvert the law. The agency explained that § 2640.103(a)(1), which the U.S. Office of Government Ethics (OGE) issued in 1997 to interpret financial conflict of interest prohibitions in 18 U.S.C. § 208(a), defined "particular matters" as those that involve "deliberation, decision or action that is focused upon the interest of specific persons, or a discrete and identifiable class of persons." In 2006, the OGE issued a memorandum further explaining that PMGA may

¹The whistleblower's allegations were referred to former Treasury Secretary Jacob J. Lew for investigation pursuant to 5 U.S.C. § 1213(c) and (d). The Treasury Office of the Inspector General conducted the investigation. Former Deputy Secretary Sarah Bloom Raskin reviewed and signed the agency's report. The agency's supplemental report was reviewed and signed by the Honorable Eric M. Thorson, Inspector General.

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include “legislation and policymaking if they were focused on a specific class or industry.”

In 1996, OCC issued a memorandum summarizing the various approaches to PMGA under 18 U.S.C. § 208(a) and recommending that OCC recuse only employees who are negotiating for employment with a bank from matters focusing on the specific bank or narrowly focused on a discrete and identifiable class of banks. Despite subsequent guidance issued by Treasury that should have informed OCC’s interpretation, including the Treasury Ethics Handbook beginning in 2000, which advised a broader approach to PMGA than OCC’s guidance, OCC continued to follow this erroneous guidance for 15 years. The agency acknowledged that OCC district ethics officials were not aware of the PMGA guidance in the Ethics Handbook.

The agency asserted that OCC did not directly advise employees regarding PMGA but applied its interpretation consistently when addressing recusals. OCC officials acknowledged that they should have coordinated with OGE on their approach to PMGA. However, OCC did not coordinate with OGE until the 2011 appointment of ██████████ ██████████ to the position of Senior Deputy Controller for Bank Supervision Policy and Chief National Bank Examiner led OGE officials to voice concerns about OCC’s interpretation of PMGA. Mr. ██████████ was ultimately transitioned into a different position.

OCC issued a press release in October 2011 announcing that Mr. ██████████ had switched jobs with another employee. The press release did not mention the issue of PMGA or explain the underlying reason for the switch. The agency, however, determined that this oversight did not constitute a false statement, and that OCC did not have an obligation to disclose the reasons for Mr. ██████████ reassignment. Thereafter, OCC headquarters ethics official ██████████ addressed PMGA with OCC ethics officials during a conference call and, according to the agency, OCC ethics officials took immediate action to amend OCC’s interpretation and guidance on PMGA. Thus, the agency did not substantiate the whistleblower’s allegation that OCC officials attempted to downplay PMGA in communication with employees.

In 2011, OCC officials repeatedly discussed the issue of PMGA and, according to the agency, proactively reviewed senior employee financial disclosure forms, identifying only Mr. ██████████ as having a PMGA conflict. Non-senior employees who were implicated were also advised in 2012 of their now-expanded recusals. In 2012, OCC initiated an ethics clearance process for employees in public filer positions and higher-graded positions under the Chief National Bank Examiner. OCC also issued an agency-wide ethics bulletin on the scope of the recusal requirements. Thus, the agency determined that OCC training and policy currently reflects an appropriate interpretation of PMGA. In addition, the agency noted that OCC has increased its communication with the Treasury

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Legal Division in recent years, including reviews of ethics advice and financial disclosure filings.

The whistleblower believes that the agency did not make a good faith effort to conduct a serious investigation of the allegations. For example, the whistleblower stated that OCC had no interpretation of PMGA at all, notwithstanding the agency's initial finding that OCC officials from 1996 onward had applied a consistent approach to PMGA. The whistleblower further asserted that the 1996 OCC PMGA memorandum was not distributed to ethics officials, and that the concept of PMGA was never discussed or explained to staff. In fact, PMGA was not raised at all with employees until 2011, which the whistleblower believes was a purposeful concealment of the PMGA concept by OCC officials. The whistleblower also posited that the 2011 press release regarding the reassignment of an OCC official was further evidence of OCC's attempts to conceal its failure to address and implement PMGA. The whistleblower strongly advocated that OCC should have directly stated that the move was the result of a conflict of interest under PMGA.

The whistleblower further asserted that the report overlooked witness statements that the whistleblower characterized as falsehoods. These include whether a highly-placed OCC official was involved in policymaking pursuant to PMGA and whether [REDACTED] [REDACTED] obscured the discovery and rollout of PMGA compliance to employees. The whistleblower opined that the report whitewashed these actions to obscure their origin and effect. Specifically, the whistleblower pointed to actions by OCC officials, including Ms. [REDACTED], to downplay the rollout of OCC's "new" PMGA interpretation and make it appear to be less than a significant change to standing policy.

The whistleblower also addressed OCC's remedial actions, asserting that the agency overcorrected to deflect attention from its lapses. The whistleblower stated that OCC officials subjected employees who were not involved in policymaking to PMGA review, requiring them to complete expanded recusals or divest their holdings, causing undue stress for employees and ethics officials.

I have reviewed the original disclosure, agency reports, and whistleblower comments. As the whistleblower noted, and as the agency acknowledged in its supplemental report, OCC engaged in a serious ethical lapse spanning 15 years by failing to implement any kind of PMGA oversight between 1996 and 2011. The reports also show that OCC failed to consult with OGE or Treasury regarding PMGA at any point during that time. I am concerned by such a critical ethical oversight, particularly given the availability of alternative PMGA interpretations, the extended period of the lapse, and the number of employees who may have been affected.

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Nevertheless, upon recognizing its failures, OCC implemented policies to correct its interpretation of PMGA and to ensure that employees received updated ethical guidance. While the whistleblower disagreed with the manner of OCC's PMGA "rollout" and questioned the forthrightness of its public statements, the report makes clear that OCC identified and corrected its PMGA policy and reassigned affected employees as required. OCC has also increased its collaboration with the Treasury Legal Division, which may limit the occurrence of similar lapses in the future. As the agency's supplemental report noted, internal deliberation and disagreement over the language of OCC's internal and public announcements is not unexpected, and such discussion does not bear directly on whether the agency is now meeting its ethical responsibilities.

Although the whistleblower takes issue with how the agency conducted its investigation, it appears that the agency did conduct a good faith investigation. Furthermore, it appears the agency took appropriate corrective actions in response to the substantiated allegations. For these reasons I have determined that the report meets all statutory requirements, and the findings appear reasonable.

As required by 5 U.S.C. § 1213(e)(3), I have sent a copy of this letter, the agency reports, and the whistleblower comments to the Chairmen and Ranking Members of the Senate Committee on Banking, Housing, and Urban Affairs and the House Committee on Financial Services. I have also filed redacted copies of these documents and the redacted § 1213(c) referral letter in our public file, which is available at www.osc.gov. This matter is now closed.

Respectfully,



Henry J. Kerner
Special Counsel

Enclosure