September 20, 2013

My Comments in Response to Treasury Report on My Whistleblowing Pursuant to 5 USC 1213

My whistleblowing focuses on the ethics program of the Office of the Comptroller of the Currency (OCC). OCC is a component of Treasury. For ethics purposes, Treasury is the agency. The Designated Agency Ethics Official (DAEO) and Treasury General Counsel are above the OCC ethics command chain in the OCC Law Department.

I received reports from the Office of Special Counsel (OSC) that were prepared by Treasury Office of Inspector General (TOIG). The two reports were (1) a five-page Memorandum of June 17, 2013, from Treasury Inspector General Eric Thorson, and (2) a supplemental report of September 5, also from Mr. Thorson. The June 17 memo is the investigative report required by 5 USC 1213(c)(1). The September 5 supplemental report addresses remedies or disciplinary actions, pursuant to 5 USC 1213(d)(5). I will refer below to both reports as the Main Treasury reports.

Brief Recap of Process

I initiated the process via my letter to OSC on February 19, relying on 5 USC 1213(a). OSC made its substantial-likelihood determination under 5 USC 1213(b) and sent a letter to Treasury Secretary Jacob Lew, dated April 18, with a cc to Inspector General Thorson. TOIG then investigated my allegations as requested by Treasury's Office of General Counsel. TOIG did various interviews at Main Treasury and at the OCC, diligently focused on my specific allegations. The result was the Thorson memo of June 17. The Thorson memo was sent to OSC under a cover letter of June 21, by former Treasury Deputy Secretary Neal Wolin. After OSC received the Wolin letter and the Thorson memo, OSC forwarded both to me and also asked Main Treasury for a supplemental report about remedies, which I received on September 9. I decided that I would address the Main Treasury reports comprehensively in these comments*, with emphasis on the "all fixed" tenor of the supplemental report.

---

*I have chosen to submit these comments anonymously . I do not consent to any release of my name or identifying information whatsoever. I am obviously familiar with the OCC ethics program. The individuals who direct and administer the OCC ethics program are obviously aware of my identity. Other OCC officials are aware too, including but not limited to my immediate supervisor; the OCC Deputy Chief Counsels; and the new OCC Chief Counsel.

Facts are Materially Accurate

The Thorson memo is factually accurate and commendable. That is, Inspector General Eric Thorson, Counsel Rich Delmar and their staff diligently investigated the facts and established what I alleged. I specifically alleged that the OCC had failed to provide written notices to employees that are required by 5 CFR 730.104, a regulation of the Office of Personnel Management (OPM) pursuant to 5 USC 7302.

I specifically alleged that the OCC failure to do the notices was a total failure dating back to 2009 and not in any way a sporadic "miss" where a few notices slipped between the proverbial cracks. More significantly, I alleged that the OCC Headquarters Law Department ethics officials were specifically reminded, repeatedly, that the required notices were being totally disregarded. Yet they failed to act. Thorson's memo confirms all of that.

One fact contained in the Thorson memo is important, as part of the gravity of the misconduct and the remedies. I was uncertain about how many employees failed to receive the 5 CFR 730.104 notices since 2009. In my February 19 submission to OSC, I wrote: "I can only very roughly estimate that at least 100 employees crossed the pay threshold from 2009 to present, and the number might be two or three times that." It turns out that there are approximately 400 senior employees. (footnote 2 and page 3 of Thorson memo) That rough number represents about 8 percent of the OCC workforce. Furthermore, this relates to the OCC's "unique pay scale" (page 1 of Thorson memo) and to the supposed excuse of the OCC not having sufficient resources to comply with an ethics regulation such as 5 CFR 730.104.

No material facts are disputed. My comments below therefore turn entirely to remedies.

Absence of Remedies Is Unacceptable

The supplemental report dated September 5 (and received by me on September 9) absolutely confirmed what I had predicted, with total cynicism. I predicted that the specific violations would be corrected, and then there would be a declaration that nothing more is needed. I made my forecast long before I received the supplemental report. I communicated my forecast to OSC, to OPM, and most importantly, to the Office of Government Ethics (OGE). I sent a letter of June 19 to OGE, and I will quote from that letter below.

An all-fixed stance is unacceptable for two basic reasons:

(1) The confirmed fact that the OCC totally and willfully violated the regulation and statute points to the OCC ethics program's gross mismanagement.

(2) Even if the responsible officials were inclined to put on the blinders and not ask "what else" has gone wrong, I have now clearly and repeatedly informed them: OCC ethics problems under the current leadership go beyond the specific violations that have been alleged, confirmed, and corrected.

I will explain below why correction of the specific violations is not enough. Correction and TOIG verification would only suffice if one gives weight to the various "excuses" that can readily be inferred from the Main Treasury reports. I will take apart the excuses.

On the broader problem, a "what else" ought to be asked anytime the misconduct and incompetence of agency officials is demonstrated by one set of total and willful violations. No prompting should be needed for the what-else investigation. In this case though, the whistleblower has taken extra time and extra risk to state clearly that "this is not all." The agency ought to recognize that I am serious.

Some hope does now exist. I repeatedly reached out to Main Treasury, and I received a response on September 18. These comments are due to OSC, based on prior agreement, on September 20. Therefore, I am submitting my comments by the deadline, but I have added this paragraph to reflect that an opening may now have been created, to try to resolve or at least begin to address the broader problem. In the section below that I entitled "Recommended Remedies", one remedy is the opening of a communications channel with Main Treasury. It is much too early to know whether the tentative new opening may be productive. I am glad though to add this paragraph to acknowledge that Main Treasury may be receptive. It is a start.

TOIG Has So Far Taken a Mild, Narrow View of OCC Misconduct

The Wolin letter stated: "In brief, the OIG found that OCC had failed to timely provide the required advice, and that it now has a process in place to remedy that deficiency . . . . I believe that the OIG's report well and sufficiently addresses the problem referred to the Department . . . . " This clearly suggested that Mr. Wolin believed the problem was resolved, case closed. He could have stated in his transmittal letter to OSC that Main Treasury is considering additional actions or is concerned about what was found. Instead, he chose what I am calling an "all fixed" posture.

The Thorson memo is mixed on indications of the gravity of the misconduct and the appropriate remedies. However, the memo in my judgment slants toward helping the OCC and Main Treasury with an all-fixed stance. Page 5 of the Thorson memo has indications that TOIG has sympathy for the untenable excuses that the OCC would like everyone to accept. Specifically, in two paragraphs on page 5, Inspector General Thorson appears not to recognize the gravity of the OCC misconduct and the broader problems. He wrote: "OCC's practice has been changed as a result of the problem being identified and analyzed. In our view, the changes being made respond to the faults alleged . . . . "

Inspector General Thorson further wrote: "It is not the OIG's role to recommend that particular employees be disciplined for their actions or inactions. Rather, we find facts, and present them to managers and other concerned officials. That being said, there were obviously procedural lapses at the OCC, which are being corrected. And ***a unilateral decision about prioritizing which results in non-compliance with a statutory requirement is of concern, even if understandable in an environment of duties exceeding resources."***

Unilateral Decisions About Prioritizing and About Non-Compliance Should Be PROFOUNDLY Concerning

The above-quoted statement by Inspector General Thorson goes to the very heart of my concern about remedies. Unless it is understood that the unilateralism demonstrated in this matter is part and parcel of a broader set of problems at the OCC, Main Treasury severely underestimates the gravity of my whistleblowing.

Unilateralism is embedded in the OCC organizational culture. I have made that point, to OSC and in my letter of June 19 to OGE and OPM. I wrote: "OCC chose to treat ethics requirements as a non-priority. . . . As a deeply-embedded element of the OCC culture of 'independence', the OCC tends to choose what laws are important and to dismiss or defer compliance with laws that are inconvenient."

I also wrote: "I want to be clear about the larger picture here. The OCC's noncompliance with 5 CFR 730.104 is not an isolated occurrence. This is not simply about the OCC failing to implement one obscure OPM regulation even after its senior ethics officials were repeatedly warned that the notices had been disregarded." I referred to the insular organizational culture of the OCC, and I emphasized that the specific violations of law that I reported to OSC are only the tip of the proverbial iceberg. IF Main Treasury wishes to see my entire letter of June 19, I would likely provide it on request. To the multiple addressees at OGE and OPM, I specifically asked that it be kept confidential at the time, because the Main Treasury report was pending, and my pessimistic predictions were only predictions at that time. In fact, I wrote: "I sincerely hope that I am very wrong in my predictions."

"Of concern" is a much too mild statement about the unilateralism and unaccountability of Jen Dickey. David Kane has essentially delegated the operation of the OCC ethics system to her. Jen Dickey unilaterally decided that she would ignore 5 CFR 730.104. The Thorson memo at page 4 reports: "Ms. Dickey stated that she was alerted to the notice issue in 2011 by an email from a District ethics official, and told him that it was not a priority because of the more pressing matters associated with the merger with the Office of Thrift Supervision." According to TOIG, Jen Dickey said **it simply was not a priority at the time.** (Emphasis added.)

Who is Jen Dickey to decide that noncompliance with a regulation and a statute is not a priority? Did she inform her supervisors that the OCC was noncompliant? Did she request instructions or help to bring the OCC into compliance? It is reasonably certain that she did nothing of that nature. TOIG appears not to have covered that point, because Jen Dickey was silent after the warnings. She made the prioritization decision on her own. She kept the OCC in noncompliance until I blew the whistle.

I specifically noted the command chain for OCC ethics in my submission to OSC on February 19:

> Julie Williams, former Chief Counsel
> Dan Stipano, Deputy Chief Counsel
> David Kane, Director, Administrative and Internal Law Division

Patricia Grady, Assistant Director, Administrative and Internal Law Division
Jennifer Dickey, Special Counsel, Administrative and Internal Law Division

I also specifically noted that Jen Dickey and David Kane have been most directly responsible for the day-to-day administration of the OCC ethics program. In fact, David Kane, as I noted above, has relieved himself of any work and handed it all to Jen Dickey. She indisputably is making key decisions, on all OCC ethics matters, large and small. She has been doing so for more than three years now, since coming to the OCC from another bureau of Treasury, what was then the Financial Management Service. At the Financial Management Service, she developed some familiarity with Main Treasury and its ethics officials. Main Treasury, including the Treasury General Counsel to whom the OCC Law Department officials listed above ultimately report, seems to have entrusted Jen Dickey and David Kane to run the OCC ethics system with little or no oversight. **THAT** is a fundamental problem that Main Treasury ought to reconsider, and then provide clear directions to the new OCC Chief Counsel.

Jen Dickey lacks the judgment, integrity and even the technical care to run the OCC ethics system. At best, she might fill a transitional role, as one of a number of assistants to a new ethics director, a successor to David Kane. A new ethics director should have responsibility for the system, under the OCC Chief Counsel, the DAEO, and the Treasury General Counsel. A new ethics director must be brought to the OCC from the outside, and that person must assume hands-on responsibility for the complex but essential operation of the ethics system. That person should appoint someone other than Jen Dickey as a primary assistant. Jen Dickey is discredited by various matters, of which the current matter is only one. I wrote to OSC on February 19: "My present disclosures are only a portion of a larger problem of violations of law and gross mismanagement by the HQ ethics officials of the OCC. Certain other disclosures involve greater complexity of facts and law. I am currently assessing what further actions to take, distinct from the present submission."

Gross mismanagement of the OCC ethics system is attributable not only to Jen Dickey but to senior OCC officials, including especially three officials that I listed above: David Kane, Dan Stipano, and Julie Williams. Since Julie Williams is now retired, the focus should be on Dan Stipano and David Kane. Mr. Stipano will totally support David Kane and Jen Dickey, because he always supports "the troops"—his troops. The new OCC Chief Counsel, along with Comptroller of the Currency Tom Curry, should ignore Stipano's support for Kane and Dickey. They should proceed, as recommended above, to search for and hire a new ethics director. David Kane is both incompetent and retirement-eligible. After he is retired, Jen Dickey must be properly and closely supervised, if she stays at the OCC doing ethics.

People in any organization face prioritization challenges daily. The right thing to do is to inform supervisors that Task A, B, or C cannot be done promptly because of other priorities—and if Task A is compliance with a statute or regulation, a subordinate surely ought to state that clearly to supervisors. Jen Dickey chose instead to dismiss noncompliance. Had she at least informed David Kane (or her intermediate supervisor, Patricia Grady) about the noncompliance, the responsibility for noncompliance would have rested more squarely on Kane (or Grady). Kane, in turn, has long demonstrated that he does not have the appetite or capability to obtain adequate resources for the OCC ethics program. There were clear indications that the ethics program was sliding, yet Kane abdicated his responsibility as

ethics director. He lacked the experience and competence to handle matters, and he failed to go to his supervisors to obtain the needed resources.

Are OCC Resources Short?

The answer is absolutely not. "Procedural lapses" on ethics are attributable to years-long neglect—to gross mismanagement-- by Kane, Stipano and former Chief Counsel Williams. A resource shortage is a totally phony excuse. I will deal with this point emphatically, because the Thorson memo suggests that resources may be a good excuse: noncompliance is "understandable in an environment of duties exceeding resources."

To the extent that OCC ethics duties exceed resources, that is entirely a result of OCC senior management choices. Other agencies are not similarly situated. TOIG itself has resource contraints, as does OSC and OGE. Those agencies and most other agencies in the Executive Branch are appropriated and are subject to all that has occurred and is occurring regarding the appropriations process and related troubles such as the sequester, travel curtailment, and the looming government shutdown. OCC is not affected by any of the resource constraints that pose real problems for most of the federal government. The non-appropriated OCC sets its own budget, based on the assessments derived primarily from large banks and large federal savings associations. OCC resources may be devoted to whatever priorities Comptroller Tom Curry chooses, under the general direction of Main Treasury. For the OCC ethics program, the limits are only what Mr. Curry and/or the new Chief Counsel choose. So, for example, an ethics official in the OCC Law Department's Administrative and Internal Law Division (the division that David Kane directs) could be assigned the single task of attaining and maintaining OCC compliance with 5 CFR 730.104. That obviously would be unnecessary and wildly excessive, but my point is that Jen Dickey and David Kane have no excuse whatsoever for disregarding ethics rules and prioritizing them to a "maybe someday"-- as they did in this case. If Jen Dickey was supposedly too busy with the OCC's merger with the Office of Thrift Supervision, another OCC employee could have been assigned to coordinate with Human Resources to get the OCC into prompt compliance with 5 CFR 730.104. The problem was not a shortage of funds or of qualified persons. It was a deficiency of OCC leadership, or gross mismanagement. I hope the new OCC Chief Counsel and the Comptroller of the Currency recognize that and fix it.

The failure to prioritize ethics is a failure attributable to former Chief Counsel Julie Williams as well as to Messrs. Stipano and Kane. Ethics was secondary to Julie Williams, although that would never be acknowledged. The primary values were to assert OCC independence from Main Treasury and to devote resources to banking law, including fighting state attorneys general and others who might infringe on an aggressive preemption regime and the OCC franchise from Congress. It is doubtful that David Kane or Dan Stipano ever went to former Chief Counsel Julie Williams to ask for additional resources. Kane even egregiously failed to plan for succession management. The Thorson memo at page 2 noted that Barry Aldemeyer and Brenda Curry preceded Jen Dickey as the day-to-day managers of the OCC ethics system. Barry Aldemeyer gave long notice of his retirement in 2007, and Brenda

Curry's illness and death in 2009 was not sudden. But David Kane utterly failed to plan for any back-up or successor, leading ultimately to the hiring of Jen Dickey in June 2010. (The Thorson memo incorrectly stated that her transfer from Financial Management Service was in 2009.)

Early on with Jen Dickey, it was possible to sympathize about the neglected ethics system that was essentially "dumped" on her by David Kane. She indeed had much support, a gracious manner of thanking people profusely, and the necessary experience in Executive Branch ethics. As Jen Dickey proceeded though, it became all too clear that she had a misfocused agenda. She notably took on matters that were non-essential even while she deliberately opted to disregard 5 CFR 730.104 in 2011. One time-consuming project, for example, was production of a video. Although employee ethics training is required, production of a slick video can wait—especially if a clear legal requirement is being ignored. Throughout 2011 and 2012, Jen Dickey was working on many matters that were non-essential. Of course, if she is the sole prioritizer, she determines what is important.

In 2012, Jen Dickey found it important to introduce throughout the OCC an ethics concept that I will not presently cover in these comments. Suffice to note presently that vast amounts of time were expended across the OCC on the introduction of that concept. Far more disgracefully, vast amounts of time were spent on seeking to obscure the fact that the OCC had inexplicably and totally disregarded the concept for some 15+ years. On that matter, Jen Dickey was at the forefront of OCC efforts to misrepresent what had occurred and to point a finger of blame at OGE, deflecting blame from her bosses.

Profound philosophical differences exist between Jen Dickey and me. She will not acknowledge serious mistakes and will try instead to place the blame elsewhere. Far more significant though is Jen Dickey's belief in "protecting" employees and the agency as the ulitmate goals. I believe that public confidence is the ultimate goal of government ethics. Government ethics is more than the prevention of conflicts of interest. Fundamental honesty and candor are expected of all federal employees, <u>especially</u> ethics officials. Jen Dickey has amply demonstrated her deficiencies as to honesty and candor. I can show that very specifically. On specific matters, she has labored to camouflage the truth.

My immediate supervisor has vaguely and verbally threatened me regarding "teamwork" with Jen Dickey. I have documented and will continue to document any such statements. They clearly emanate from David Kane if not higher levels. I have made serious allegations about David Kane and Jen Dickey, in my comments above and earlier. Limited interactions with Jen Dickey are unavoidable for the foreseeable future. I can maintain a charade of "teamwork" to some extent. That charade though is subordinate to truth, adherence to law, and the ultimate goal of serving the United States.

<u>Is the OCC Ethics Program Supervised?</u>

The answer is essentially no. The program is left to Jen Dickey, as I have explained above. With limited exceptions, no one is checking her, holding her accountable, or providing any meaningful oversight of the OCC.

The Thorson memo at page 2 confirms what I have known to be the lack of supervision: "(W)e interviewed Treasury's DAEO, Assistant General Counsel for General Law, Ethics and Regulation (GLER) Rochelle Granat, and her Deputy for ethics and standards of conduct, Elizabeth Horton, about the Department's overall process for assuring that all bureaus and offices comply [with the 5 CFR 730.104 notice requirement] . . . . Generally, and specifically with respect to OCC's Office of Chief Counsel, GLER engages in periodic check-ins about the process, and ethics/standards of conduct trainng and advice, but does not routinely supervise that office. Ms. Granat stated that there is no formal 'audit' of these functions."

OGE also does not supervise the Dickey-run program at the OCC. OGE long has had a program review division. However, years ago, OGE stopped doing regular program reviews. A light or uncomprehensive review that depends on Jen Dickey's veracity would be useless anyway.

It appears that TOIG may follow up about correction of the specific violations, to confirm that Jen Dickey in conjunction with OCC Human Resources is now complying with 5 CFR 730.104. The Thorson memo also contained a useful but narrow recommendation: "(W)e recommend that GLER consider standardizing the 207(c) notice requirement across the Department, and heighten its oversight and follow-up with office and bureau implementation." I agree with that specific recommendation, but I believe that TOIG should recommend far broader oversight of the OCC ethics program in general.

For broad oversight, I believe that various remedies are available. Obviously, if OGE or Main Treasury are interested in holding the OCC accountable, either or both has authority to do so. TOIG also can begin to hold the OCC broadly accountable, on its own initiative or at the request of others. Most directly, the Comptroller of the Currency and the new OCC Chief Counsel can insist on accountability and no longer permit David Kane and Jen Dickey to operate independently, countenanced by Stipano. A new ethics director could, and I believe should, report directly to the OCC Chief Counsel. That would assure that matters are surfaced and not relegated to the secondary status that ethics has always had at the OCC (notwithstanding rhetoric to the contrary).

My Efforts at Communication With Main Treasury: Now a Tentative Opening

I recognized early the likelihood that an all-fixed stance would be taken. That stance was confirmed, unfortunately, in the supplemental report dated September 5, which I received on September 9.

I tried to reach out to Main Treasury and TOIG to warn that an all-fixed stance is unacceptable. In two lengthy emails, on September 8 (a day prior to my receipt of the supplemental report) and on September 14, I made very reasonable efforts to contact senior officials of Main Treasury and ask them to reconsider immediately the all-fixed stance.

Some hope does now exist, as noted above. Two-way communication with Main Treasury is now in the earliest stage, leading perhaps to productive engagement. I would prefer non-public communication to the present public file comments, but I have a deadline with OSC, and possibly no further opportunity to

comment publicly on this matter. I deliberately chose not to try to communicate directly with the new OCC Chief Counsel; that is the responsibility of the Treasury General Counsel, the DAEO, and TOIG. The new OCC Chief Counsel has a very difficult job, given all that was inherited. Treasury General Counsel, the DAEO, and TOIG should direct and support her on taking meaningful actions, including some or all of the actions that I recommend below.

Recommended Remedies

Based on extensive experience and reflection, here is what I specifically recommended, in the above-noted emails of September 8 and September 14:

(1) A new ethics director should be promptly recruited, from outside the OCC. That person would replace David Kane. I am certain that many highly-qualified candidates can be presented to the Comptroller and the Chief Counsel, especially in view of the OCC's unique pay system. Consideration should be given to restructuring the position of Director of the Administrative and Internal Law Division of the OCC Law Department. A new ethics director should have more focused responsibilities and should, in my judgment, report directly to the OCC Chief Counsel and the Designated Agency Ethics Official (DAEO) at Main Treasury.

(2) David Kane should be encouraged to retire. If he were to resist, Comptroller Curry and his Chief Counsel, together with Main Treasury, have the authority to reassign him. He is unfit to continue as ethics director. I can make that case more forcefully if needed.

(3) Jen Dickey should face strong disciplinary action. I am under no illusions about the potential barriers to that, including but not limited to OCC resistance. To the extent that officials in Main Treasury may regard Ms. Dickey positively as a result of whatever experience they have had with her, I also cannot know whether my present comments may cause them to reconsider.

(4) Main Treasury should open a communications channel to ethics officials like me. I have noted, to OSC and others, that I have never had any communication with the DAEO. I am obviously hoping to change that, with this email. I cannot predict whether this email might be the start of an informal channel of communication or a non-starter. I know none of you individually. I currently have no indication that Main Treasury is at all receptive to any information. A communications channel does not have to involve anything elaborate. I can send and receive emails. It should be possible to bypass the senior OCC ethics officials when anyone has information about serious ethics issues or problems, while observing the normal command chain for routine or untroubling matters.

I cut and pasted the above recommendations from my September 8 and September 14 emails. Again, with regard to my recommendation (4), some hope now exists. At least a degree of receptivity to information now appears to exist. That is a start.

Although it is too late for actions that would alter these public file comments, Main Treasury and the OCC do have time to avoid future problems, by seriously considering and adopting my recommended remedies.

Conclusion

The facts are undisputed, but the gravity of the established facts has been ignored, thus the remedies are totally insufficient. Main Treasury conceivably was unaware of this whistleblower's views weeks ago, but that is certainly no longer the case.

So far, no one apparently wants to take responsibility for OCC ethics problems. The attitude so far is to narrowly do what is specifically required, and not more. Thus, the Main Treasury reports narrowly take an all-fixed stance. Even though the new OCC Chief Counsel has the authority to act, no direction is being given by other Treasury officials, so far.

The "excuses" are all phony. The OCC is not short on resources. Unilateral decisions about prioritizing and non-compliance ought to be profoundly concerning. The OCC ethics program is not supervised or held accountable. All these points, and more, ought to be considered now by Treasury General Counsel and subordinates.

My preference would have been to proceed confidentially. I reached out, before writing these comments, and I am glad that an opening may now exist for explaining what is wrong, beyond the specific violations that have been alleged, confirmed, and corrected. The focus now should be totally on the message and not the messenger. Time will tell whether Main Treasury and the OCC Law Department accept that.