

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

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In the Matter of	)	
	)	
<b>JAMES E. PLACK</b> , individually,	)	OCC AA-EC-2014-90
and as an institution-affiliated party of	)	
	)	
AMERICAN BANK	)	
ROCKVILLE, MARYLAND	)	
(FEDERAL SAVINGS ASSOCIATION)	)	

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**THOMAS J. CURRY, Comptroller of the Currency:**

**DECISION AND ORDER RESOLVING REMAINING PROCEDURAL ISSUES**

This Decision addresses procedural issues remaining after the termination by settlement of an enforcement action brought by the Office of Comptroller of the Currency (“OCC”) against James E. Plack (“Plack”), who had been President, Chief Executive Officer and Director of American Bank, a Federal savings and loan association. Beginning before and continuing after the termination of the proceeding, American Bank, its holding company, and Congressional Bank, the successor in interest to American (collectively, “the Bank”), filed a series of four motions seeking interlocutory review by the Comptroller of procedural and evidentiary rulings by Christopher B. McNeil, the presiding Administrative Law Judge (“ALJ”).

Almost all of the issues raised in those motions have been mooted by subsequent events or resolved by agreement between the parties. In its most recent pleading, the Bank states: “Congressional Bank’s only remaining interest in this matter is ensuring that American Bank’s privileged information submitted in these proceedings is not later disclosed to third parties.”

Reply Brief,<sup>1</sup> March 11, 2016 at 3. To that end, the Bank requests three forms of relief:

- That the Comptroller order that the eleven hearing exhibits and six hearing transcript proceedings at issue be sealed.
- That the Bank's Motion For Interlocutory Review be granted.
- That the Comptroller Order that the Bank's "privileged documents identified on the Proposed Privilege Log remain privileged with respect to third parties in response to requests under the Freedom of Information Act or otherwise."

Reply Brief March 11, 2016 at 4.

For the reasons discussed below, the Comptroller resolves these requests as follows. First, the Comptroller orders the identified evidentiary material to be sealed: Enforcement Counsel does not oppose that request; it approximates what a denied Protective Order sought by Enforcement Counsel would have achieved; and other considerations outweigh the now attenuated public policy weighing in favor of open proceedings.

Second, the Bank's multiple motions for Interlocutory Review have been mooted by the termination of the hearing. The motions will instead be treated as procedural motions and are resolved herein.

Third, the Comptroller declines to make the requested Order as to waiver of privilege, which would extend beyond the Comptroller's plenary authority over OCC enforcement proceedings to other tribunals not subject to the OCC's authority. The Comptroller will, however, address the scope of the statutory protection against waiver of privilege in documents required to be produced to banking regulatory agencies such as the OCC.

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<sup>1</sup> Reply by Congressional Bank, as Successor in Interest to American Bank, FSB, to OCC Enforcement Counsel's Consolidated Response to Motion For Interlocutory Review, March 11, 2016. The Bank's unopposed March 11, 2016 Application for leave to reply is hereby granted.

Given the narrowing of the issues in dispute, the Comptroller finds it unnecessary to resolve the question whether the ALJ correctly decided that no attorney-client privilege attached to the material for which the Bank claimed privilege.

#### **Statutory and Regulatory Background.**

The OCC is an independent bureau in the Department of the Treasury that supervises national banks, Federal savings associations,<sup>2</sup> and Federal branches and agencies of foreign banks. The Federal Deposit Insurance Act (“FDI Act”) authorizes the “appropriate Federal banking agency” (or “AFBA”)<sup>3</sup> to impose various remedies for misconduct by a banking institution or by an institution-affiliated party (“IAP”), such as the president of an insured depository institution. 12 U.S.C. § 1818; *see also id.* § 1813(q) (defining the scope of each AFBA’s authority under the FDI Act by reference to the institutions it supervises); *id.* § 1813(u) (defining IAP). The FDI Act sets forth a comprehensive scheme of administrative enforcement and judicial review of each AFBA’s enforcement actions. Among other things, it authorizes the banking agencies to assess civil money penalties and issue cease-and-desist orders against banks and to issue removal-and-prohibition orders against IAPs (such as bank officers and directors) for violations of law, unsafe or unsound practices, or breach of fiduciary duty. 12 U.S.C. §§ 1818(a)-(b), (e).

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<sup>2</sup> On July 21, 2011, § 312(b)(2)(B) of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank”), 12 U.S.C. § 5414(b)(2)(B) (2010), transferred all functions of the Office of Thrift Supervision (“OTS”) and its Director relating to Federal savings associations to the OCC and the Comptroller, respectively. On the same date, the OCC and the Comptroller also succeeded to all powers, authorities, rights, and duties formerly vested in the OTS and its Director relating to the transferred functions. *Id.* Dodd-Frank also mandated the transfer to the OCC of all OTS property used to perform or support the transferred functions, including (without limitation) records, files, reports of examination, work papers, correspondence related to such reports, and any other information or materials. Dodd-Frank § 323(a)-(b)(1), 12 U.S.C. § 5433(a)-(b)(1).

<sup>3</sup> The AFBA’s are the OCC, the Board of Governors of the Federal Reserve System, and the Federal Deposit Insurance Corporation. 12 U.S.C. § 1813(q).

Only the courts of appeals have jurisdiction to review final agency orders under petitions for review filed by a party to the enforcement hearing. *Id.* § 1818(h). The FDI Act protects enforcement actions from disruption through collateral attacks in state or federal court: “except as otherwise provided in this section \* \* \* no court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under [this] section, or to review, modify, suspend, terminate, or set aside any such notice or order.” 12 U.S.C. § 1818(i)(1).

The FDI Act provides that “[a]ll hearings on the record with respect to any notice of charges issued by a Federal banking agency shall be open to the public, unless the agency, in its discretion, determines that holding an open hearing would be contrary to the public interest.” 12 U.S.C. § 1818(u)(2). The provision reflects a reversal in Financial Institutions, Reform, Recovery, and Enforcement Act of 1989 (“FIRREA”) of Congress’s previous policy setting a statutory presumption that FDI Act enforcement hearings be closed to the public.

Another provision of the FDI Act protects privileges in documents submitted to banking agencies as part of the supervisory process. “The submission by any person of any information to \* \* \* any Federal banking agency \* \* \* for any purpose in the course of any supervisory or regulatory process of such \* \* \* agency \* \* \* shall not be construed as waiving, destroying, or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than such \* \* \* agency \* \* \*.” 12 U.S.C. § 1828(x).

#### **OFIA and the Uniform Rules of Practice and Procedure.**

FDI Act administrative enforcement proceedings are conducted before an ALJ from the Office of Financial Institution Adjudication (“OFIA”). OFIA is charged with overseeing the operation of administrative enforcement proceedings for the OCC, the Board of Governors of the

Federal Reserve System, the Federal Deposit Insurance Corporation, and the National Credit Union Administration (“NCUA”). 12 C.F.R. § 19.3(k).<sup>4</sup> As directed by Congress in the FIRREA, a uniform set of rules of practice and procedures govern the banking agencies’ administrative proceedings. *See* FIRREA, § 916 (directing banking agencies to “develop a set of uniform rules and procedures for administrative hearings”). The OCC’s version of the uniform rules of practice and procedure (“Rules of Procedure”) is set forth at 12 C.F.R. Part 19. OFIA ALJs’ duties and functions are set forth in the uniform rules of practice and procedure, *see, e.g.*, 12 C.F.R. § 19.5. The ALJs may consider and rule upon procedural and other motions, 12 C.F.R. § 19.5, but only the Comptroller has “the power to grant any motion to dismiss the proceeding or to decide any other motion that results in a final determination of the merits of the proceeding.” *Id.* § 19.5(b)(7). The Comptroller has plenary authority over the conduct of the proceeding. While the ALJs have the authority to set schedules and regulate the course of the administrative proceedings, *id.* § 19.5, “at any time during the pendency of [the] proceeding” before the ALJ, the Comptroller may “perform, direct the performance of, or waive performance of, any act which could be done or ordered by the administrative law judge.” *Id.* § 19.4.

The Comptroller may grant interlocutory review of a ruling of the ALJ if: (1) the ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion; (2) immediate review of the ruling may materially advance the ultimate termination of the proceeding; (3) subsequent modification of the ruling at the conclusion of the proceeding would be an inadequate remedy; or (4) subsequent modification of the ruling would cause unusual delay or expense. *Id.* § 19.28. Consistent with the FDI Act, the Rules of

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<sup>4</sup> Because the Bank was a Federal savings association, the parallel procedural rules of the OTS technically applied to the proceedings before the ALJ. *See* 12 C.F.R. Part 109. To avoid confusion, this decision will cite to the corresponding rules of the OCC.

Procedure provide that all hearings shall be open to the public, unless the Comptroller, in the Comptroller's discretion, determines that holding an open hearing would be contrary to the public interest. 12 C.F.R. § 19.33(a). Under the Rules, a respondent may request a private hearing and the Comptroller is empowered to act on that request. 12 C.F.R. § 19.33(a). The Rules also provide authority for Enforcement Counsel to file a document under seal:

“Enforcement Counsel, in his or her discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The administrative law judge shall take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.” 12 C.F.R. § 19.33(b). Notably, the rule places this discretion with Enforcement Counsel, and does not give the ALJ discretion to deny Enforcement Counsel's decision to file the document under seal.

#### **Course of Proceedings Before the ALJ.**

American Bank Holdings, Inc., was a savings and loan holding company, and American Bank was a Federal savings association and an insured depository institution. Both institutions were located in Rockville, Maryland. Both were supervised by OTS before its 2011 merger into the OCC under Dodd-Frank. In connection with its supervision of American Bank as the successor to OTS, the OCC on October 29, 2014, commenced an administrative enforcement proceeding against American Bank's President and Chief Executive Officer James E. Plack by serving him with a Notice of Charges. The Notice of Charges alleged that in 2010 Plack caused American Bank to engage in a fraudulent adjusted price trade by structuring transactions at artificially inflated prices through the use of an intermediary in order to conceal the true amounts of the Bank's profits and losses from those transactions; that Plack had misrepresented the transactions to obtain board of directors approval, failed to disclose to examiners of the OTS the

material aspects of these transactions and lied to federal regulators in sworn testimony during the OCC's investigation of these transactions; and that he separately caused the Bank to make a loan that concealed unrecognized losses. The OCC sought an order, pursuant to 12 U.S.C. § 1818(e), removing Plack from his position with American Bank and prohibiting him from further participation in the banking industry. *Id.* at 18-19. The OCC also sought civil monetary penalties. *Id.* at 19-20.

The Bank first attempted to intervene in the proceedings on November 14, 2014, in an "Emergency Motion to Intervene and Request to Stay Proceedings Pending Completion of Bank Merger." The motion did not make any reference to attorney-client privilege issues, but instead cited a then-pending bank merger as its basis. The motion was denied by the ALJ on December 5, 2014 and the Comptroller denied the Bank's motion for interlocutory review on January 27, 2015. The Bank again attempted to intervene on December 9, 2015 by filing another "Emergency Motion to Intervene and to Stay Proceedings," which cited attorney-client privilege as its basis. In the absence of any action – because the time for responsive pleadings had not run – the Bank filed a second motion for interlocutory review the next day, December 10, 2015. The Bank then filed a Petition for Review and Emergency Motion for Stay Pending Appeal in the U.S. Court of Appeals for the District of Columbia Circuit. The D.C. Circuit denied the stay on December 15, 2015.

The hearing on the Notice against Plack began on December 15, 2015,<sup>5</sup> the same day that the D.C. Circuit denied the Motion for Emergency Stay. OCC Enforcement Counsel and Plack reached a settlement on December 17, 2015, terminating the enforcement hearing. The ALJ,

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<sup>5</sup> Plack had attempted a separate collateral attack on the hearing, initiating an action for a preliminary injunction in district court in the Southern District of New York predicated on an asserted violation of the Appointments Clause in the employment of the ALJ. The district court dismissed that complaint on December 10, 2015 for lack of jurisdiction under 12 U.S.C. § 1818(i) and improper venue.

while denying the Bank's motion to intervene, nevertheless accommodated the Bank's asserted privilege concerns by permitting Bank counsel to appear at the hearing to protect the Bank's interests. Enforcement Counsel also attempted to accommodate the Bank's privilege concerns by proffering a consent Protective Order that would have permitted the documents for which privilege was asserted to be filed under seal and would have closed the hearing to the public and media during the testimony that was asserted to be privileged. Proposed Second Protective Order ¶¶ 2-3. The proposed order also called for portions of the transcript of such testimony to be filed under seal and remain confidential. *Id.* ¶ 4. When the Bank refused to join in the Proposed Consent Order designed to protect the interests that the Bank had identified, Enforcement Counsel moved for a Protective Order. The motion was opposed by the Bank through counsel and denied by the ALJ.

Following the settlement between Plack and Enforcement Counsel, the ALJ extended the proceeding solely for purposes of accommodating the assertions of privilege by the Bank. On December 18, 2015, the ALJ issued an order allowing the Bank, as a nonparty, to submit a privilege log by January 27, 2016, identifying those exhibits in the record it believed to be covered by attorney-client privilege. On December 31, 2015, the Bank filed a third motion for interlocutory review.

The Bank was merged into Congressional Bank on January 1, 2016, and the merged institution engaged new counsel to represent the Bank. The Bank, through newly engaged counsel, worked with Enforcement Counsel to resolve the remaining issues. The Bank agreed with Enforcement Counsel to hold the Interlocutory Review proceedings before the Comptroller in abeyance pending resolution of the privilege log process.



The ALJ reviewed Bank's proposed Privilege Log and in an order on February 3, 2016 denied the Bank's request to treat the materials as privileged on the ground that the Bank had not sustained its argument that the evidence was subject to the attorney-client privilege. The Bank filed its fourth motion for interlocutory review on February 18, 2016, which, among other things, sought an order from the Comptroller reversing the ALJ's privilege determination. The Bank, through its new counsel, admitted in the fourth motion for interlocutory review that the protective order that Enforcement Counsel had proffered during the hearing, if it had been agreed to by the Bank or granted by the ALJ, would have satisfied the Bank's concerns.

On February 29, 2016, the ALJ granted a joint motion by the Bank and Enforcement Counsel to limit the hearing record. As a result, there are only 11 hearing exhibits and six excerpts of hearing transcripts that are part of the hearing record and identified as privileged on the Bank's Privilege Log. On February 29, 2016, the ALJ declared the proceedings before him to be concluded. On March 2, 2016, in light of the progress made in working toward a consensual outcome with Enforcement Counsel, the Bank voluntarily dismissed its petition for review in the D.C. Circuit.

On March 11, 2016, Enforcement Counsel filed a "Consolidated Response" to the Bank's third and fourth motions for interlocutory review. The Consolidated Response noted that Enforcement Counsel would have no objection if the "Comptroller were to exercise his plenary authority to resolve this matter by, for example, sealing the 11 hearing exhibits and six hearing transcript excerpts." Consolidated Response at 2 n. 3.

On March 11, 2016, the Bank filed a Reply to Enforcement Counsel's Consolidated Response that further narrowed the issues to be resolved. The Bank asked that the identified material be sealed, noting Enforcement Counsel's lack of objection. "That result would be

consistent with the limited nature of the intended waiver in the proceedings below. It would also further the public policy of effective communication between financial institutions and their regulators consistent with 12 U.S.C. § 1828(x).” The Bank also asked that the Comptroller state that the limited waiver with respect to the OCC in the OCC’s enforcement proceeding would not waive the privilege with respect to third parties. The Bank further asked that its motion for interlocutory review be granted, but did not identify any additional relief that would attend that grant.

## DISCUSSION

### The Documents to be Sealed

The Rules of Procedure provide tools to Enforcement Counsel and to the ALJ to address the concerns of nonparties to the proceeding as to matters such as disclosure of sensitive or privileged information. There is a presumption of a public hearing, *see* 12 U.S.C. § 1818(u)(2), but the statute provides discretion for the agency to close the hearing in the public interest. The Rules of Procedure also provide that a party may request a private hearing. 12 C.F.R. § 19.33(a). In addition to closing the hearing entirely, the rules provide for making portions of the proceeding nonpublic. “Enforcement Counsel, in his or her discretion, may file any document or part of a document under seal if disclosure of the document would be contrary to the public interest. The administrative law judge shall take all appropriate steps to preserve the confidentiality of such documents or parts thereof, including closing portions of the hearing to the public.” 12 C.F.R. § 19.33(b).

Enforcement Counsel attempted to employ these tools here. On December 9, 2015, the ALJ issued a “Limited Waiver Order” concluding that the Bank had waived its attorney-client privilege with respect to the OCC’s use of communications between bank employees and a

lawyer for the bank concerning a transaction central to the enforcement proceeding. In order to address the Bank's concerns about the Limited Waiver Order, Enforcement Counsel proposed to the Bank and Respondent Plack a stipulated protective order. The protective order would have closed the hearing to the public for the testimony of the Bank's lawyer that the Bank claimed involved attorney-client communications and would have required the parties to file under seal all documents that the Bank claimed contained privileged attorney-client communications (without determining whether the privilege applied).

The Bank and Plack declined to support the proposed stipulated protective order; Plack did not take a position, and the Bank opposed the proposed protective order. During the hearing, notwithstanding noncooperation from the Bank and Plack, Enforcement Counsel made an oral and later written request for a protective order to minimize the impact of disclosure of the materials that the Bank claimed were privileged. The ALJ denied those requests.

The communications between the Bank and its counsel were obtained by the OCC in the course of its supervision of the Bank and the Bank claims that these communications are confidential and privileged. There is no question that the OCC is entitled to use these communications in its supervision of the Bank including enforcement actions against bank officers, but the Bank claims that it could be harmed if the communications are made available to the public. Enforcement Counsel has stated that it would not object to sealing the documents and hearing transcripts identified by the Enforcement Counsel and the Bank. Consolidated Response March 3, 2016 at 2 n.3. Because the proposed Protective Order offered by Enforcement Counsel addressed the Bank's stated concerns, the Bank should have agreed to it. The Bank *now* agrees that the entry of that Protective Order would have addressed its concerns. The Rules of Procedure authorized Enforcement Counsel to cause exhibits to be filed under seal and to close

portions of the hearing to the public in the public interest.

The Comptroller finds that, on balance, it is in the public interest for the contested evidentiary material<sup>6</sup> to be sealed and kept confidential and, accordingly, issues this Order. While the public has an interest in access to the administrative enforcement proceedings conducted before OFIA ALJs, it also has an interest in open communications between supervised financial institutions and their regulators.<sup>7</sup> These communications could be impaired if sensitive or privileged information were not appropriately protected throughout the supervisory process. In addition, the public has an interest in all administrative proceedings being conducted in a manner that allows the parties to present evidence efficiently. This interest includes having the ALJ's time and attention focused on the substantive question of whether the alleged misconduct occurred and whether the enforcement remedies should be imposed rather than having them unduly consumed by issues that will not affect the outcome of the proceeding. In this proceeding, the ALJ and the parties were entitled to use the contested evidence regardless of whether it was public or sealed. For the reasons just stated, the public interest weighs in favor of sealing the record with respect to the contested evidentiary material in this case.

Sealing these materials now allows efficient resolution of the issues remaining in this proceeding. The enforcement proceeding was terminated on December 17, 2015, and the post-

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<sup>6</sup> The contested evidentiary material is identified as: OCC Exhibits 20, 154, 211, 218, 367, 369, and 374 and Respondent's Exhibits 220, 336, and 366. Enforcement Counsel's Consolidated Response, March 3, 2016 at 3 n.4. The transcript excerpts are identified as: 113:15-114:3; 268:14-268:20; 269:17-269:24; 271:9-271:12; 274:4-276:11; 473:4-474:17.

<sup>7</sup> As the D.C. Circuit has explained: "Bank safety and soundness supervision is an iterative process of comment by the regulators and response by the bank. The success of the supervision therefore depends vitally upon the quality of communication between the regulated banking firm and the bank regulatory agency. This relationship is both extensive and informal. \* \* \* Because bank supervision is relatively informal and more or less continuous, so too must be the flow of communication between the bank and the regulatory agency. Bank management must be open and forthcoming in response to the inquiries of bank examiners, and the examiners must in turn be frank in expressing their concerns about the bank." *In re Subpoena Served Upon Comptroller of the Currency*, 967 F.2d 630, 633 (D.C. Cir. 1993).

hearing proceedings before the ALJ were closed on February 29, 2016. As explained above, while the public has an interest in access to enforcement hearings, the OCC's rules recognize a countervailing interest in maintaining the confidentiality of certain information when its disclosure could impair or injure other important public interests. In the circumstances presented by this case, the Comptroller concludes that these competing interests are best accommodated by restricting access to the small quantum of material identified by Enforcement Counsel and the Bank. Ultimately, if it is later determined that relief in the form of unsealing the materials is warranted in the public interest, mechanisms exist to easily grant that relief. No comparable mechanism exists to grant relief from any harmful effects to the Bank from public disclosure of confidential or privileged information.

#### The Motions for Interlocutory Review

The OCC's Rules of Procedure provide for the possibility of interlocutory review by the Comptroller, in his discretion, before the termination of the enforcement hearing. 12 C.F.R. § 19.28. The decision whether or not to grant interlocutory review is a matter entirely within the discretion of the Comptroller. 12 C.F.R. § 19.4.<sup>8</sup> Here, the provisions for interlocutory review in the Rules of Procedure ceased to apply upon the termination of the enforcement proceeding on December 17, 2015, leaving no room for "interlocutory" relief. The Comptroller addresses the remaining issues as an exercise of his plenary authority over procedural issues and makes the following observations about the use of the provision for interlocutory review.

The procedural and evidentiary issues raised by the motions do not justify the

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<sup>8</sup> The rules state considerations that might inform the Comptroller's discretion: 1) that the ruling involves a controlling question of law or policy as to which substantial grounds exist for a difference of opinion; 2) that immediate review of the ruling may materially advance the ultimate termination of the proceeding; 3) that subsequent modification of the ruling after the conclusion of the proceeding would be an inadequate remedy; or 4) that subsequent modification of the ruling would cause unusual delay or expense. 12 C.F.R. § 19.28(b)(1)-(4).

extraordinary procedure of interlocutory review. The provision for interlocutory review in the Rules of Procedure is meant for the unusual case where the Comptroller's intervention may be justified in the interests of efficiency and fairness. Just as in interlocutory review in Article III courts, interlocutory review by the Comptroller is rarely justified. It is not meant for routine procedural and evidentiary issues, which are to be handled, in the first instance, between the parties or, if that is not feasible, by the procedural tools vested in Enforcement Counsel and the ALJ. Those tools also are available to protect the legitimate confidentiality interests of nonparties to the proceedings such as the Bank. Procedural and evidentiary issues ordinarily will be resolved on a non-interlocutory basis in the Comptroller's Final Decision. The Bank's multiple motions for interlocutory review, particularly the motion filed on the eve of the hearing when the issues raised in that motion could have been resolved earlier in the process, were not justified.

#### Motions to Intervene

Multiple motions to intervene were filed on behalf of American Bank, its holding company, and Congressional Bank on the theory that the Bank was entitled to appear before the ALJ to protect its privilege with respect to some of the documents and testimony. The motions are not well founded in that there is no provision authorizing intervention in the applicable statute or regulations, in contrast, *e.g.*, to the provisions for intervention in the Rules of Civil and Appellate Procedure. See Fed. R. Civ. P. 24; Fed. R. App. P. 15(d). Furthermore, intervention by a nonparty in an enforcement proceeding under the FDI Act is fundamentally contrary to the statutorily defined purpose and boundaries of those proceedings, which are altogether different from those of a civil proceeding in district court. More specifically, intervention by a nonparty conflicts with the policy of non-interference in proceedings embodied in the FDI Act provision

depriving any court of jurisdiction to affect by injunction or otherwise the issuance of a notice or order in the conduct of an FDI Act enforcement proceeding. 12 U.S.C. § 1818(i).<sup>9</sup> Intervention would complicate, and potentially disrupt, ongoing proceedings. To the extent that nonparties have cognizable interests that could be affected by the proceedings, the regulatory Rules of Procedure provide mechanisms for accommodating them, as addressed above.

#### Waiver of Privilege

The Bank's remaining request for relief is that the Comptroller "Order that American Bank's privileged documents identified on the Proposed Privilege Log remain privileged with respect to third parties and are not subject to production to third parties in response to requests under the Freedom of Information Act or otherwise." Reply, March 11, 2016 at 4. First, it is unclear the extent to which the decision to seal that material renders this request moot. Second, while the Comptroller does not find it necessary to resolve the existence of the privilege, the ALJ concluded that the material was not privileged; if it is not privileged, no privilege would be waived.

Third, to the extent that the contested material might be found by another tribunal to constitute attorney-client privileged material, the privilege would not have been waived by the compelled production to the OCC. "The submission by any person of any information to the [OCC] for any purpose in the course of any supervisory or process of [the OCC] shall not be construed as waiving, destroying or otherwise affecting any privilege such person may claim with respect to such information under Federal or State law as to any person or entity other than the [OCC]." 28 U.S.C. § 1828(x) (emphasis added). The Comptroller interprets this provision

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<sup>9</sup> Consistent with this non-interference policy, the Rules of Procedure provide that: "Neither a request for interlocutory review nor any disposition of such a request by the Comptroller suspends or stays the proceeding unless otherwise ordered by the administrative law judge or the Comptroller." 12 C.F.R. § 19.28(d).

as extending to the use of such material in enforcement hearings, a foreseeable and routine reason for securing the material in the first place. If waiver of privilege were routinely to accompany the introduction of privileged material during a hearing before an OFIA ALJ, it could predictably lead to frequent requests to close hearings in whole or in part. That result would be contrary to the Congressional preference for open hearings made manifest in the 1989 FIRREA reversal of the presumption of closed hearings.

Furthermore, the Comptroller affirms that it was not the intent of the OCC to cause waiver of the privilege by using the contested documents in the course of its supervisory and enforcement actions. Nevertheless, the Comptroller lacks the authority to grant the order requested by the Bank. The Comptroller's plenary authority over the conduct of hearings before the OCC does not extend to authority over decisions made by other tribunals. By the same token, the procedural rulings made by the ALJ have no currency beyond the scope of this proceeding, and so do not bind the Bank in other tribunals.

The Comptroller does not take a position on whether the material might be subject to production under the Freedom of Information Act or other disclosure regimes, each of which has its substantive and procedural requirements for resolving issues of privilege, except to note that the materials have been sealed.

Based on the foregoing, IT IS ORDERED THAT:

1. OCC Exhibits 20, 154, 211, 218, 367, 369, and 374; Respondent's Exhibits 220, 336, and 366; and transcript excerpts 113:15-114:3; 268:14-268:20; 269:17-269:24; 271:9-271:12; 274:4-276:11; and 473:4-474:17 are sealed and shall not be disclosed publicly except upon further order of the Comptroller;
2. The pending motions for interlocutory review are denied;



3. The motions to intervene are denied; and
4. The remaining procedural issues in this matter are resolved as set forth above.

IT IS SO ORDERED

Dated at Washington, D.C., **this 25th day of April**, 2016  
/s/ Thomas J. Curry, Comptroller of the Currency, Office of the Comptroller of the Currency

