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Compliance Lessons from OFAC Case Studies—Part II

By Paul L. Lee*

Part I of this article analyzed the regulatory and law enforcement actions taken against ABN AMRO Bank N.V., Lloyds TSB Bank plc, Credit Suisse AG, and Barclays Bank PLC for violations of the Trading with the Enemy Act and the International Emergency Economic Powers Act as administered by the Office of Foreign Assets Control ("OFAC"). Part II of this article analyzes the subsequent regulatory and law enforcement actions taken against ING Bank, N.V., Standard Chartered Bank, HSBC Holdings plc, The Bank of Tokyo-Mitsubishi UFJ, Ltd., The Royal Bank of Scotland plc, and BNP Paribas S.A. for OFAC violations.

Part I of this article analyzed the regulatory and law enforcement actions taken against ABN AMRO Bank N.V., Lloyds TSB Bank plc, Credit Suisse AG and Barclays Bank PLC for violations of the Trading with the Enemy Act (the "TWEA") and the International Emergency Economic Powers Act ("IEEPA") as administered by the Office of Foreign Assets Control ("OFAC"). Part I drew some initial compliance lessons from these cases. Part II analyzes the subsequent regulatory and law enforcement actions taken against ING Bank, N.V., Standard Chartered Bank, HSBC Holdings plc, The Bank of Tokyo-Mitsubishi UFJ, Ltd., The Royal Bank of Scotland plc, and BNP Paribas S.A. for OFAC violations.

The analysis of these additional cases confirms in many respects the initial lessons drawn in Part I, but the analysis also provides further insights into the compliance challenges in this area. This analysis also allows an observer to amend and extend the initial lessons to other compliance areas as well. The lessons from these cases are not limited to legacy issues such as cover payments and U-turn transactions. They provide insights more generally to the challenges facing the compliance function. At the same time, these cases confirm the need for a heightened commitment—by foreign and domestic institutions alike—to compliance programs for U.S. sanctions regimes, particularly as the United States expands its use of economic sanctions in response to geopolitical crises as, for example, in the Ukraine.

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ING Bank

There was an interlude of almost two years between the law enforcement actions against Barclays Bank in August 2010 and the next set of law enforcement actions for OFAC matters. In June 2012, ING Bank, N.V. ("ING Bank") entered into deferred prosecution agreements with the U.S. Department of Justice (the "DOJ") and New York County District Attorney's Office (the "DANY").[1] In the deferred prosecution agreement with the DOJ, ING Bank was charged with violations of the TWEA (and the Cuban sanctions issued thereunder) and IEEPA (and the Iranian sanctions issued thereunder). In the deferred prosecution with the DANY, ING Bank was charged with violations of Section 175.10 of the New York Penal Law. Under the deferred prosecution agreements, ING Bank agreed to make a $619 million forfeiture payment to the DOJ and the DANY. ING Bank simultaneously entered into a settlement agreement with OFAC covering essentially the same matters as contained in the deferred prosecution agreement with the DOJ and imposing a $619 million civil money penalty that was deemed satisfied by the forfeiture under the DOJ deferred prosecution agreement.[2] The $619 million forfeiture was the largest to that date assessed for violations of U.S. sanctions laws.[3] The sanctions violations involved more than 20,000 transactions amounting to more than $2 billion in value.[4]

The Factual Statement accompanying the deferred prosecution agreements

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[1] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement); *ING Bank, N.V. and District Attorney of the County of New York Deferred Prosecution Agreement*, Jun. 12, 2012.

[2] *See* Settlement Agreement, U.S. Dep't of the Treasury and ING Bank, N.V. (Jun. 11, 2012) (hereinafter ING OFAC Settlement Agreement), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/06122012_ing_agreement.pdf. The ING OFAC Settlement Agreement contained the standard provision in OFAC settlement agreements that the Agreement did not constitute either an admission or a denial by ING Bank of any allegation made or implied by OFAC.

[3] Press Release, U.S. Dep't of Justice, ING Bank N.V. Agrees to Forfeit $619 Million for Illegal Transactions with Cuban and Iranian Entities (Jun. 12, 2012), *available at* http://www.justice.gov/opa/pr/2012/June/12-crm-742.html.

[4] Press Release, U.S. Dep't of the Treasury, U.S. Treasury Department Announces $619 Million Settlement with ING Bank, N.V. (Jun. 12, 2012), *available at* http://www.treasury.gov/press-center/press-releases/Pages/tg1612.aspx. The ING OFAC Settlement Agreement and the Department of Treasury press release state that the apparent violations totaled more than $1.67 billion. The difference between this figure and the figure in the DOJ press release may relate to a difference in the periods covered by the ING OFAC Settlement Agreement (between October 2002 and July 2007) and the ING deferred prosecution agreement (between 2001 and 2006).

states that ING Bank engaged in criminal conduct by:

(i) processing payments for ING Bank's Cuban banking operations through its branch in Curaçao on behalf of Cuban customers without reference to the Cuban origin of the payments;

(ii) providing U.S. dollar trade finance services to sanctioned entities through misleading payment messages, shell companies, and the misuse of an internal ING Bank sundry account;

(iii) eliminating payment data in payment messages that would have revealed the involvement of sanctioned countries and entities, such as Cuba and Iran;

(iv) advising sanctioned entities on how to conceal their involvement in U.S. dollar transactions;

(v) fabricating an ING Bank endorsement stamp for two Cuban banks to process U.S. dollar travelers' checks; and

(vi) threatening to punish employees if they failed to take specified steps to remove references to sanctioned entities in payment messages.[5]

Neither the insurance operations nor the banking operations of ING in the United States were the subject of the DOJ and DANY investigation.

The Factual Statement tells a picaresque tale of misadventure at virtually every turn. It states that conduct violative of the OFAC sanctions "occurred in various business units in ING Bank's Wholesale Banking division, in locations around the world with the knowledge, approval and encouragement of senior corporate managers and the Legal and Compliance departments of ING Groep, N.V."[6] The story begins in Cuba in 1994 when the Cuban government issued a license to Netherlands Caribbean Bank ("NCB"), a Curaçao-chartered bank that operated as a joint venture between ING Bank and a company owned by the Cuban government, to open a representative office in Havana.[7] ING Bank also established a representative office of its own in Havana, which (notwithstanding its characterization as a representative office) provided banking services to Cuban government entities. From the early 1990s through 2006, ING Bank's branch in Curacao processed U.S. dollar payments for NCB's represen-

[5] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 3–4.

[6] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 2.

[7] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 6–7.

tative office in Havana, for ING Bank's representative office in Havana, and for another Cuban bank.[8] ING Bank's Curaçao branch formatted payment messages so as to conceal from its unaffiliated U.S. correspondent banks the Cuban origin of the transactions. In some cases, the Curaçao branch substituted ING Bank's name in payment messages for the originating Cuban customer's name. In other cases, the Curaçao branch used MT 202 cover payment messages, rather than serial MT 103 payment messages, to transfer funds for Cuban entities.[9] ING Bank's Curaçao branch used its own OFAC filter as a way to identify payment messages with Cuban references and then strip the payment messages. In the words of the Factual Statement, "ING Bank Curaçao thus used a compliance tool to circumvent U.S. sanctions."[10] The Factual Statement emphasizes that these activities were conducted with the knowledge of the ING Groep Compliance and Legal departments.[11]

Meanwhile ING Bank's trade and commodities finance department in Rotterdam was providing trade financing services to Cuban entities. One of its most important U.S. dollar clearing clients was a company majority-owned by the Cuban government and designated as a Specially Designated National by OFAC.[12] The Rotterdam office allowed the use of front companies in connection with transactions for this client and another client that was also a Specially Designated National.[13] When one of the payments originated by this

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[8] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 7.

[9] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 9. A cover payment involves an MT 202 payment message sent into the United States accompanied by an MT 103 payment message sent by the foreign originating bank to a foreign beneficiary bank outside the United States. In contrast, a serial MT 103 payment message would involve an MT 103 message being sent into the United States.

[10] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 9.

[11] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 9-11.

[12] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 12–13. Specially Designated Nationals are individuals and companies designated by OFAC as being owned by or controlled by, or acting for or on behalf of, sanctioned countries as well as individuals and entities, such as terrorists or narcotic traffickers, designated under OFAC sanctions programs that are not country specific. Their assets are blocked under the OFAC regulations. *See Frequently Asked Questions and Answers, Question 8*, U.S. DEP'T OF THE TREASURY, http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx.

[13] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 13–14.

company was blocked by a U.S. correspondent bank, ING Bank unsuccessfully tried to get a release of the funds by telling the U.S. bank and OFAC that the originating company was 100 percent Dutch-owned when it was in fact majority-owned by the Cuban government.[14] The Factual Statement says that in making these misrepresentations the Curaçao staff acted on the instructions and with the knowledge of the ING Groep Compliance and Legal departments.[15] The Factual Statement also notes that in 1995 outside counsel warned ING Bank that in expanding its Cuban operations, ING Bank should not use U.S. dollars in providing financial services in Cuba.[16] The Factual Statement notes that in 2003 the Legal Department at ING Bank's New York office questioned whether ING Bank's Curaçao branch was violating U.S. sanctions laws.[17] In response to this question, ING Groep compliance personnel did not object to the continuation of Curaçao's practices.

ING Bank's branch in Belgium, referred to in the Factual Statement as ING Bank Belgium, held a U.S. dollar correspondent account for Bank Markazi, the Central Bank of Iran, that was used to receive U.S. dollar proceeds of oil purchases by ING Bank's customers from the National Iranian Oil Company.[18] ING Bank used cover payments to process these transactions because its personnel believed that the only way for ING Bank to get Iranian transactions through U.S. banks was to ensure that the OFAC filters at the U.S. banks would not identify the Iranian origin of the transactions. The Factual Statement notes that although most of these transactions may have been exempt under the U-turn exemption in the Iranian Transactions Regulations, ING Bank did not make any determination at the time whether the payments were in fact U-turn compliant.[19] The Factual Statement notes that in any event ING Bank also processed U.S. dollar transactions for Iran that did not qualify for the U-turn

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[14] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 12.

[15] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 9.

[16] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 10.

[17] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 10-11.

[18] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 15-16.

[19] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 15.

exemption.[20] As a historical point of reference, the Head of ING Bank Belgium's Compliance Department said that the use of cover payments in connection with OFAC-sanctioned countries had been in place at ING Bank for 40 years, beginning with Cuba and later extended to other sanctioned countries such as Iran.[21] There was no U-turn exemption applicable to Cuba or any other sanctioned country except Iran.

ING Bank's branch in France, referred to as ING Bank France, also processed U.S. dollar payments for Cuban banks. Its procedure for using cover payments to avoid detection of the Cuban origin of these payments by U.S. correspondent banks was memorialized in a document reviewed by ING Bank France's compliance department and posted to ING Bank France's intranet site where it remained until the beginning of ING Bank's internal investigation in 2006.[22] ING Bank France also provided U.S. dollar travelers' check cashing services to two Cuban banks from 2000 to 2006. The check cashing service was facilitated when ING Bank France gave the Cuban banks permission to fraudulently use an ING Bank France endorsement stamp. From the appearance of the fraudulent endorsement, a U.S. financial institution could not detect that the checks had originally been negotiated to a Cuban bank.[23] The Compliance Department of ING Bank France reviewed this practice and did not "see" a compliance problem with it.[24]

ING Bank missed at least two other opportunities to revisit and revise its U.S. dollar clearing practices in addition to those already mentioned. In 2003 an employee of ING Bank's office in London sent to a compliance representative a copy of ING Bank's "modus operandi" for effecting U.S. dollar payments on behalf of an Iranian government entity. The employee in London specifically asked whether in the "climate of anti-money laundering and OFAC sanctions," ING Bank London would continue to conduct these transactions.

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[20] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 16.

[21] Settlement Agreement, U.S. Dep't of the Treasury and ING Bank, N.V. at 3 (Jun. 11, 2012), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/06122012_ing_agreement.pdf.

[22] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 18–19.

[23] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 20.

[24] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 20.

The compliance employee responded that ING Bank London could continue to engage in the business.[25]

Another opportunity to reconsider its practices arose in May 2004 when compliance personnel at ING Bank London circulated an e-mail to employees in several European offices of ING Bank explaining that certain countries, including Cuba and Iran, were subject to U.S. sanctions and that ING Bank should not carry out U.S. dollar transactions with entities in those countries. A senior member of ING Groep's Legal Department responded by email:

> You are absolutely right in warning the business for the fines the OFAC can hand out. But on the other hand we have been dealing with Cuba (and ways around clearing through Manhattan) for a lot of years now and I'm pretty sure that we know what we are doing in avoiding any fines. So don't worry and direct any future concerns to me so that we can discuss before stirring up the whole business.[26]

In July 2005 a senior officer of ING Bank in New York finally raised concerns about ING Bank's historical compliance with U.S. sanctions with De Nederlandsche Bank, N.V., the Central Bank of the Netherlands. In consultation with the De Nederlandsche Bank, ING Bank in March 2006 began an internal investigation of its practices of dealing with OFAC-sanctioned entities. The internal investigation involved 775 interviews in 18 different jurisdictions and the review of millions of documents.[27] As a result of the internal investigation, ING Bank stopped processing outgoing U.S. dollar payments for Cuban customers and subsequently for customers in other sanctioned countries. In the meanwhile OFAC, the DOJ, and the DANY began their own investigations of ING Bank for possible OFAC violations. Although ING Bank was not initially "fully forthcoming" regarding the extent and scope of its practices in its responses to the inquiries from the U.S. government investigators, ING Bank eventually began to cooperate with the U.S. investigators.[28]

During the course of its internal investigations, ING Bank took various remedial actions on its own to enhance its sanctions compliance programs. For

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[25] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 17.

[26] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 18.

[27] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 22.

[28] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 23.

example, in addition to improving sanctions training and expanding the headcount in its compliance department, ING Bank conducted over 160 internal audits with a significant focus on compliance risk management. In 2007 ING Bank changed its governance structure, appointing a chief risk officer, and separating the legal and compliance functions with the chief compliance officer reporting to the chief risk officer. Also in early 2007 ING Bank instituted disciplinary actions against more than 60 employees, requiring the retirement of three employees and the termination of seven other employees.[29] In subsequent OFAC cases, the U.S. bank regulators would expand their focus specifically to encompass disciplinary actions taken by the institution against employees involved in the wrongdoing.

Standard Chartered Bank

The pattern of investigations into the U.S. dollar clearing practices of foreign banks changed radically in August 2012 when the New York State Department of Financial Services (the "NYDFS"), successor to the New York State Department of Banking (the "NYSBD"), issued unilaterally (and some would say, pre-emptively) an enforcement order against Standard Chartered Bank ("SCB") relating to its U.S. dollar clearing practices for sanctioned entities.[30] The order purported to summarize the findings from a NYDFS investigation of SCB's role in processing Iranian transactions, involving "willful" and "egregious" violations of law. The order directed SCB to appear before the NYDFS and explain the "apparent" violations of law.[31]

The issuance of this order by the NYDFS departed from prior well-established practice in OFAC investigations in several ways. First, the DOJ, DANY, OFAC and the NYSBD had carefully coordinated their enforcement actions in prior cases. The unilateral action by the NYDFS against SCB appeared to be both uncoordinated and preemptory. Second, the NYDFS order threatened SCB with the revocation of its license to operate in New York, a rarely invoked enforcement measure. The mere threat of a license revocation had very significant market consequences. Third, the NYDFS order appeared to take the position that transactions exempt under the OFAC U-turn provision were nonetheless violations of New York law because of the non-transparent

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[29] *United States v. ING Bank, N.V.*, No. CR-12-136 (D.D.C. Jun. 12, 2012) (deferred prosecution agreement), Exhibit A at 24.

[30] *In the Matter of Standard Chartered Bank, New York Branch*, Order Pursuant to Banking Law § 39 (Aug. 6, 2012) (hereinafter NYDFS Order of August 6, 2012) *available at* http://www.dfs.ny.gov/about/ea/ea120806.pdf.

[31] *In the Matter of Standard Chartered Bank, New York Branch*, Order Pursuant to Banking Law § 39 at 2 (Aug. 6, 2012), *available at* http://www.dfs.ny.gov/about/ea/ea120806.pdf.

way that they had been processed in New York.

The NYDFS order asserted that SCB had "schemed" with the government of Iran from 2001 through 2010 to hide from the U.S. regulators roughly 60,000 "secret" transactions involving at least $250 billion.[32] The transactions involved were U.S. dollar wire transfers most of which were apparently exempt as U-turn transactions, but which the NYDFS asserted had been "stripped" by SCB to remove unwanted data and to substitute false entries.[33] The order prominently featured an excerpt from an October 2006 e-mail from SCB's CEO for the Americas to various senior SCB officers in London, warning of "catastrophic reputational damage" to the SCB group and the potential for serious criminal liability for SCB's management from SCB's dollar-clearing activities for Iranian banks.[34]

The NYDFS order also asserted that as early as 1995, SCB's general counsel had embraced a "framework for regulatory evasion." The order quoted from a 1995 e-mail from SCB's general counsel suggesting that "if SCB London were to ignore OFACs regulations AND SCBNY were not involved in any way & (2) had no knowledge of SCB Londons [sic] activities . . . then IF OFAC discovered SCB Londons [sic] breach, there is nothing they could do against SCB London, or more importantly against SCBNY."[35] The 1995 e-mail also advised that when SCB London was dealing with other OFAC-sanctioned countries, SCB London should use another U.S. dollar clearer in New York and not SCB's New York branch to process the transactions.[36] The theme that a foreign bank might limit its exposure to penalties from OFAC by clearing through unaffiliated U.S. banks rather than through its own U.S. branch would reappear in subsequent OFAC cases.

The advisability of clearing for Iranian banks was revisited in March 2001 when SCB sought advice from outside U.S. counsel and was apparently advised that U.S. law required a process by which SCB's New York branch received "foreknowledge of such authorized [U-turn] payments" so as to "otherwise

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[32] *In the Matter of Standard Chartered Bank, New York Branch*, Order Pursuant to Banking Law § 39 at 1 (Aug. 6, 2012), *available at* http://www.dfs.ny.gov/about/ea/ea120806.pdf.

[33] *In the Matter of Standard Chartered Bank, New York Branch*, Order Pursuant to Banking Law § 39 at 3 (Aug. 6, 2012), *available at* http://www.dfs.ny.gov/about/ea/ea120806.pdf.

[34] *In the Matter of Standard Chartered Bank, New York Branch*, Order Pursuant to Banking Law § 39 at 4-5 (Aug. 6, 2012), *available at* http://www.dfs.ny.gov/about/ea/ea120806.pdf.

[35] *In the Matter of Standard Chartered Bank, New York Branch*, Order Pursuant to Banking Law § 39 at 9 (Aug. 6, 2012), *available at* http://www.dfs.ny.gov/about/ea/ea120806.pdf.

[36] *In the Matter of Standard Chartered Bank, New York Branch*, Order Pursuant to Banking Law § 39 at 9 n. 10 (Aug. 6, 2012), *available at* http://www.dfs.ny.gov/about/ea/ea120806.pdf.

ascertain that the payments were authorized."[37] The NYDFS order asserted that rather than instituting such a procedure, SCB continued to transmit misinformation to its New York branch by removing and otherwise misrepresenting wire transfer data that could identify Iranian parties.[38] The NYDFS order stated that SCB made false and misleading entries in the MT 202 cover payment messages to avoid regulatory scrutiny. The procedures were included in formal operations manuals, which directed SCB London employees to "repair" payment messages by deleting entries that would identify Iranian clients and substituting a "." in a particular field in an MT 103 message and in an MT 202 message.[39]

In October 2003 one of SCB's outside legal counsel in the U.S. warned that SCB's system for executing U-turn transactions anonymously through its New York branch did "not comport with the law or the spirit of OFAC rules, which lay out explicit details on how such transactions are to be conducted" and that "OFAC insists on full disclosure of all parties in transactions to ensure that transactions meet the terms of the rule."[40] The NYDFS order further observed that in March 2003 SCB learned that Lloyds TSB Bank was withdrawing its services from one of its Iranian bank customers "primarily for reputational risk reasons." Rather than revisiting its own clearing practices for Iranian banks, the NYDFS order said that "SCB positioned itself to take the abandoned market share."[41]

In 2005 SCB did review its practice of processing U-turn payments based on the conduct of "offshore due diligence" on the transactions. SCB had previously concluded that it could comply with the U-turn exemption by conducting due diligence outside the United States to verify that the transaction met the regulatory requirements for the U-turn exemption. This was in lieu of sending serial MT 103 payment messages with originator and beneficiary information to the New York branch. The general counsel of SCB strategized in a February 2006 e-mail "much as he had in 1995" that "it was reasonable to undertake due diligence on behalf of New York outside the U.S." even though the procedure

[37] *In the Matter of Standard Chartered Bank, New York Branch*, Order Pursuant to Banking Law § 39 at 11 (Aug. 6, 2012), *available at* http://www.dfs.ny.gov/about/ea/ea120806.pdf.

[38] *In the Matter of Standard Chartered Bank, New York Branch*, Order Pursuant to Banking Law § 39 at 11-12 (Aug. 6, 2012), *available at* http://www.dfs.ny.gov/about/ea/ea120806.pdf.

[39] *In the Matter of Standard Chartered Bank, New York Branch*, Order Pursuant to Banking Law § 39 at 12-13 (Aug. 6, 2012), *available at* http://www.dfs.ny.gov/about/ea/ea120806.pdf.

[40] *In the Matter of Standard Chartered Bank, New York Branch*, Order Pursuant to Banking Law § 39 at 14 (Aug. 6, 2012), *available at* http://www.dfs.ny.gov/about/ea/ea120806.pdf.

[41] *In the Matter of Standard Chartered Bank, New York Branch*, Order Pursuant to Banking Law § 39 at 15 (Aug. 6, 2012), *available at* http://www.dfs.ny.gov/about/ea/ea120806.pdf.

potentially placed the New York branch of SCB at risk if "our due diligence procedures are not fully effective."[42] The NYDFS order, however, characterized the offshore due diligence process undertaken by SCB as a sham, asserting that the SCB staff members in the U.K. were not trained to know the elements of a lawful U-turn transaction.[43] Finally, the NYDFS order also asserted that in 2006 SCB had misled the NYSBD about its clearing activities for Iranian banks in response to specific inquiries posed by the NYSBD.

The unilateral action by the NYDFS in issuing its August 6, 2012 order came as a shock to SCB. It also came as a shock to the other federal and state authorities involved in the investigation. But perhaps most importantly, it came as a shock to the markets. SCB responded immediately, releasing on August 6 a statement challenging the portrayal of facts as set forth in the NYDFS order.[44] The SCB release stated that SCB had in January 2010 voluntarily advised all the relevant U.S. agencies, including the NYDFS, that it had initiated a review of its historical U.S. dollar transaction practices and in particular their compliance with the U-turn exemption. SCB said that it had given regular presentations to the NYDFS and other U.S. agencies on the review. SCB also stated that well over 99.9 percent of the transactions relating to Iran complied with the U-turn exemption and that the "total value of the transactions that did not follow the U-turn was under $14 [million]."[45] SCB further stated that it believed that the interpretation of the U-turn exemption reflected in the NYDFS order was incorrect as a matter of law.[46] SCB noted that it had ceased all new business

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[42] *In the Matter of Standard Chartered Bank, New York Branch*, Order Pursuant to Banking Law § 39 at 18 (Aug. 6, 2012), *available at* http://www.dfs.ny.gov/about/ea/ea120806.pdf.

[43] *In the Matter of Standard Chartered Bank, New York Branch*, Order Pursuant to Banking Law § 39 at 16-17 (Aug. 6, 2012), *available at* http://www.dfs.ny.gov/about/ea/ea120806.pdf.

[44] Press Release, Standard Chartered PLC, Standard Chartered PLC strongly rejects the position and portrayal of facts made by the New York State Department of Financial Services (Aug. 6, 2012), *available at* https://www.sc.com/en/news-and-media/news/global/2012-08-06-response-to-NY-State-Department-comments.html.

[45] Press Release, Standard Chartered PLC, Standard Chartered PLC strongly rejects the position and portrayal of facts made by the New York State Department of Financial Services (Aug. 6, 2012), *available at* https://www.sc.com/en/news-and-media/news/global/2012-08-06-response-to-NY-State-Department-comments.html.

[46] The NYDFS Order of August 6, 2012 cited §560.516(c) of the Iranian Transactions Regulations, which appeared to indicate that a U.S. depository institution had to determine that an underlying transaction is not prohibited by Part 560, in support of the proposition that the U.S. bank involved in clearing a U-turn transaction had the obligation to determine that the transaction complied with the U-turn exemption. *See In the Matter of Standard Chartered Bank, New York Branch*, Order Pursuant to Banking Law § 39 at 7 (Aug. 6, 2012). In a letter issued on August 8, 2012 to the Treasury of the United Kingdom, the Director of OFAC clarified that

with Iranian customers in any currency over five years earlier. Finally, SCB noted that the resolution of these types of matters normally proceeds through a coordinated approach among the relevant agencies and that it was surprised to receive the order from the NYDFS given that discussions with the agencies were ongoing.

The SCB statement mattered little to the markets. The mere threat of a license revocation in New York by the NYDFS overwhelmed any legal or factual analysis, no matter how carefully framed it might be. The markets required a speedy resolution of the threat, not the facts.[47] SCB was forced by market pressure to reach a settlement with the NYDFS in scarcely more a week of the initial announcement of the enforcement action. On August 14, the NYDFS announced that it had settled the regulatory matters with SCB.[48] The settlement called for the payment of a $340 million civil money penalty by SCB and an agreement by SCB to install an independent monitor who would report directly to the NYDFS for a two-year period.[49] The NYDFS requirement for the appointment of a monitor introduced a new element not contained in the

§560.516(c) did not apply to U.S. financial institutions serving as intermediaries on U-turn transactions contrary to the interpretation of the NYDFS. Letter from Adam J. Szubin, Dir., Office of Foreign Assets Control, to Tom Scholar, Second Permanent Sec., HM Treasury (Aug. 8, 2012), *available at* http://images.politico.com/global/2012/08/treasury_scholar.html. Apparently, OFAC regulations can be misinterpreted not only by foreign banks, but also by other regulatory agencies.

[47] *See*, *e.g.*, Duncan Robinson *et al.*, *StanChart shares hit over Iran probe*, Fin. Times, Aug. 7, 2012, http://www.ft.com/intl/cms/s/0/fa5236ac-e061-11e1-9335-00144feab49a.html#axzz3Ann27vGI (reporting that the shares of SCB plunged 24 percent after the NYDFS accused the bank of hiding $250 billion of transactions with Iran); Patrick Jenkins, *StanChart hits back at Iran claims*, Fin. Times, Aug. 7, 2012, http://www.ft.com/intl/cms/s/0/888bd13c-e0ba-11e1-b465-00144feab49a.html (reporting that SCB's strong rejection of the portrayal of facts by the NYDFS failed to convince investors); *StanChart is forced into the trenches, New York State's charges against the bank are explosive*, Fin Times, Aug. 7, 2012, http://www.ft.com/intl/cms/s/0/3d62ae6c-e090-11e1-9335-00144feab49a.html#axzz3Ann27vGI (reporting that the threat to strip SCB of its banking license in New York would mean the end of its business model as a trade finance provider to the emerging markets).

[48] Press Release, Statement from Benjamin M. Lawsky, Superintendent of Financial Services, Regarding Standard Chartered Bank (Aug. 14, 2012) (announcing an agreement to settle the matters raised in the NYDFS Order of August 6, 2012), *available at* http://www.dfs.ny.gov/about/press/pr1208141.htm; Press Release, Statement from Benjamin M. Lawsky, Superintendent of Financial Services, Regarding Signing of Final Agreement With Standard Chartered Bank (Sep. 21, 2012) (announcing the signing of the final agreement with SCB), *available at* http://www.dfs.ny.gov/about/press/pr1209211.htm; *In the Matter of Standard Chartered Bank, New York Branch*, Consent Order Under New York Banking Law § 44 (Sept. 21, 2012), *available at* http://www.dfs.ny.gov/about/ea/ea120921.pdf.

[49] *In the Matter of Standard Chartered Bank, New York Branch*, Consent Order Under New

prior deferred prosecution agreements or settlements for OFAC violations. This element would reappear in subsequent OFAC enforcement cases.

It was something of an anti-climax when SCB subsequently came to settle with the other federal and state governmental authorities on these OFAC matters four months after the NYDFS action. On December 10, 2012, SCB entered into deferred prosecution agreements with the DOJ and the DANY and a settlement agreement with OFAC, arising out of essentially the same facts as were addressed by the NYDFS consent order.[50] Under the deferred prosecution agreements, SCB agreed to make a forfeiture payment of $227 million. Under the OFAC settlement agreement, SCB agreed to pay OFAC a civil money penalty of $132 million, which was deemed satisfied by the payment to the DOJ.[51] In addition, the Federal Reserve Board imposed a separate civil money penalty of $100 million on SCB.[52]

The Factual Statement accompanying the deferred prosecution agreements recites that SCB's criminal conduct included:

(i) processing payments through its London and Dubai branches on behalf of sanctioned entities without reference to the payments' origin;

(ii) eliminating payment data that would have revealed the involvement of sanctioned entities; and

(iii) using alternative payment methods (i.e., cover payments) to mask

York Banking Law § 44 (Sept. 21, 2012) *available at* http://www.dfs.ny.gov/about/ea/ea120921.pdf.

[50] *United States v. Standard Chartered Bank*, No. CR-12-262 (D.D.C. Dec. 10, 2012) (deferred prosecution agreement); *Standard Chartered Bank and District Attorney of the County of New York Deferred Prosecution Agreement*, Dec. 10, 2012.

[51] *See* Settlement Agreement, U.S. Dep't of the Treasury and Standard Chartered Bank (Dec. 10, 2012), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/121210_SCB_settlement.pdf.

[52] *In the Matter of Standard Chartered PLC et al.*, FRB Dkt. No. 12-069-CMP-FB (Dec. 10, 2012) (Order of Assessment of a Civil Money Penalty Issued Upon Consent), *available at* http://www.federalreserve.gov/newsevents/press/enforcement/enf20122012a2.pdf. The consent order of the Federal Reserve Board contained the standard provision in Federal Reserve Board consent orders that the consent order did not constitute either an admission or a denial by SCB of any allegation made or implied by the Federal Reserve Board. The recitals in the Federal Reserve Board order state that in 2005 and 2006, SCB New York provided incomplete and misleading responses to examiner inquiries relating SCB's dollar clearing activities, particularly with regard to Iranian customers. A similar allegation was contained in the NYDFS Order of August 6, 2012.

the involvement of sanctioned countries.[53]

The Factual Statement notes that SCB's unlawful actions occurred both inside and outside the United States. Paralleling language in the ING Bank Factual Statement, the SCB Factual Statement says that certain of the SCB payment practices were done "with the knowledge and approval of senior corporate managers and the legal and compliance departments of SCB."[54] The Factual Statement also states that SCB provided incomplete information in relation to sanctioned country payments in submissions to SCB's U.S. bank regulators, the Federal Reserve Bank of New York (the "FRBNY"), and the NYSBD (the predecessor to the NYDFS).[55] In addition, SCB made misleading statements to OFAC in the course of self-reporting certain sanctions violations to OFAC.

The fact pattern relating to Iranian transactions began on a similar note to that of ING Bank. Bank Markazi, the Central Bank of Iran, approached SCB early in 2001 to act as its correspondent bank for U.S. dollar payments, including those for oil sales by the National Iranian Oil Company. Bank Markazi directed SCB to remove any reference to Iran in the payment messages entering the United States. Before taking on this Iranian business, the SCB Group legal department had received advice from external U.S. counsel that Iranian information *could* be removed from payment messages "as long as [SCB] New York otherwise knows or has the ability to know that such payments are of a type that are authorized under the [Iranian Transactions Regulations]."[56] The counsel stated that it would be "advisable" for SCB London and SCB New York to agree to a standard operating procedure for the payments so that they could be identified in a way that both SCB London and SCB New York could readily determine that the payments conformed to the Iranian Transactions Regulations. This appears to be a reference to the same legal advice that was cited in the August 6, 2012 order of the NYDFS. The Factual Statement states that "[d]espite this legal advice, no such operating

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[53] *United States v. Standard Chartered Bank*, No. CR-12-262 (D.D.C. Dec. 10, 2012) (deferred prosecution agreement), Exhibit A at 2.

[54] *United States v. Standard Chartered Bank*, No. CR-12-262 (D.D.C. Dec. 10, 2012) (deferred prosecution agreement), Exhibit A at 2.

[55] *United States v. Standard Chartered Bank*, No. CR-12-262 (D.D.C. Dec. 10, 2012) (deferred prosecution agreement), Exhibit A at 1-2.

[56] *United States v. Standard Chartered Bank*, No. CR-12-262 (D.D.C. Dec. 10, 2012) (deferred prosecution agreement), Exhibit A at 9. On October 22, 2012, OFAC changed the title of the Iranian Transactions Regulations to the Iranian Transactions and Sanctions Regulations. *See* 77 Fed. Reg. 64, 664 (Oct. 22, 2012). For the period relevant to the law enforcement actions against SCB, the title of the applicable regulations was the Iranian Transactions Regulations.

procedure was ever put into place."[57] This latter statement was presumably included in the Factual Statement by the DOJ to rebut any suggestion that SCB could claim as a defense that in removing information from payment messages it had relied on advice of counsel.

In July 2003, SCB learned that a competitor (Lloyds TSB Bank) was exiting its Iranian business completely. SCB began discussions with five Iranian banks that were exiting Lloyds TSB Bank.[58] SCB Group's legal department consulted with the same external U.S. counsel that had advised SCB in 2001 on the Bank Markazi proposal. This time the advice from the U.S. counsel on the need for transparency was more direct: "I should point out that permissible U-turn transactions should be done on a fully disclosed basis, that is, SCB (London) . . . should disclose *all* details of the transaction. Not to do so could place SCB (New York) seriously in harm's way under the law. . . . "[59]

The Factual Statement then states that "due to conflicting legal advice," SCB requested advice from a second external U.S. law firm. In October 2003 the second U.S. law firm advised SCB that the OFAC regulations required the New York branch of SCB to obtain information on the remitter and the beneficiary to process U-turn transactions.[60] In January 2004 SCB made the decision to proceed with the new Iranian bank business, but not on the basis of sending the remitter and beneficiary information to the New York branch. Instead, SCB decided that it would rely on "offshore due diligence" of the transactions to establish their eligibility for the U-turn exemption. According to the Factual Statement, the Head of Legal in the New York branch was comfortable with the proposed course of action on the basis that SCB was processing only legitimate U-turn transactions and that there was a rigorous vetting process in place (presumably meaning the offshore due diligence being conducted by SCB).[61]

SCB conducted the business with the five additional Iranian banks from February 2004 through May 2006, using a similar "repair" procedure to that used for Bank Markazi transactions, replacing the identification code of the

[57] *United States v. Standard Chartered Bank*, No. CR-12-262 (D.D.C. Dec. 10, 2012) (deferred prosecution agreement), Exhibit A at 9.

[58] *United States v. Standard Chartered Bank*, No. CR-12-262 (D.D.C. Dec. 10, 2012) (deferred prosecution agreement), Exhibit A at 12.

[59] *United States v. Standard Chartered Bank*, No. CR-12-262 (D.D.C. Dec. 10, 2012) (deferred prosecution agreement), Exhibit A at 12 (emphasis original).

[60] *United States v. Standard Chartered Bank*, No. CR-12-262 (D.D.C. Dec. 10, 2012) (deferred prosecution agreement), Exhibit A at 13.

[61] *United States v. Standard Chartered Bank*, No. CR-12-262 (D.D.C. Dec. 10, 2012) (deferred prosecution agreement), Exhibit A at 14.

Iranian bank in the MT 202 payment message with SCB's code or with a ".". The insertion of a "." in a particular field in the payment message was necessary to avoid the SCB system automatically showing the Iranian bank code in the field. The Factual Statement notes that the "vast majority of these payments, while modified to prevent the U.S. clearing bank from recognizing them as Iranian, nonetheless complied with the then-existent U-turn exemption."[62] The ultimate conclusion in the Factual Statement is that between 2001 and 2007 the vast majority of SCB's dealing with Iranian clients, approximately $242 billion, consisted of payments that complied with the then-existent U-turn exemption.[63] In addition to the U-turn compliant transactions, however, there were $23 million in Iranian transactions that were not U-turn compliant and hence violated IEEPA.

The Factual Statement confirmed that in addition to Iranian business, SCB also processed payments for Libya, Sudan and Burma. Most of these payments were processed using a cover payment and began and ended with a non-U.S. financial institution. But as the Factual Statement notes, unlike Iranian transactions there was no U-turn exemption for any other sanctioned country.[64] The Factual Statement also cites an example of a Libyan payment sent as an MT 103 message that was blocked by the New York branch in June 2003. SCB reported the blocked payment, as well as seven earlier Libyan payments that had been processed through the New York branch as MT 202 cover payments and had not been blocked, to OFAC in August 2003. In its August 2003 letter to OFAC, SCB said that "SCB (London) has advised us that, while all eight payment instructions were in conformity with UK law, the use of cover payments was contrary to [SCB's] global instructions relating to OFAC sanctioned countries that would have precluded the initiation of such cover payment instructions."[65] The Factual Statement states that this statement in the letter to OFAC was misleading because SCB regularly used cover payments to process billions of dollars in payments, lawful and unlawful, through the New

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[62] *United States v. Standard Chartered Bank*, No. CR-12-262 (D.D.C. Dec. 10, 2012) (deferred prosecution agreement), Exhibit A at 15-16.

[63] *United States v. Standard Chartered Bank*, No. CR-12-262 (D.D.C. Dec. 10, 2012) (deferred prosecution agreement), Exhibit A at 17. This conclusion is generally consistent with the position that SCB had asserted in response to the NYDFS Order of August 6, 2012.

[64] *United States v. Standard Chartered Bank*, No. CR-12-262 (D.D.C. Dec. 10, 2012) (deferred prosecution agreement), Exhibit A at 17.

[65] *United States v. Standard Chartered Bank*, No. CR-12-262 (D.D.C. Dec. 10, 2012) (deferred prosecution agreement), Exhibit A at 22.

York branch of SCB for sanctioned entities. [66]

The Factual Statement also cites another important incident in SCB's relationship with its U.S. bank regulators. In November 2003, a joint examination by the FRBNY and the NYSBD had found significant deficiencies in SCB New York's procedures for monitoring its high-risk U.S. dollar clearing business. As a result, the FRBNY and the NYSBD entered into a written agreement with SCB in October 2004, requiring a detailed "look back" review of SCB New York's correspondent banking services. One aspect of the work plan for the "look back" review submitted by SCB to the FRBNY and the NYSBD dealt with the screening of SCB New York's wire payment data against the OFAC list of sanctioned countries. The Factual Statement says that despite that work plan, SCB did not disclose to the U.S. regulators that SCB New York was processing non-transparent payments for sanctioned countries during the course of the "look back" review.[67] As a result, approximately $88 billion of non-transparent Iranian U.S. dollar transactions passed through SCB New York during the look back review and were not included in the review. An FRBNY examiner was quoted on this matter as saying that "the FRBNY was misled."[68]

SCB began another review of its Iranian business in March 2005 when SCB learned that ABN AMRO Bank was exiting its U.S. dollar business with Iran because of regulatory concerns. As part of this internal review, a lawyer from SCB Group sought advice from two U.S. law firms. One firm advised that various bank regulators were showing increased interest in ensuring that banks "are not taking actions that could be viewed as having as their purpose the evasion of the OFAC regulations."[69] The other U.S. firm confirmed that "[t]he U.S. authorities are taking very seriously apparent evasions by some banks of Libyan and Iranian sanctions by means of cover payments."[70] In January 2006,

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[66] *United States v. Standard Chartered Bank*, No. CR-12-262 (D.D.C. Dec. 10, 2012) (deferred prosecution agreement), Exhibit A at 23. OFAC also asserted that the SCB letter was misleading. *See* Settlement Agreement, U.S. Dep't of the Treasury and Standard Chartered Bank at 3 (Dec. 10, 2012), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/121210_SCB_settlement.pdf.

[67] *United States v. Standard Chartered Bank*, No. CR-12-262 (D.D.C. Dec. 10, 2012) (deferred prosecution agreement), Exhibit A at 27-28.

[68] *United States v. Standard Chartered Bank*, No. CR-12-262 (D.D.C. Dec. 10, 2012) (deferred prosecution agreement), Exhibit A at 28. The Federal Reserve Board issued a civil money penalty assessment of $100 million against SCB and its New York branch arising out of these matters.

[69] *United States v. Standard Chartered Bank*, No. CR-12-262 (D.D.C. Dec. 10, 2012) (deferred prosecution agreement), Exhibit A at 37.

[70] *United States v. Standard Chartered Bank*, No. CR-12-262 (D.D.C. Dec. 10, 2012)

SCB Group again sought advice from external U.S. counsel. This counsel advised that "we have noted that there is great uncertainty at the moment as to whether anything less than full transparency in payment instructions sent to U.S. depository institutions on behalf of sanctioned banks could be construed by a prosecutor or regulator as intentional deception of a U.S. depository institution, even when SCB has taken reasonable steps to ensure that the payment would not breach the Iranian sanctions regime."[71] This counsel in a rare but skillful use of a quadruple negative further advised that:

> we cannot say that there is no risk that a U.S. prosecutor or regulator would not try to argue that the foreign bank intentionally misled the U.S. clearing bank by not identifying the payment as one subject to the U.S. sanctions regime.[72]

As a result of this advice, in March 2006, SCB stopped the "repair" process, but continued to process transparent Iranian U-turn payments pursuant to the U-turn exemption. In October 2006, SCB made the decision to exit all U.S. dollar business for Iran. In August 2007, SCB suspended all new Iranian business in other currencies.[73]

As previously noted, SCB in January 2010 voluntarily reported to the relevant U.S. authorities that it was conducting a comprehensive review of its historical payment processing practices. As part of the U.S. authorities' investigation, SCB voluntarily waived its attorney-client and work product privilege and entered into a tolling agreement on the applicable statutes of limitation.[74] In addition as a result of its own internal investigation, SCB had voluntarily taken various steps to enhance its sanctions compliance programs. The Federal Reserve Board in a consent cease and desist order required SCB to undertake further improvements to its compliance programs, including OFAC compliance reviews conducted by an independent consultant.[75]

(deferred prosecution agreement), Exhibit A at 37.

[71] *United States v. Standard Chartered Bank, No*. CR-12-262 (D.D.C. Dec. 10, 2012) (deferred prosecution agreement), Exhibit A at 38.

[72] *United States v. Standard Chartered Bank*, No. CR-12-262 (D.D.C. Dec. 10, 2012) (deferred prosecution agreement), Exhibit A at 38-39.

[73] *United States v. Standard Chartered Bank*, No. CR-12-262 (D.D.C. Dec. 10, 2012) (deferred prosecution agreement), Exhibit A at 40.

[74] *United States v. Standard Chartered Bank*, No. CR-12-262 (D.D.C. Dec. 10, 2012) (deferred prosecution agreement), Exhibit A at 41.

[75] *In the Matter of Standard Chartered plc et al.*, Cease and Desist Order Issued Upon Consent, Dkt. No. 12-069-B-FB (Dec. 10, 2012), *available at* http://www.federalreserve.gov/newsevents/press/enforcement/enf20121012a1.pdf.

The most comprehensive supervisory measure flowing from the regulatory and law enforcement actions came from the NYDFS consent order of September 21, 2012, which required SCB to submit to oversight by an independent monitor who would report directly to the NYDFS for a two-year period.[76] The monitor was to conduct a comprehensive review of the BSA and OFAC compliance programs at SCB and recommend necessary remediation steps. The operation of the monitor appointed for SCB has already had very significant consequences for SCB. As discussed further below, on August 19, 2014 the NYDFS announced that it had entered into a new consent order with SCB relating to certain anti-money laundering compliance failures.[77] Pursuant to the consent order, SCB was required to pay a $300 million civil money penalty and to suspend its U.S. dollar clearing operations for certain categories of high-risk customers. The anti-money laundering deficiencies were brought to the attention of the NYDFS by the monitor at SCB.[78]

HSBC Holdings

The ink on the signature pages of the deferred prosecution agreements with SCB was barely dry when one day later, on December 11, 2012, the U.S. law enforcement and regulatory authorities released an even broader set of actions against HSBC Holdings plc ("HSBC") and its U.S. subsidiary, HSBC Bank USA, N.A. ("HBUS"). HSBC and HBUS entered into deferred prosecution agreements with the DOJ and the DANY pursuant to which they agreed to forfeit $1.256 billion for violations of the Bank Secrecy Act ("BSA") and violations of the TWEA and IEEPA and violations of New York Penal Law Section 175.10.[79] In addition to the forfeiture, HSBC and HBUS agreed to pay $665 million in civil money penalties: $500 million to the Office of the Comptroller of the Currency (the "OCC") and $165 million to the Federal Reserve Board.[80] The payment to the OCC also satisfied a separate $500

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[76] *In the Matter of Standard Chartered Bank, New York Branch*, Consent Order Under New York Banking Law § 44 at ¶ 9 (Sept. 21, 2012), *available at* http://www.dfs.ny.gov/about/ea/ea120921.pdf.

[77] *In the Matter of Standard Chartered Bank, New York Branch*, Consent Order Under New York Banking Law §§ 39 and 44 (Aug. 19, 2014), *available at* http://www.dfs.ny.gov/about/ea/ea140819.pdf.

[78] *In the Matter of Standard Chartered Bank, New York Branch*, Consent Order Under New York Banking Law §§ 39 and 44 (Aug. 19, 2014), *available at* http://www.dfs.ny.gov/about/ea/ea140819.pdf.

[79] *United States v. HSBC Bank USA, N.A. et al.*, No. CR-12-763 (E.D.N.Y. Dec. 11, 2012) (deferred prosecution agreement); *HSBC Holdings plc and District Attorney of the County of New York Deferred Prosecution Agreement*, Dec. 11, 2012.

[80] *In the Matter of HSBC Bank USA, N.A.*, Consent Order No. 2012-261 (Dec. 11, 2012),

million penalty assessed by the Financial Crimes Enforcement Network for BSA violations.[81] The forfeiture to the DOJ also satisfied a separate $375 million penalty assessed by OFAC for TWEA and IEEPA violations.[82] One may assume that the DOJ ran the playbook in the huddles among the multiple government players as they coordinated their actions.

The deferred prosecution agreement with the DOJ consisted of four counts: two counts relating to violations of the BSA and the anti-money laundering program requirements thereunder; and two counts relating to violations of the TWEA with respect to the Cuban sanctions and IEEPA with respect to the Iranian, Libyan, Sudanese and Burmese sanctions.[83] The deferred prosecution agreement states that at least $881,000,000 was involved in transactions that violated the BSA and at least $375,000,000 was involved in transactions that violated the TWEA or IEEPA.[84] In a significant departure from the deferred prosecution agreements used in prior OFAC cases, the deferred prosecution agreement for HSBC included a requirement for the appointment of a monitor for up to a five-year period.[85]

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available at http://www.occ.gov/news-issuances/news-releases/2012/nr-occ-2012-173a.pdf; *In the Matter of HSBC Bank USA, N.A.*, Consent Order for the Assessment of a Civil Money Penalty No. 2012-262 (Dec. 11, 2012), *available at* http://www.occ.gov/news-issuances/news-releases/2012/nr-occ-2012-173b.pdf; *In the Matter of HSBC Holdings PLC et al.*, FRB Dkt. No. 12-062-CMP-FB (Dec. 11, 2012) (Order of Assessment of a Civil Money Penalty Issued Upon Consent), *available at* http://www.federalreserve.gov/newsevents/press/enforcement/enf20121211a1.pdf; *In the Matter of HSBC Holdings PLC*, FRB Dkt. No. 12-062-B-FB (Dec. 11, 2012) (Order to Cease and Desist Issued Upon Consent), *available at* http://federalreserve.gov/newsevents/press/enforcement/enf20121211a2.pdf.

[81] *In the Matter of HSBC Bank USA, N.A.*, Consent Order No. 2012-02 (Dec. 10, 2012) (Assessment of Civil Money Penalty), *available at* http://www.fincen.gov/whatsnew/pdf/20121211.pdf.

[82] Settlement Agreement, U.S. Dep't of the Treasury and HSBC Holdings plc (Dec. 11, 2012), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/121211_HSBC_Settlement.pdf.

[83] *United States v. HSBC Bank USA, N.A. et al.*, No. CR-12-763 (E.D.N.Y. Dec. 11, 2012) (deferred prosecution agreement), ¶ 1.

[84] *United States v. HSBC Bank USA, N.A. et al.*, No. CR-12-763 (E.D.N.Y. Dec. 11, 2012) (deferred prosecution agreement), ¶ 7. The Statement of Facts, which appears as Attachment A to the deferred prosecution agreement, states that the total value of the OFAC-prohibited transactions for the period from 2000 through 2006 was approximately $600 million, including transactions involving Burma, Iran, Sudan, Cuba and Libya. *Id.* at 21. HSBC also processed approximately $20 billion in otherwise permissible Iranian U-turn payments during this period. *Id.* at 25 n. 6.

[85] See *United States v. HSBC Bank USA, N.A. et al.*, No. CR-12-763 (E.D.N.Y. Dec. 11, 2012) (deferred prosecution agreement), Exhibit B.

A larger part of the Statement of Facts accompanying the deferred prosecution agreement with HSBC relates to BSA and anti-money laundering failures than to the OFAC sanctions failures. This article discusses only the parts of the HSBC law enforcement actions and regulatory actions relating to OFAC sanctions failures. Following the general pattern established in previous deferred prosecution agreements for OFAC violations, the Statement of Facts recites that HSBC engaged in criminal conduct by:

(i) following instructions from the sanctioned entities not to mention their names in U.S. dollar payment messages sent to HBUS and other financial institutions located in the United States;

(ii) amending and reformatting U.S. dollar payment messages to remove information identifying the sanctioned entities;

(iii) using a less transparent method of payment messages, i.e., cover payments; and

(iv) instructing at least one sanctioned entity on how to format payment messages in order to avoid sanctions filters that could have caused payments to be blocked or rejected.[86]

The Statement of Facts indicates that HSBC Bank plc (a U.K. incorporated bank subsidiary of HSBC that is referred to in the Statement of Facts as HSBC Europe) beginning in the 1990s established a "repair queue" in which HSBC Europe employees manually removed all references to sanctioned entities in U.S. dollar payment messages.[87] The Statement of Facts also notes that HSBC Europe's main processing center in the U.K. understood that the use of a cover payment would also hide the identity of the originating party and the beneficiary.[88] The Statement of Facts notes that HSBC Europe instituted "nominal processes" to screen for Specially Designated Nationals and to make determinations whether a payment fit within the U-turn exemption. But, according to the Statement of Facts, HSBC Europe used inadequately trained clerks and untested automated filters.[89]

In January 2001 HSBC Europe approached HBUS with a proposal to clear

[86] *United States v. HSBC Bank USA, N.A. et al.*, No. CR-12-763 (E.D.N.Y. Dec. 11, 2012) (deferred prosecution agreement), Attachment A at 18.

[87] *United States v. HSBC Bank USA, N.A. et al.*, No. CR-12-763 (E.D.N.Y. Dec. 11, 2012) (deferred prosecution agreement), Attachment A at 22-23.

[88] *United States v. HSBC Bank USA, N.A. et al.*, No. CR-12-763 (E.D.N.Y. Dec. 11, 2012) (deferred prosecution agreement), Attachment A at 24.

[89] *United States v. HSBC Bank USA, N.A. et al.*, No. CR-12-763 (E.D.N.Y. Dec. 11, 2012) (deferred prosecution agreement), Attachment A at 24-25.

U.S. dollar transactions for Bank Melli, using MT 202 cover payments that would not reference Bank Melli. In July 2001 the chief compliance officer in HBUS told HSBC Group's Head of Compliance that she was concerned that the use of cover payments prevented HBUS from confirming whether the underlying transactions met OFAC requirements.[90] The chief compliance officer of HBUS also warned the HSBC Group Head of Compliance about the amending of messages and was assured by the Group Head of Compliance that "Group Compliance would not support blatant attempts to avoid sanctions, or actions that would place [HSBC Bank USA] in a potentially compromising position."[91] In response to the proposal of HSBC Europe, HBUS had proposed that Bank Melli payments be processed only as fully transparent MT 103 messages with Bank Melli shown as the originator so that HBUS could conduct the due diligence to assure the availability of the U-turn exemption.[92] The Statement of Facts states that from 2001 through 2006 HBUS repeatedly told senior compliance officers at HSBC that it would not be able to properly screen sanctioned entity payments if payments were being sent using the cover payment method. The Statement of Facts says that "[t]hese protests were ignored."[93] The DOJ press release prominently featured these longstanding warnings from HBUS to HSBC in establishing the case against HSBC.

Subsequent events in the HSBC story are described in more detail in the OFAC settlement agreement. In 2003 HSBC Group Compliance determined that HSBC Europe was providing U.S. dollar clearing services to six Iranian banks and was manually intervening in the processing of the payment orders to avoid references to Iran.[94] HSBC Group Head of Compliance instructed HSBC Europe to stop the practice, but subsequently granted several exemptions to HSBC Europe and HSBC Middle East, allowing the amendment of messages from sanctioned entities to continue until 2006. In December 2004,

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[90] *United States v. HSBC Bank USA, N.A. et al.*, No. CR-12-763 (E.D.N.Y. Dec. 11, 2012) (deferred prosecution agreement), Attachment A at 25.

[91] *United States v. HSBC Bank USA, N.A. et al.*, No. CR-12-763 (E.D.N.Y. Dec. 11, 2012) (deferred prosecution agreement), Attachment A at 26.

[92] *United States v. HSBC Bank USA, N.A. et al.*, No. CR-12-763 (E.D.N.Y. Dec. 11, 2012) (deferred prosecution agreement), Attachment A at 23. *See also* Settlement Agreement, U.S. Dep't of the Treasury and HSBC Holdings plc at 2 (Dec. 11, 2012) *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/121211_HSBC_Settlement.pdf.

[93] *United States v. HSBC Bank USA, N.A. et al.*, No. CR-12-763 (E.D.N.Y. Dec. 11, 2012) (deferred prosecution agreement), Attachment A at 25.

[94] Settlement Agreement, U.S. Dep't of the Treasury and HSBC Holdings plc, at 2 (Dec. 11, 2012), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/121211_HSBC_Settlement.pdf.

HSBC Europe agreed to a protocol with HSBC Group Compliance to process U-turns for Iranian banks through HBUS on a fully disclosed basis, but this agreement was never fully implemented by HSBC Europe.[95] In July 2005 HSBC Group Compliance issued a group-wide policy that for the first time prohibited HSBC Group affiliates from processing U.S. dollar payments that were prohibited by OFAC regulations.[96] This policy made an exception for the continued use of cover payments for Iranian transactions, which were to be processed by a specialized compliance review team in HSBC Middle East to confirm their conformance to the U-turn exemption. In April 2006 HSBC Group Compliance issued another group-wide policy prohibiting the use of cover payments for OFAC-sensitive payments and requiring such payments to be made as fully transparent MT 103 payments, subject again to an exception for U-turn-compliant Iranian transactions. In October 2006, HSBC Group Compliance issued a further group-wide policy directing all HSBC Group affiliates to stop processing Iranian U.S. dollar payments, except for permissible U-turn payments made in connection with existing legally binding contractual obligations.[97] As the OFAC settlement agreement notes, HSBC voluntarily terminated the use of the U-turn exemption two years before OFAC itself repealed the exemption. Finally, in June 2007 as a result of a meeting with a senior U.S. Treasury Department official, HSBC Group Compliance agreed that the HSBC Group would end all its Iranian business relationships.[98]

The saga of HSBC's extrication from its Iranian business, spanning the period from 2000 through 2007, is recounted in even greater detail in a report issued in July 2012 by the United States Senate Permanent Subcommittee on Investigations (the "Subcommittee Report").[99] The Subcommittee chose HSBC as a case study in part because of HSBC's prior problems with BSA and

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[95] Settlement Agreement, U.S. Dep't of the Treasury and HSBC Holdings plc, at 2 (Dec. 11, 2012), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/121211_HSBC_Settlement.pdf.

[96] Settlement Agreement, U.S. Dep't of the Treasury and HSBC Holdings plc, at 3 (Dec. 11, 2012), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/121211_HSBC_Settlement.pdf.

[97] Settlement Agreement, U.S. Dep't of the Treasury and HSBC Holdings plc, at 3 (Dec. 11, 2012), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/121211_HSBC_Settlement.pdf.

[98] Settlement Agreement, U.S. Dep't of the Treasury and HSBC Holdings plc, at 3 (Dec. 11, 2012) *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/121211_HSBC_Settlement.pdf.

[99] *U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History Report by the Permanent Subcommittee on Investigations* (Jul. 17, 2012) (hereinafter

anti-money laundering compliance.[100] During the course of its investigation the Subcommittee issued multiple subpoenas and reviewed over 1.4 million documents from HSBC. The Subcommittee Report provides significantly more detail on virtually all aspects of the HSBC problems than either the DOJ Statement of Facts or the OFAC Settlement Agreement.[101] Several observations from the Subcommittee Report are relevant to the themes discussed in this article. The Subcommittee Report explains, for example, that in early 2001 in response to the initial request from Bank Melli for clearing services, HSBC and HBUS each consulted with separate U.S. external counsel and that there appeared to be a difference of opinion between the two counsel about the availability of the U-turn exemption and the need for full transparency in the U-turn payment messages.[102] In August 2001 HBUS determined on its own that it would allow clearing for Bank Melli only on a fully transparent basis, i.e., using serial MT 103 messages and not MT 202 cover payments.[103] It may be assumed that HBUS took this position for several reasons. First, as a risk management matter, HBUS presumably preferred to follow the more conservative version of the advice received from one of the two firms. Second, HBUS may have assumed that its U.S. bank regulators would expect it as a supervisory matter to be able to demonstrate compliance with the U-turn exemption based on the diligence conducted by HBUS and not a foreign affiliate. Finally, recognizing the element of human error even in OFAC checking in the United States, HBUS may have assumed that the risk of error would be higher if OFAC checking was conducted by offshore personnel less familiar with OFAC rules.

Subcommittee Report), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112shrg76061/html/CHRG-112shrg76061.htm.

[100] HSBC and HBUS were subject to broad-ranging regulatory enforcement orders issued by the Federal Reserve Board and the OCC in 2010. *See In the Matter of HSBC North America Holdings, Inc.,* Cease and Desist Order Issued Upon Consent, Dkt. No. 10-202-B-HC (Oct. 4, 2010), *available at* http://www.federalreserve.gov/newsevents/press/enforcement/enf20101007cl.pdf.; *In the Matter of HSBC Bank USA, N.A.,* Consent Order No. 2010-199 (Oct. 6, 2010), *available at* http://www.occ.gov/news-issuances/news-releases/1010/nr-occ-2010-121a.pdf.

[101] The discussion of OFAC issues in the HSBC Statement of Facts runs to seven pages. The discussion of OFAC issues in the Subcommittee Report runs to almost 75 pages.

[102] *U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History Report by the Permanent Subcommittee on Investigations* at 123-124 & n. 681 (Jul. 17, 2012), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112shrg76061/html/CHRG-112shrg76061.htm. The Subcommittee Report contains further discussions of HSBC's frequent consultation with external legal counsel on these OFAC issues at 130, 134, 137 n.769, 142, 143 n.811, 146 & 149.

[103] *U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History Report by the Permanent Subcommittee on Investigations* at 127 (Jul. 17, 2012), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112shrg76061/html/CHRG-112shrg76061.htm.

This concern would only have been heightened by the prospect that HSBC Europe had proposed to use "straight-through processing," putting into the hands of Bank Melli the determination that the payments qualified for the U-turn exemption.[104]

On September 6, 2001, the Head of Compliance and the General Counsel of HBUS together with their external U.S. counsel met with the Director of OFAC to discuss the proposal for HBUS to clear payments from Bank Melli on a fully transparent basis.[105] Based on the available public records, this appears to have been the first time that senior officers of a U.S. operation of a foreign bank met directly with the Director of OFAC to discuss the issues of clearing for a Iranian bank on a U-turn basis. As noted above, the HBUS proposal for clearing for Bank Melli on a fully disclosed basis was never fully implemented by HSBC Europe. Unknown to HBUS at the time, HSBC Europe was already clearing and would continue to clear for Bank Melli and other Iranian banks using cover payments on an undisclosed basis.

The Subcommittee Report also recounts in great detail the peristaltic process at HSBC involved in resolving the tensions between the HSBC payments unit and compliance personnel, who continued to raise concerns about the Iranian business, and the HSBC business relationship managers, who wanted to expand the Iranian business. The Subcommittee Report notes that the Head of Group Compliance explained to the Subcommittee that Group Compliance could not simply order a business to cease a practice; it could only recommend a course of action.[106] After desultory efforts at the business level, the OFAC issues were elevated by the Head of Group Compliance to the HSBC Group CEO in June 2005.[107] As a result, in July 2005, HSBC Group Compliance issued a group-wide policy prohibiting all HSBC affiliates from participating in any U.S. dollar transactions that were prohibited by OFAC (but permitting transactions permissible under the Iranian U-turn exemption). Senior manage-

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[104] *U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History Report by the Permanent Subcommittee on Investigations* at 126 (Jul. 17, 2012), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112shrg76061/html/CHRG-112shrg76061.htm.

[105] *U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History Report by the Permanent Subcommittee on Investigations* at 128 (Jul. 17, 2012), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112shrg76061/html/CHRG-112shrg76061.htm.

[106] *U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History Report by the Permanent Subcommittee on Investigations* at 138 (Jul. 17, 2012), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112shrg76061/html/CHRG-112shrg76061.htm.

[107] *U.S. Vulnerabilities to Money Laundering, Drugs, and Terrorist Financing: HSBC Case History Report by the Permanent Subcommittee on Investigations* at 154 (Jul. 17, 2012), *available at* http://www.gpo.gov/fdsys/pkg/CHRG-112shrg76061/html/CHRG-112shrg76061.htm.

ment at HSBC appeared to be fully engaged on OFAC issues thereafter.

The consequences for HSBC arising from its anti-money laundering program failures and its OFAC sanctions failures were substantial. Besides paying one of the largest penalties in U.S. banking history (but one subsequently dwarfed by settlements with other U.S. and foreign banks), HSBC was required to retain an independent monitor acceptable to the DOJ to oversee its compliance with U.S. anti-money laundering laws and U.S. sanctions laws for five years. As noted above, the NYDFS had required the appointment of an independent monitor for SCB in its consent order. HSBC appears to be the first deferred prosecution agreement with a foreign bank for OFAC violations to require an independent monitor, although the DOJ has in certain other deferred prosecution agreement cases, dealing, for example, with anti-money laundering and foreign corrupt practices matters, required the appointment of a monitor. The DOJ decision to require a monitor in the HSBC case may reflect the fact that the violations of U.S. law emanated in many instances from HSBC operations outside the United States. It would be difficult for any U.S. regulatory or law enforcement authority to monitor remediation activities in far flung foreign jurisdictions. Indeed, a U.S. regulator may conclude that the appointment of a monitor to oversee a broad remediation process is necessary or desirable even in respect of the U.S. operations of a regulated entity. The NYDFS has imposed an independent monitor requirement in several of its recent enforcement orders (such as the SCB order discussed above and the BNP order discussed below) and may even impose a monitor requirement on an institution as a supervisory matter in advance of any public enforcement order.[108]

In addition to the regulatory and financial consequences, there were also significant reputational and governance consequences for HSBC from these law enforcement and regulatory actions. Some of these reputational and governance consequences were reflected in the deferred prosecution agreement itself. The deferred prosecution agreement with the DOJ listed more than two dozen remedial actions that HSBC had taken or would take as part of the resolution of the matters, including the fact that HSBC had installed a new leadership team in the United States, including a new Chief Executive Officer, a new General Counsel and a new Head of Compliance, and a new leadership team in London, including a new Chief Executive Officer, a new Chief Legal Officer,

[108] As discussed below, the NYDFS required BNP Paribas to install a monitor for its U.S. operations as a supervisory matter even before the issuance of a formal enforcement order requiring such a monitor.

and a new Head of Global Standards Assurance.[109] Other remedial measures relevant from the perspective of the discussion in this article was a strengthening of the compliance reporting line in HBUS by separating the Legal and Compliance Departments and providing that the AML director would regularly report directly to the board and senior management.[110] A similar strengthening of the compliance function occurred at the Group level. The Head of HSBC Group Compliance was given direct oversight over every compliance officer worldwide and the new Head of HSBC Group Compliance was made a member of global senior management. These actions among others were presumably intended to address the lack of "voice" that appeared to characterize the Group Compliance function in the years preceding the enforcement actions. The deferred prosecution agreement also cited the fact that HSBC had significantly increased the headcount in the HSBC compliance function and had spent over $290 million on other remedial measures.[111] In addition, HSBC committed to a global review and remediation of all its know-your-customer files on a worldwide basis, at an estimated cost of $700 million over a five-year period.[112] The HSBC enforcement actions thus entailed substantial ongoing remediation expenses in addition to the up-front forfeiture payment and monetary penalties.

The Bank of Tokyo-Mitsubishi UFJ

The more muscular role of the NYDFS in pursuing U.S. dollar clearing practices among foreign banks was emphasized in June 2013 when The Bank of Tokyo-Mitsubishi UFJ, Ltd. ("BTMU") entered into a consent order with the NYDFS.[113] Pursuant to the consent order BTMU was required to pay a $250,000,000 penalty to the NYDFS. The consent order recited that BTMU had from at least 2002 through 2007 systemically omitted information in wire transfer transactions relating to sanctioned countries, including approximately

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[109] See *United States v. HSBC Bank USA, N.A. et al.*, No. CR-12-763 (E.D.N.Y. Dec. 11, 2012) (deferred prosecution agreement) at ¶ 5(a) & (m).

[110] *United States v. HSBC Bank USA, N.A. et al.*, No. CR-12-763 (E.D.N.Y. Dec. 11, 2012) (deferred prosecution agreement) at ¶ 5(e).

[111] *United States v. HSBC Bank USA, N.A. et al.*, No. CR-12-763 (E.D.N.Y. Dec. 11, 2012) (deferred prosecution agreement) at ¶ 5(d) & (l). HBUS increased its AML staff from 92 full-time employees and 25 consultants as of January 2010 to approximately 880 full-time employees and 267 consultants as of May 2012. *Id.* ¶ 5(d).

[112] *United States v. HSBC Bank USA, N.A. et al.*, No. CR-12-763 (E.D.N.Y. Dec. 11, 2012) (deferred prosecution agreement) at ¶ 5(w).

[113] *In the Matter of The Bank of Tokyo Mitsubishi-UFJ, Ltd., New York Branch*, Consent Order Under New York Banking Law § 44 (Jun. 19, 2013), *available at* http://www.dfs.ny.gov/about/press2013/pr201306201-tokyo.pdf.

28,000 transactions worth close to $100 billion involving Iran and other sanctioned entities.[114]

In contrast to the NYDFS action, in December 2012 OFAC had imposed a penalty of only $8,571,634 on BTMU for deleting or omitting information referring to sanctioned countries in payment messages sent into the United States.[115] The OFAC enforcement document indicated that BTMU processed at least 97 transactions in the aggregate amount of $5,898,943 in apparent violation of various OFAC regulations. BTMU's senior management learned of these practices in 2007 and initiated a voluntary self-disclosure to OFAC.[116]

The disparity in the civil money penalties imposed by OFAC and by the NYDFS may be explained at a minimum by at least two factors. First, as noted above in the SCB case, the NYDFS takes the position that even U-turn compliant Iranian payments violated the New York Banking Law if relevant information was deleted or omitted from the payment messages sent into New York. This vastly expands the number and amount of the transactions subject to penalty by the NYDFS. Second, the OFAC enforcement document covers the time period from only April 3, 2006 through March 16, 2007. The NYDFS order appears to cover a period from 2002 through 2007.

Further background on the BTMU case may be gleaned from a settlement agreement entered into by the NYDFS and PricewaterhouseCoopers LLP ("PwC") on August 18, 2014.[117] PwC was retained by BTMU in June 2007 to do a transaction review of BTMU's U.S. dollar clearing activities covering the period April 1, 2006 through March 31, 2007. In June 2008 PwC submitted its report to the NYDFS and other regulators. According to the introductory section of the August 2014 settlement agreement, the PwC report provided the cornerstone for the 2013 NYDFS consent order with BTMU and BTMU and the NYDFS had agreed to use the findings in the report as a basis for

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[114] *In the Matter of The Bank of Tokyo Mitsubishi-UFJ, Ltd., New York Branch*, Consent Order Under New York Banking Law § 44 at 2 (Jun. 19, 2013), *available at* http://www.dfs.ny.gov/about/press2013/pr201306201-tokyo.pdf.

[115] Enforcement Information for December 12, 2012, U.S. Dep't of Treasury (Dec. 2012), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20121212_btmu.pdf.

[116] Enforcement Information for December 12, 2012, U.S. Dep't of Treasury (Dec. 2012), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20121212_btmu.pdf.

[117] Settlement Agreement, N.Y. Dep't of Fin. Servs. and PricewaterhouseCoopers (Aug. 14, 2014) (hereinafter PwC NYDFS Settlement Agreement), *available at* http://www.dfs.ny.gov/about/press2014/pr140818_PwC_Order.pdf.

extrapolating the number of improper transactions processed by BTMU through its New York branch for the period of 2002 through 2007. According to the factual background section of the settlement agreement, BTMU requested PWC to delete or modify certain language in the report on BTMU's U.S. dollar clearing practices. The deletions or modifications related to information concerning "special" instructions contained in BTMU Tokyo's written administrative procedures for handling U.S. dollar payments involving sanctioned countries. Another deletion related to a statement in an earlier draft of the report, which said that if PwC had known about the special instructions at the outset of the review, PwC would have used a different approach to completing the project. The settlement agreement states that the NYDFS and PwC agree that PwC's work as a consultant for BTMU on this matter did not demonstrate "the necessary objectivity, integrity, and autonomy that is now required of consultants" by the NYDFS.[118]

The Royal Bank of Scotland

In December 2013, The Royal Bank of Scotland plc ("RBS") also became the object of regulatory enforcement orders—but not criminal sanctions—for OFAC violations. OFAC entered into a settlement agreement with RBS requiring a $33 million penalty payment by RBS.[119] Simultaneously the Federal Reserve Board imposed a $50 million civil money penalty on RBS relating to its U.S. dollar clearing practices.[120] The payment to OFAC was deemed to be satisfied by the $50 million payment to the Federal Reserve Board. The NYDFS also imposed a separate $50 million civil money penalty on RBS.[121]

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[118] As part of the PwC NYDFS Settlement Agreement, PwC agreed to a $25 million payment to the NYDFS and to a two-year suspension for its Regulatory Advisory Services Group from consulting engagements for institutions regulated by the NYDFS. PwC also agreed to implement a series of reforms designed to address potential conflicts of interest in the consulting industry. The NYDFS had imposed similar measures on Deloitte Financial Advisory Services in 2013 in respect of a consulting assignment previously performed for SCB. *See* Press Release, N.Y. Dep't of Fin. Servs., Cuomo Administration Reaches Reform Agreement with Deloitte over Standard Chartered Consulting Flaws (Jun. 18, 2013), *available at* http://www.dfs.ny.gov/about/press2013/pr1306181.htm.

[119] Settlement Agreement, U.S. Dep't of the Treasury and Royal Bank of Scotland plc (Dec. 11, 2013), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/12112013_rbs_settle.pdf.

[120] *In the Matter of The Royal Bank of Scotland Group plc et al.,* Order of Assessment of a Civil Money Penalty Issued Upon Consent, Dkt. No. 13-019-B-FB1 (Dec. 11, 2013), *available at* http://www.federalreserve.gov/newsevents/press/enforcement/enf20131211a1.pdf.

[121] *In the Matter of The Royal Bank of Scotland plc*, Consent Order Under New York Banking

The factual recitations in the OFAC settlement order are more detailed than the descriptions in either the penalty order of the Federal Reserve Board or the penalty order of the NYDFS. In 1997 National Westminster Bank ("NatWest"), which RBS acquired in 2000, established a correspondent banking account in the U.K. for Bank Melli Iran and its wholly-owned UK subsidiary, Melli Bank plc. NatWest (and later RBS) cleared U.S. dollar transactions for these Iranian entities by the use of cover payments.[122] Around the time that NatWest began its clearing relationship with Bank Melli, it sought advice from a U.S. law firm regarding the application of the U-turn exemption.[123] In its initial legal advice the U.S. law firm provided guidance that a series of proposed transactions would not appear to violate the Iranian sanctions regulations. The description of the transactions in the initial legal advice stated that Bank Melli would be listed as the originator of the transactions. In response to this written advice, NatWest asked for an updated opinion as to whether the guidance remained valid if the names of the Iranian parties were not included in the payment instructions sent into the United States. The OFAC settlement agreement says that "[w]hile the law firm stated in a letter to NatWest that its initial legal guidance remained valid, it appears to have based this assessment on an understanding that the bank processed all USD transfers in the same manner."[124] It is not absolutely clear what this reference means, but it appears to refer to the fact that the U.S. counsel did not understand that NatWest would be using MT 202 messages for Iranian customer transactions while using serial MT 103 messages for other (non-sanctioned) customer dollar transfers. The statement of the facts in the OFAC settlement agreement suggests another instance of incomplete communication or misunderstanding between the U.S. counsel and a foreign bank.

The issues for RBS may have been further compounded by later changes in RBS's automated processing system. While senior managers at RBS believed that the bank could process Iranian-related transactions via cover payments pursuant to the U-turn exemption, they also recognized that any mention of

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Law § 44 (Dec. 11, 2013), *available at* http://www.dfs.ny.gov/about/press2013/131211-rbs.pdf.

[122] Settlement Agreement, U.S. Dep't of the Treasury and Royal Bank of Scotland plc at 1 (Dec. 11, 2013), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/12112013_rbs_settle.pdf.

[123] Settlement Agreement, U.S. Dep't of the Treasury and Royal Bank of Scotland plc at 1 (Dec. 11, 2013), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/12112013_rbs_settle.pdf.

[124] Settlement Agreement, U.S. Dep't of the Treasury and Royal Bank of Scotland plc at 1-2 (Dec. 11, 2013), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/12112013_rbs_settle.pdf.

Iran in a payment message would likely cause the payment to be rejected by U.S. correspondents even if it were a permissible U-turn transaction.[125] These senior managers worked with staff in the RBS payments operations unit to implement changes in the automated payment processing system to remove entries that would otherwise refer to Iran. It appears that this adjustment to the automated system was intended to be used only for permissible Iranian payments, i.e., those covered by the U-turn exemptions or other general licenses for Iranian transactions. In practice, however, the adjustment to the automated process permitted various units in RBS to process U.S. dollar payments for other sanctioned countries such as Libya.[126]

In November 2003 the Group Executive Management Committee of RBS revised the RBS group-wide policy statement on sanctions financings to confirm that U.S. regulations required U.S. dollar payments cleared through the U.S. to be checked against OFAC lists and that U.S. dollar payments must comply with U.S. regulations.[127] In early 2006 RBS adopted an additional series of policies to reduce its U.S. dollar business with Iran (other than U-turn permissible transactions) and other sanctioned countries. Notwithstanding these policy initiatives, various RBS units continued to process U.S. dollar payments in violation of the Burmese, Cuban, Sudanese and Iranian sanctions until 2009. RBS voluntarily self-disclosed all of these apparent violations to OFAC.[128] It appears that in establishing the settlement amount of $33,122,307, OFAC did not include Iranian transactions that at the relevant time met the requirements for a U-turn exemption.

In contrast, the NYDFS consent order, requiring RBS to pay a civil money penalty of $50 million, cites RBS for violating New York law by processing transactions involving sanctioned countries in a non-transparent manner.[129] The consent order recites that RBS conducted more than 3,600 transactions

[125] Settlement Agreement, U.S. Dep't of the Treasury and Royal Bank of Scotland plc at 2 (Dec. 11, 2013), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/12112013_rbs_settle.pdf.

[126] Settlement Agreement, U.S. Dep't of the Treasury and Royal Bank of Scotland plc at 3 (Dec. 11, 2013), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/12112013_rbs_settle.pdf.

[127] Settlement Agreement, U.S. Dep't of the Treasury and Royal Bank of Scotland plc at 4 (Dec. 11, 2013), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/12112013_rbs_settle.pdf.

[128] Settlement Agreement, U.S. Dep't of the Treasury and Royal Bank of Scotland plc at 5 (Dec. 11, 2013), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/12112013_rbs_settle.pdf.

[129] *In the Matter of The Royal Bank of Scotland plc*, Consent Order Under New York Banking

valued at approximately $523 million, involving principally Sudanese and Iranian entities. This aggregate figure presumably includes U-turn exempt transactions that were processed as cover payments. The recitals in the consent order also state that senior RBS employees, including RBS's Group Head of Anti-Money Laundering and Head of Operational Risk, were fully aware of the instructions used to avoid detection of U.S. dollar payments for sanctioned countries.[130] Another recital notes that RBS had dismissed certain officers as a result of its internal investigation.[131] The NYDFS has become a champion of requiring institutions to take actions against employees involved in the wrongdoing as part of a corporate settlement. As discussed below, in subsequent enforcement orders with other banks, it has required the termination of, or other disciplinary actions against, employees involved in the wrongdoing.

BNP Paribas

On June 30, 2014 in a law enforcement action surpassing all prior OFAC enforcement actions, the DOJ and the DANY announced that BNP Paribas S.A. ("BNPP") had agreed to plead guilty to conspiring to violate the TWEA and IEEPA and to pay $8.9736 billion in forfeitures and fines.[132] The agreement by BNPP to plead guilty to a criminal offense was the first time that a financial institution had agreed to plead guilty based on large-scale violations of U.S. sanctions laws.[133] A general precedent for a plea to a criminal charge by a large foreign bank, however, had been set several months earlier in May 2014 when Credit Suisse AG had pled guilty to a criminal conspiracy in aiding and abetting U.S. taxpayers in filing false income tax returns.[134]

Law § 44, at 2 (Dec. 11, 2013), *available at* http://www.dfs.ny.gov/about/press2013/131211-rbs.pdf.

[130] *In the Matter of The Royal Bank of Scotland plc*, Consent Order Under New York Banking Law § 44 at 3 (Dec. 11, 2013), *available at* http://www.dfs.ny.gov/about/press2013/131211-rbs.pdf.

[131] *In the Matter of The Royal Bank of Scotland plc*, Consent Order Under New York Banking Law § 44 at 4 (Dec. 11, 2013), *available at* http://www.dfs.ny.gov/about/press2013/131211-rbs.pdf.

[132] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

[133] Press Release, U.S. Dep't of Justice, BNP Paribas Agrees to Plead Guilty and to Pay $8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions (Jun. 30, 2014), *available at* http://www.justice.gov/opa/pr/2014/June/14-ag-686.html.

[134] Press Release, U.S. Dep't of Justice, Credit Suisse Pleads Guilty to Conspiracy to Aid and Assist U.S. Taxpayers in Filing False Returns (May 19, 2014), *available at* http://www.justice.gov/opa/pr/2014/May/14-ag-531.html.

The prospect of a criminal plea by BNPP and the likelihood of a penalty approaching $10 billion had been widely heralded in the press in the weeks preceding the DOJ announcement.[135] This pattern was reminiscent of the press reports preceding the DOJ announcement of a guilty plea by Credit Suisse in its tax case.[136] These advance press reports presumably pre-conditioned the markets and bank customers in each case to the prospect of a guilty plea and the scale of financial penalties to be imposed.

The DOJ press release announcing the action against BNPP quoted senior officials of the DOJ to the effect that BNPP "went to elaborate lengths to conceal prohibited transactions, cover its tracks, and deceive U.S. authorities."[137] The press release also quoted a senior official to the effect that when BNPP was contacted by U.S. law enforcement authorities, "it chose not to fully cooperate" and that its failure to cooperate "significantly impacted the government's ability to bring charges against responsible individuals, sanctioned entities and satellite banks."[138] The senior official said that "[t]his failure together with BNP's prolonged misconduct mandated the criminal plea and the nearly $9 billion penalties that we are announcing today."[139]

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[135] *See*, *e.g.*, Devlin Barrett *et al.*, *Justice Dept. Seeks More Than $10 Billion Penalty from BNP Paribas*, WALL ST. J., May 19, 2014, http://online.wsj.com/articles/justice-dept-seeks-more-than-10-billion-penalty-from-bnp-paribas-1401386918; Tom Schoenberg & Fabio Benedetti-Valentini, *U.S. Seeking More than $10 Billion Penalty From BNP*, BLOOMBERG, May 30, 2014, http://www.bloomberg.com/news/2014-05-29/u-s-said-to-seek-more-than-10-billion-penalty-from-bnp.html; Aruna Viswanatha & Karen Freifeld, *Exclusive: As bank fines soar, U.S. threatened $16 billion BNP penalty*, REUTERS, Jun. 6, 2014, http://www.reuters.com/article/2014/06/06/us-bnpparibas-fines-exclusive-idUSKBN0EH0KN20140606.

[136] *See*, *e.g.*, Ben Protess & Jessica Silver-Greenberg, *Two Giant Banks, Seen as Immune, Become Targets*, N.Y. TIMES, Apr. 29, 2014, http://dealbook.nytimes.com/2014/04/29/u-s-close-to-bringing-criminal-charges-against-big-banks; David Voreacos & Hugh Son, *Credit Suisse Plea Looms as U.S. Said to Reassure Banks*, BLOOMBERG, May 19, 2014, http://www.bloomberg.com/news/print/2014-05-19/credit-suisse-plea-looms-as-u-s-said-to-reassure-banks.html.

[137] Press Release, U.S. Dep't of Justice, BNP Paribas Agrees to Plead Guilty and to Pay $8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions (Jun. 30, 2014), *available at* http://www.justice.gov/opa/pr/2014/June/14-ag-686.html.

[138] Press Release, U.S. Dep't of Justice, BNP Paribas Agrees to Plead Guilty and to Pay $8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions (Jun. 30, 2014), *available at* http://www.justice.gov/opa/pr/2014/June/14-ag-686.html.

[139] Press Release, U.S. Dep't of Justice, BNP Paribas Agrees to Plead Guilty and to Pay $8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions (Jun. 30, 2014), *available at* http://www.justice.gov/opa/pr/2014/June/14-ag-686.html.

Simultaneously, with the entry into the plea agreements with the DOJ and the DANY, BNPP also entered into a settlement agreement with OFAC, calling for a payment of $963 million by BNPP, which was deemed satisfied by the forfeiture payment to the DOJ.[140] The $963 million settlement was the largest in OFAC history.[141] BNPP entered into a consent order with the NYDFS pursuant to which BNPP paid the NYDFS a civil money penalty of $2,243,400,000.[142] BNPP also entered into a consent order with the Federal Reserve Board pursuant to which it paid a civil money penalty of $508,000,000.[143] This was the largest civil money penalty ever assessed by the Federal Reserve Board.[144] The civil money penalties paid to the NYDFS and the Federal Reserve Board were credited against the forfeiture amount payable to the DOJ.

The Statement of Facts accompanying the plea agreement recites that from at least 2004 up to and including 2012, BNPP conspired with banks and other entities located in or controlled by sanctioned countries, including Sudan, Iran and Cuba, to knowingly and willfully move at least $8,833,600,000 through the U.S. financial system on behalf of sanctioned entities in violation of U.S. sanctions laws.[145] At least $4.3 billion of these transactions involved Specially Designated Persons, including persons or entities suspected of terrorist activities, nuclear proliferation, and human rights abuses.[146] The Statement of Facts states that among the methods used by BNPP to carry out the conspiracy were the following:

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[140] Settlement Agreement, U.S. Dep't of the Treasury and BNP Paribas SA (Jun. 30, 2014) (hereinafter BNPP OFAC Settlement Agreement), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20140630_bnp_settlement.pdf.

[141] Press Release, U.S. Dep't of Treasury, Treasury Reaches Largest Ever Sanctions-Related Settlement with BNP Paribas SA for $963 Million (Jun. 30, 2014), *available at* http://www.treasury.gov/press-center/press-releases/Pages/jl2447.aspx.

[142] *In the Matter of BNP Paribas S.A., New York Branch*, Consent Order Under New York Banking Law § 44 (Jun. 30, 2014), *available at* http://www.dfs.ny.gov/about/ea/ea140630.pdf.

[143] *In the Matter of BNP Paribas S.A.,* Order to Cease and Desist and Order of Assessment of Civil Money Penalty Issued Upon Consent, Dkt. No. 14-022-B-FB (Jun. 30, 2014), *available at* http://www.federalreserve.gov/newsevents/press/enforcement/enf20140630a1.pdf.

[144] Press Release, Federal Reserve Board, Federal Reserve announces civil money penalty and issues cease and desist order against BNP Paribas, S.A. (Jun. 30, 2014), *available at* http://www.federalreserve.gov/newsevents/press/enforcement/20140630a.htm.

[145] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 5, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

[146] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 5, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

(i) intentionally using a non-transparent method of payment messages, known as cover payments, to conceal the involvement of sanctioned entities in U.S. dollar transactions processed through BNPP New York and other financial institutions in the United States;

(ii) working with other financial institutions to structure payments in highly complicated ways, with no legitimate business purpose, to conceal the involvement of sanctioned entities in order to prevent the illicit transactions from being blocked when transmitted through the United States;

(iii) instructing other co-conspirator financial institutions not to mention the names of sanctioned entities in U.S. dollar payment messages sent to BNPP New York and other financial institutions in the United States;

(iv) following instructions from co-conspirator sanctioned entities not to mention their names in U.S. dollar payment messages sent to BNPP New York and other financial institutions in the United Sates; and

(v) removing information identifying sanctioned entities from U.S. dollar payment messages in order to conceal the involvement of sanctioned entities from BNPP New York and other financial institutions in the United States.[147]

Unlike many of the other foreign bank OFAC cases, Iranian transactions did not represent as large a subset of the total violations as did Sudanese transactions. According to the Statement of Facts, $6.4 billion of the $8.8 billion of OFAC violations related to Sudanese entities, including 18 Sudanese Specially Designated Nationals, six of which were BNPP clients.[148]

Shortly after the imposition of U.S. sanctions against Sudan in 1997, a Swiss-based subsidiary of BNPP, BNP Paribas (Suisse) S.A. (referred to as BNPP Geneva in the Statement of Facts), became the sole correspondent bank in Europe for one of the Sudanese government-owned banks. This Sudanese bank directed other major commercial banks in Sudan to use BNPP Geneva as their primary correspondent bank in Europe. BNPP Geneva handled U.S. dollar transfers for these Sudanese banks. BNPP Geneva became a major force in providing trade finance services to Sudan as well. By 2006, letters of credit managed by BNPP for the Sudanese banks represented approximately a quarter

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[147] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 5-6, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

[148] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 6, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

of all exports and a fifth of all imports for Sudan.[149] A senior DOJ official characterized BNPP as a "de facto central bank for the government of Sudan."

BNPP like other foreign banks processed U.S. dollar transfers for its Sudanese bank clients by systematically omitting references to Sudan in messages BNPP sent into the United States. But BNPP Geneva developed another method to conceal transactions involving Sudanese banks. BNPP Geneva used a series of unaffiliated non-Sudanese banks (referred to internally at BNPP Geneva as "satellite banks") to cloak the Sudanese connection with the transactions.[150] In effect, the satellite banks operated as a front for transactions involving the Sudanese banks. The vast majority of the satellite banks' business with BNPP Geneva involved facilitating U.S. dollar transfers for these Sudanese banks. According to the Statement of Facts, BNPP Geneva's methods for evading U.S. sanctions against Sudan—both the omission of references in wire transfers and the use of satellite banks to process payments—"were known to and condoned by senior compliance and business managers at both BNPP Geneva and BNPP Paris."[151]

In 2004 the FRBNY and the NYSBD identified deficiencies in BNPP New York's monitoring of its correspondent accounts and pursuant to a memorandum of understanding directed BNPP New York to improve its systems for compliance with U.S. anti-money laundering and sanctions laws. According to the Statement of Facts, shortly after BNPP entered into the memorandum of understanding in September 2004, senior executives at BNPP Paris and BNPP Geneva decided to switch to an unaffiliated U.S. bank to process payments for countries subject to U.S. sanctions, rather than to continue to use BNPP New York for such clearing.[152] The Statement of Facts relates the decision taken by BNPP in switching to a U.S. bank to clear U.S. dollar payments for sanctioned

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[149] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 7, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

[150] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 10–11, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

[151] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 12, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

[152] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 12–13, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf. The OFAC Settlement Agreement indicates that BNPP made the decision to process U.S. dollar payments for sanctioned countries through an unaffiliated U.S. bank rather than BNPP's New York branch "as a precautionary matter" in case BNPP's interpretation of U.S. sanctions law might be incorrect. Settlement Agreement, U.S. Dep't of the Treasury and BNP Paribas SA at 3 (Jun. 30, 2014), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20140630_bnp_settlement.pdf.

entities to legal advice rendered to BNPP in October 2004:

> In implementing the switch to U.S. Bank 1, BNPP relied on incorrect advice that outside counsel ("U.S. Law Firm 1") provided, which suggested that BNPP may have been able to protect itself from being penalized by U.S. authorities if it conducted these prohibited transactions through another U.S. bank.[153]

On several occasions senior compliance and legal personnel at BNPP Geneva raised concerns about BNPP's business with Sudanese entities, but they were generally rebuffed with the indication that the Sudanese transactions had the "full support" of management at BNPP Paris. In September 2005 senior compliance officers at BNPP Geneva arranged a meeting with BNPP executives "to express, to the highest level of the bank, the reservations of the Swiss Compliance office concerning the transactions" for Sudanese customers. The meeting was attended by several senior BNPP Paris and Geneva executives. The Statement of Facts describes the outcome of the meeting in the following words: "At the meeting, a senior BNPP Paris executive dismissed the concerns of the compliance officials and requested that no minutes of the meeting be taken."[154] The senior BNPP Paris executive at the meeting was the then chief operating officer of BNPP.[155]

Several BNPP employees later said that they did not believe that U.S. sanctions laws applied to foreign banks, particularly if the transactions were processed through an unaffiliated U.S. bank. As the Statement of Facts acknowledges, "[t]his view of the reach of U.S. sanctions, while incorrect, was supported in part by a legal memorandum from U.S. Law Firm 1 received by BNPP in October 2004 regarding the general applicability of U.S. sanctions (the '2004 Legal Opinion')."[156] The Statement of Facts points out, however, that BNPP employees could not continue to rely on that 2004 advice after May

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[153] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 13, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

[154] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 16, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

[155] Settlement Agreement, U.S. Dep't of the Treasury and BNP Paribas SA, at 3 (Jun. 30, 2014), *available at* http://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20140630_bnp_settlement.pdf. The BNPP OFAC Settlement Agreement explains that these particular statements in the Statement of Facts came from a chronology of events drafted several years after the September 2005 meeting. Another handwritten note taken after the meeting characterized the conclusion reached at the meeting as BNNP Geneva could "continue current operations while respecting embargoes and exercising caution." *Id.* at 4.

[156] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 16, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

2006 when BNPP received a legal opinion from U.S. Law Firm 2, which advised BNPP that if it were to omit identifying information in U.S. dollar payments sent into the United States, it could be subjecting itself to various U.S. criminal laws.[157] Moreover, in March and June 2006, BNPP received two additional legal opinions from U.S. Law Firm 1, advising BNPP that U.S. sanctions could apply to BNPP even when the transactions are processed by a U.S. bank instead of BNPP New York and that BNPP should take procedures to guard against the abuse of cover payments to process payments on prohibited transactions.[158] The Statement of Facts states that even after the receipt of this revised legal advice and the issuance in July 2006 of a BNPP policy that acknowledged the applicability of U.S. sanctions to non-U.S. banks, units within BNPP continued to process transactions for Sudanese entities. The conclusion of the Statement of Facts on the Sudanese business is that from July 2006 until BNPP ended its Sudanese business in June 2007, BNPP knowingly and willfully processed approximately $6.4 billion in illicit U.S. dollar transactions involving Sudan. By starting the time frame from July 2006, the DOJ in effect excluded earlier transactions that occurred arguably in reliance on the 2004 Legal Opinion.[159]

The compliance functions at BNPP Geneva and BNPP Paris were not always aligned even among themselves on sanctions issues with some compliance and legal personnel warning about BNPP's practices and others acquiescing in the practices. By early 2007 certain senior compliance officers at BNPP Paris were urging BNPP Geneva to discontinue its U.S. dollar business with Sudan. The final impetus to discontinue the Sudanese business, however, came not from BNPP, but from OFAC. In May 2007 senior officials from OFAC met with executives at BNPP New York and warned that BNPP Geneva was conducting U.S. dollar business in violation of U.S. sanctions.[160] OFAC requested that

[157] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 17, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

[158] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 17 *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

[159] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 17-18 and 20, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf. Press reports suggested that BNPP had thought that the 2004 Legal Opinion might provide it broader protection from a claim that it had acted with "intent" to violate the U.S. sanctions law. *See*, *e.g.*, Jessica Silver-Greenberg & Ben Protess, *BNP Paribas Pinned Hopes on Legal Memo, in Vain*, N.Y. TIMES, Jun. 3, 2014, http://dealbook.nytimes.com/2014/06/03/bnp-paribas-pinned-hopes-on-legal-memo-in-vain/.

[160] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 19, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

BNPP conduct an internal investigation of BNPP Geneva's activities on behalf of Sudan and report its findings to OFAC. BNPP only stopped its U.S. dollar business with Sudan in June 2007 after this intervention by OFAC.

BNPP also processed transactions for Cuban entities. These transactions occurred from 2000 up to and including 2010. Most of the transactions arose from eight credit facilities managed by BNPP Paris for Cuban entities.[161] The Statement of Facts states that the credit facilities were structured in highly complicated ways that had no business purpose other than to conceal the connection to Cuba for the payments processed through the United States.[162] BNPP gave its Cuban clients and the other banks involved in the credit facilities instructions on how to tailor the payment messages to evade the OFAC filters at U.S. financial institutions.

Notwithstanding BNPP Paris' instructions to avoid references to Cuba in the payment messages, three payments under these facilities were stopped in the United States in February 2006, two at BNPP New York and one at U.S. Bank 1. BNPP resubmitted the three payments as one lump sum through U.S. Bank 1. The Statement of Facts states that BNPP took the step of resubmitting the lump sum payment through U.S. Bank 1 "out of fear that if OFAC learned of the blocked payments, BNPP's entire history with the Cuban [c]redit [f]acilities could have been exposed and could have resulted in BNPP facing sanctions by U.S. authorities."[163]

After the blocking of the original payments but before their resubmission as a lump sum, a senior attorney at BNPP Paribas in March 2006 sought advice from U.S. Law Firm 1. U.S. Law Firm 1 confirmed that the transactions were required to be blocked and that BNPP should consider discontinuing participation in any such U.S. dollar facility. The BNPP senior attorney responded to U.S. Law Firm 1 and instructed it to suspend any further work on the matter.[164] BNPP decided to resubmit the transactions as one lump sum through U.S. Bank 1 and thereafter to process the U.S. dollar transactions under the credit facilities through U.S. Bank 1, instead of BNPP New York.

Certain BNPP employees involved in the Cuban transactions said that they

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[161] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 22, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

[162] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 24-25, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

[163] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 26, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

[164] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 27, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

too did not appreciate that U.S. sanctions laws applied to transactions run out of Paris. The Statement of Facts says that "[t]o the extent that BNPP employees genuinely held this incorrect view of the reach of U.S. sanctions," they were put on notice by the 2004 Legal Opinion from U.S. Law Firm 1 that U.S. dollar transactions cleared for Cuban counterparties violated U.S. sanctions.[165] The Statement of Facts further states that "while the 2004 Legal Opinion left some ambiguity as to whether BNPP could face criminal liability if its transactions with [s]anctioned [e]ntities were cleared through an unaffiliated financial institution, as opposed to BNPP New York, the Cuban [c]redit [f]acilities were cleared almost exclusively through BNPP New York."[166]

The Statement of Facts states that beginning in late 2006 compliance personnel at BNPP Paris tried to convince their business colleagues to convert the U.S. dollar Cuban credit facilities to Euros or another currency. Several facilities were converted to Euros, but certain credit facilities remained denominated in U.S. dollars for several more years and U.S. dollar transactions continued at one credit facility into 2010.[167] The Statement of Facts says that senior officers of BNPP allowed the credit facilities to stay in U.S. dollars "due to BNPP's longstanding relationships with Cuban entities and the perceived cost to BNPP of converting the facilities to Euros."[168] The conclusion in the Statement of Facts is that from October 2004 when the 2004 Legal Opinion was disseminated throughout BNPP Paribas until BNPP's final U.S. dollar transactions with Cuban entities in early 2010, BNPP knowingly and willfully processed illicit U.S. dollar transactions involving Cuba in a total amount of approximately $1.747 billion.[169]

BNPP Paris also had an involvement with at least two Iranian or Iranian-controlled companies, but this involvement appears to have been less extensive than BNPP's involvement with Sudanese and Cuban entities. Paradoxically, BNPP's involvement with these two Iranian entities began—and more significantly ended—later in time than its involvement with the Sudanese and Cuban

[165] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 28, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

[166] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 28-29, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

[167] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 31, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

[168] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 31, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

[169] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 33, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

entities. From the Statement of Facts, it appears that in December 2006 BNPP opened three letters of credit for a company organized in the United Arab Emirates, but controlled by an Iranian energy group based in Tehran, Iran. The initial transactions under the letters of credit were apparently compliant with the U-turn exemption, but BNPP continued to process U.S. dollar transactions for this client after the repeal of the U-turn exemption in November 2008 and after the DOJ and the DANY approached BNPP in January 2010 regarding its involvement with sanctioned entities.[170] BNPP only terminated transactions for this client in November 2012. The Statement of Facts states that from December 2011 when BNPP was put on notice that the Dubai company was controlled by Iranian entities until November 2012 when the transactions ended, BNPP processed approximately $586 million in transactions for the client.[171] Separately, in 2009, BNPP processed approximately $100 million in U.S. dollar transactions under six letters of credit for an Iranian oil company. These payments were processed even after compliance personnel in BNPP Paris advised the business unit that these U.S. dollar transactions were no longer allowed because of the repeal of the U-turn exemption.[172]

The fact that BNPP had continued to process payments for an Iranian-controlled entity through November 2012 was a source of great consternation to the U.S. authorities and grave trouble for BNPP. Press stories confirmed that when BNPP executives came to the United States in the summer of 2013 to share the "embarrassing" admission that the bank had still been processing illicit U.S. dollar payments almost two years after the U.S. began investigating the bank, one of the U.S. officials responded: "We can't believe we're having this conversation now."[173] The Statement of Facts further recites that despite beginning its internal investigation in early 2010 at the request of the U.S. law enforcement authorities, BNPP failed to provide the U.S. authorities with meaningful materials from BNPP Geneva until May 2013 and those materials were heavily redacted due to bank secrecy laws in Switzerland.[174] A senior DOJ

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[170] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 21, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

[171] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 22, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

[172] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 22, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

[173] David Gauthier-Villars *et al.*, *BNP Paribas' Looming U.S. Settlement to Cap Troublesome Period*, WALL ST. J., Jun. 29, 2014, http://online.wsj.com/articles/bnp-paribass-looming-u-s-settlement-to-cap-troublesome-period-for-bank-1404058219.

[174] Plea Agreement, *United States v. BNP Paribas S.A.* (Jun. 30, 2014), Exhibit B at 33–34, *available at* http://www.justice.gov/opa/documents/paribas/plea-agreement.pdf.

official characterized the behavior of BNPP personnel as "dragging their feet once the Justice Department put them on notice that their illegal conduct was under investigation."[175] This official criticized BNPP for its lack of full and timely cooperation with the U.S. law enforcement authorities in their investigation, which simply compounded the problem of BNPP's prolonged disregard for the U.S. sanctions regimes.[176]

The course ahead for BNPP will likely prove challenging. Both the Federal Reserve Board and the NYDFS in their enforcement actions have required BNPP to take substantial remedial actions. In a consent cease and desist order among BNPP, the Federal Reserve Board, and Autorité de Contrôle Prudential et de Résolution (the home supervisor of BNPP), BNPP is required to submit an acceptable compliance program to ensure compliance with OFAC regulations by BNPP's global business lines.[177] Among its many specific requirements, the program must provide for the relocation of part of BNPP's existing financial security function to the United States with ultimate responsibility for the BNPP global OFAC compliance program. This U.S. office is to serve as the "ultimate arbiter" of U.S. sanctions issues and is to have "authority to compel BNP Paribas' branches, affiliates, and global business lines to comply" with the OFAC compliance program.[178] On July 31, 2014 BNPP announced a new program to strengthen its control mechanisms as a major step in response to the requirements in the Federal Reserve Board order.[179] The program involves a major overhaul of BNPP's internal control systems. It includes a major reorganization intended among other things to ensure the independence and "resource autonomy" of the Group Compliance and Legal functions along the same lines as the existing Risk Management and Internal Audit functions at

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[175] Press Release, U.S. Dep't of Justice, Remarks by Deputy Attorney General Cole at Press Conference Announcing Significant Law Enforcement Action (Jun. 30, 2014), *available at* http://www.justice.gov/iso/opa/dag/speeches/2014/dag-speech-140630.html.

[176] Press Release, U.S. Dep't of Justice, Remarks by Deputy Attorney General Cole at Press Conference Announcing Significant Law Enforcement Action (Jun. 30, 2014), *available at* http://www.justice.gov/iso/opa/dag/speeches/2014/dag-speech-140630.html.

[177] *In the Matter of BNP Paribas S.A.*, Cease and Desist Order Issued Upon Consent, Dkt. No. 14-022-B-FB (Jun. 30, 2014), *available at* http://www.federalreserve.gov/newsevents/press/enforcement/enf20140630a2.pdf.

[178] *In the Matter of BNP Paribas S.A.*, Cease and Desist Order Issued Upon Consent, Dkt. No. 14-022-B-FB, ¶ 1(a) (Jun. 30, 2014), *available at* http://www.federalreserve.gov/newsevents/press/enforcement/enf20140630a2.pdf.

[179] Press Release, BNP Paribas, BNP Paribas Strengthens Its Control Mechanisms (Jul. 31, 2014), *available at* http://www.bnpparibas.com/en/news/press-release/bnp-paribas-strengthens-its-control-mechanisms.

BNPP. The heads of the four departments will now constitute a Group Supervisory and Control Committee under the chairmanship of the chief executive officer of BNPP. A new head of the Group Compliance function has also been appointed. In direct response to the Federal Reserve Board order, a remediation plan for U.S. sanctions requirements is also being implemented, including the creation of a Group Financial Security department in the United States where all U.S. dollar flows will be processed and controlled via BNPP's New York office.[180]

As noted above pursuant to a separate consent cease and desist order and order of assessment of civil money penalty, BNPP was required to pay a penalty of $508,000,000 to the Federal Reserve Board.[181] This order also prohibited BNPP from re-employing or otherwise engaging as consultants 11 former officers of BNPP who were involved in the actions that resulted in the violations of U.S. sanctions laws.[182] Among the 11 individuals are the former chief operating officer, former head of compliance, and former head of structured finance of BNPP. In an accompanying press release, the Federal Reserve Board said that it was pursuing separate enforcement actions against these individuals, which could include fines and orders prohibiting them from participating in the business of banking.[183] This action with respect to the former officers of BNPP followed a similar action taken by the Federal Reserve Board when it issued an enforcement action against Credit Suisse in conjunction with a guilty plea in its tax case in May 2014.[184] In that enforcement action the Federal Reserve Board required Credit Suisse to terminate its relationship with, and not re-employ or otherwise engage, nine individuals who had been indicted or convicted for their

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[180] Press Release, BNP Paribas, BNP Paribas Strengthens Its Control Mechanisms (Jul. 31, 2014), *available at* http://www.bnpparibas.com/en/news/press-release/bnp-paribas-strengthens-its-control-mechanisms.

[181] *See In the Matter of BNP Paribas S.A.,* Order to Cease and Desist and Order of Assessment of Civil Money Penalty Issued Upon Consent, Dkt. No. 14-022-B-FB (Jun. 30, 2014), *available at* http://www.federalreserve.gov/newsevents/press/enforcement/enf20140630a1.pdf.

[182] *In the Matter of BNP Paribas S.A.,* Order to Cease and Desist and Order of Assessment of Civil Money Penalty Issued Upon Consent, Dkt. No. 14-022-B-FB (Jun. 30, 2014), *available at* http://www.federalreserve.gov/newsevents/press/enforcement/enf20140630a1.pdf.

[183] Press Release, Federal Reserve Board, Federal Reserve announces civil money penalty and issues cease and desist order against BNP Paribas, S.A. (Jun. 30, 2014), *available at* http://www.federalreserve.gov/newsevents/press/enforcement/20140630a.htm.

[184] *In the Matter of Credit Suisse AG*, Order to Cease and Desist and Order of Assessment of Civil Money Penalty Issued Upon Consent, Dkt. No. 14-009-B-FB (May 19, 2014), *available at* http://www.federalreserve.gov/newsevents/press/enforcement/enf20140519a1.pdf.

involvement in the U.S. tax violations.[185]

The enforcement action taken by the NYDFS was even more daunting. As noted above, the NYDFS assessed a civil money penalty of $2,243,400,000 against BNPP. This amount, together with an equal amount allocated to the DANY, has struck some observers as an unusually large allocation to the New York authorities.[186] The NYDFS order included two other significant features. The order states that "at the direction" of the NYDFS, 13 officers, including the former chief operating officer of BNPP, the former group head of compliance, and the former head of ethics and compliance of BNPP North America, had been terminated or separated by BNPP as a result of the investigation.[187] The order directs BNPP not to retain any of these individuals in any capacity in the future. This action follows a similar action in the NYDFS enforcement order with Credit Suisse on its tax issues. The prospect of such actions had been foreshadowed in a speech delivered by Superintendent Benjamin Lawsky of the NYDFS in March 2014 in which he said that the NYDFS would be placing a much higher priority in future enforcement actions on sanctions against individuals and not just against corporations.[188]

The order also confirmed that the NYDFS had required BNPP (pursuant to a memorandum of understanding dated August 13, 2013) to appoint an independent consultant to operate on site at the BNPP New York branch.[189] The order required the extension of the consultant's engagement for an additional two years. The consultant is to conduct a review of anti-money

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[185] *In the Matter of Credit Suisse AG*, Order to Cease and Desist and Order of Assessment of Civil Money Penalty Issued Upon Consent, Dkt. No. 14-009-B-FB (May 19, 2014), *available at* http://www.federalreserve.gov/newsevents/press/enforcement/enf20140519a1.pdf.

[186] *See, e.g.*, Susanne Craig & James C. McKinley Jr., *French Bank's Guilty Plea Is Latest Big Settlement to Bolster State's Fiscal Position*, N.Y. TIMES, Jul. 1, 2014, http://www.nytimes.com/2014/07/02/nyregion/bnp-paribas-guilty-plea-is-latest-big-settlement-to-bolster-new-york-states-fiscal-position.html; Karen Freifeld & Aruna Viswanatha, *Exclusive: Cuomo intervened in BNP deal to get $1 billion more for NY state fund*, REUTERS, Jul. 30, 2014, http://www.reuters.com/article/2014/07/30/us-bnp-cuomo-exclusive-idUSKBN0FZ2L720140730.

[187] *In the Matter of BNP Paribas S.A., New York Branch*, Consent Order Under New York Banking Law § 44, at 20 (Jun. 30, 2014), *available at* http://www.dfs.ny.gov/about/ea/ea140630.pdf.

[188] Benjamin Lawsky, N.Y. State Superintendent of Fin. Servs., Remarks on Financial Regulatory Enforcement at the Exchequer Club (Mar. 19, 2014), *available at* http://www.dfs.ny.gov/about/speeches_testimony/sp140319.pdf.

[189] *In the Matter of BNP Paribas S.A., New York Branch*, Consent Order Under New York Banking Law § 44, at 19-20 (Jun. 30, 2014), *available at* http://www.dfs.ny.gov/about/ea/ea140630.pdf.

laundering and OFAC compliance procedures at the New York branch and to oversee the remediation efforts and compliance with the new order. As noted above, the NYDFS has required the appointment of independent monitors in other recent enforcement actions such as those with SCB and Credit Suisse.

The NYDFS order for BNPP also included a new feature not included in prior OFAC-related enforcement cases. As had been widely speculated in press stories in advance of the issuance of the enforcement order, the NYDFS imposed a one-year suspension on certain U.S. dollar clearing operations through BNPP's New York branch or its other affiliates.[190] The suspension applies to U.S. dollar clearing for the oil and gas business lines and offices of BNPP involved in the activities that were the subject of the enforcement actions. In addition, BNPP agreed to a two-year suspension of U.S. dollar clearing as a correspondent for unaffiliated third-party banks in New York and London.[191] While some press reports characterized the temporary suspension as among the stiffest punishments imposed on BNPP, BNPP in its own press release discussing the settlement said that the temporary suspension would have "no impact on its operational or business capabilities to serve the vast majority of its clients" and that it had taken measures to ensure that U.S. dollar clearing could be done through a third-party bank instead of BNPP's New York branch where necessary.[192]

Nonetheless, both the size of the fine imposed on BNPP and the introduction of the new measure temporarily suspending U.S. dollar clearing privileges prompted protests from foreign government sources and foreign commercial interests.[193] Press reports indicate that both the German and French govern-

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[190] *See*, *e.g.*, Viswanatha & Freifeld, *supra* note 135; Peter Eaves, *In BNP Case and Beyond, Regulators Search for Penalties to Fit the Crimes*, N.Y. TIMES, Jun. 3, 2014, http://dealbook.nytimes.com/2014/06/03/regulators-explore-options-for-suitable-penalties-in-bnps-sanctions-inquiry/.

[191] *In the Matter of BNP Paribas S.A., New York Branch*, Consent Order Under New York Banking Law § 44, at 19 (Jun. 30, 2014), *available at* http://www.dfs.ny.gov/about/ea/ea140630.pdf.

[192] Devlin Barrett *et al.*, *BNP Paribas Draws Record Fine for 'Tour de Fraud'*, WALL ST. J., Jun. 30, 2014, http://online.wsj.com/articles/bnp-agrees-to-pay-over-8-8-billion-to-settle-sanctions-probe-1404160117; Press Release, BNP Paribas, BNP Paribas Announces a Comprehensive Settlement Regarding the Review of Certain USD Transactions by US Authorities (Jul. 1, 2014), *available at* http://usa.bnpparibas.com/en/2014/06/30/bnp-paribas-announces-a-comprehensive-settlement-regarding-the-review-of-certain-usd-transactions-by-us-authorities/.

[193] *See*, *e.g.*, Viswanatha & Freifeld, *supra* note 135; Michael Stothard & Martin Arnold, *US blow leaves BNP fearing for reputation*, FIN. TIMES, Jul. 1, 2014, http://www.ft.com/intl/cms/s/0/569c3384-f0b6-11e3-9e26-00144feabdc0.html#axzz367CTPUl1; Patrick Jenkins, *Swiss Re*

ments wish to discuss the extraterritoriality of U.S. sanctions laws as part of the agenda of an upcoming G20 meeting.[194] Because of the commanding position of the U.S. dollar in international trade and finance, concern with extraterritoriality of U.S. sanctions laws remains high among the major European trading partners of the United States.

SCB Redux

The NYDFS provided a coda to this article with another enforcement action against SCB on August 19, 2014.[195] The new enforcement action was based upon a failure by SCB to remediate its anti-money laundering systems as required by the September 2012 consent order entered into between the NYDFS and SCB. The September 2012 consent order required SCB to improve and enhance its BSA, anti-money laundering and OFAC compliance programs and procedures. The remediation failure was uncovered by the monitor that the NYDFS installed at SCB as part of the September 2012 consent order.

The new consent order states that the transaction surveillance system at the New York branch of SCB failed to detect a significant number of potentially high-risk transactions for further review and that a significant number of these transactions originated from SCB's Hong Kong subsidiary and SCB's branches in the United Arab Emirates.[196] For this monitoring system failure, the consent

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chairman attacks penalties, Fin. Times, Jul. 2, 2014, http://www.ft.com/intl/cms/s/0/81e4e97c-007f-11e4-a3f2-00144feab7de.html#axzz3B8lOdHsq; Yalman Onaran, *BNP Paribas Looks to Keep Customers Amid U.S. Penalties*, Bloomberg, Jul. 1, 2014, http://www.bloomberg.com/news/2014-07-01/bnp-paribas-looks-to-keep-customers-amid-u-s-penalties.html; Gina Chon & Kara Scannell, *US agencies in rift over bank penalties*, Fin. Times, Jul. 10, 2014, http://www.ft.com/intl/cms/s/0/68ebfc1a-0842-11e4-9afc-00144feab7de.html#axzz3BQkhg1pK.

[194] *See*, *e.g.*, Alexandra Hudson *et al.*, *Germany, France seek unified EU position on US bank fines*, Reuters, Aug. 4, 2014, http://uk.reuters.com/article/2014/08/04/uk-france-banks-g-idUKKBN0G40B920140804; Michael Stothard *et al.*, *France urges G20 to put issue of US bank fines on agenda*, Fin. Times, Aug. 3, 2014, http://www.ft.com/intl/cms/s/0/da428604-1963-11e4-9745-00144feabdc0.html#axzz3B8lOdHsq.

[195] *In the Matter of Standard Chartered Bank, New York Branch*, Consent Order Under New York Banking Law §§ 39 and 44 (Aug. 19, 2014), *available at* http://www.dfs.ny.gov/about/ea/ea140819.pdf.

[196] *In the Matter of Standard Chartered Bank, New York Branch*, Consent Order Under New York Banking Law §§ 39 and 44, at 2 (Aug. 19, 2014), *available at* http://www.dfs.ny.gov/about/ea/ea140819.pdf. A press release issued by SCB indicates that the transaction monitoring system, which is the subject of the new consent order, is separate from the SCB sanctions screening process. *See* Press Release, Standard Chartered PLC, New York State Department of Financial Services' Consent Order Relating to Standard Chartered (Aug. 19, 2014), *available at* https://www.sc.com/en/news-and-media/news/global/19-08-2014-announcement.html.

order imposed a $300 million civil money penalty on SCB and required SCB to implement a comprehensive remediation plan for its transaction monitoring system. The consent order also imposed a set of temporary suspensions on certain U.S. dollar clearing activities. The New York branch will not, without prior approval of the NYDFS in consultation with the monitor at SCB, open a U.S. dollar demand deposit account for any client that does not already have such an account with the New York branch.[197] In addition, the New York branch will suspend its U.S. dollar clearing operations for high-risk retail business clients of SCB Hong Kong. It will also commence the process of exiting high-risk small and medium business clients at SCB's branches in the United Arab Emirates.[198] The suspension measures will remain in effect until detection scenarios in the transaction monitoring system at the New York branch are operating to a standard approved by the monitor.

Press reports indicate that the suspension for the Hong Kong clients focuses on about 300 clients.[199] The suspension in the SCB consent order appears generally to be prophylactic in nature, i.e., to prevent certain potentially high-risk transactions from being processed before an enhanced monitoring and surveillance system is put in place by SCB. In contrast, the suspension in the BNPP order appeared to be essentially punitive in nature for historical activity that had been terminated by the time of the issuance of the order.[200] Even if prophylactic in nature, the suspension and termination measures required by the NYDFS have created tensions with the regulatory authorities in the foreign jurisdictions affected by the measures.[201] The SCB consent order again

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[197] *In the Matter of Standard Chartered Bank, New York Branch*, Consent Order Under New York Banking Law §§ 39 and 44, at 5 (Aug. 19, 2014), *available at* http://www.dfs.ny.gov/about/ea/ea140819.pdf.

[198] *In the Matter of Standard Chartered Bank, New York Branch*, Consent Order Under New York Banking Law §§ 39 and 44, at 8 (Aug. 19, 2014), *available at* http://www.dfs.ny.gov/about/ea/ea140819.pdf.

[199] *See*, *e.g.*, Ben Protess & Chad Bray, *Caught Backsliding, Standard Chartered Is Fined $300 Million*, N.Y. TIMES, Aug. 20, 2014, http://dealbook.nytimes.com/2014/08/19/standard-chartered-in-deal-with-new-york-regulator/; Jonathan Stempel & Matt Scuffham, *StanChart's $300 million fine raises heat on board*, REUTERS, Aug. 20, 2014, http://www.reuters.com/article/2014/08/20/us-standardchartered-sanctions-idUSKBN0GJ1Q820140820.

[200] *See*, *e.g.*, Peter Eaves, *In BNP Case and Beyond, Regulators Search for Penalties to Fit the Crimes*, N.Y. TIMES, Jun. 3, 2014, http://dealbook.nytimes.com/2014/06/03/regulators-explore-options-for-suitable-penalties-in-bnps-sanctions-inquiry/.

[201] *See* Martin Arnold & Simeon Kerr, *StanChart's NY anti-money laundering settlement draws UAE ire*, FIN. TIMES, Aug. 21, 2014, http://www.ft.com/intl/cms/s/0/2c1fa566-2949-11e4-baec-00144feabdc0.html#axzz3BQkhg1pK (reporting that the UAE central bank has warned SCB that it may face litigation from thousands of customers in the UAE that it is being forced

confirms the comprehensive approach that the NYDFS is taking to addressing regulatory lapses by entities that it supervises. As part of that comprehensive approach, the SCB consent order also provides, as one might expect, for a further two-year extension of the term of the monitor originally installed under the September 2012 consent order.[202]

Final Lessons

Part I of this article identified the challenges for achieving global compliance with a national regime when political, cultural, and legal norms among jurisdictions are not sufficiently aligned. Differences in political, cultural and legal norms even among nominally allied countries have been highlighted in the economic sanctions area. To these must also be added differences in commercial interests. These differences remain a source of difficulty in achieving agreement on a coordinated approach to sanctions. Where achievable, however, a more coordinated or multilateral approach should reduce the difficulties in sanctions compliance for international banks.

In Part I it was suggested that many foreign jurisdictions have shown a strong antipathy to the extraterritorial application of U.S. sanctions measures. This antipathy for the extraterritorial application of U.S. sanctions laws has been visibly demonstrated in the BNPP case. In the first instance, this antipathy is a problem of perspective. The U.S. authorities maintain that they are not applying U.S. sanctions rules extraterritorially but instead simply applying the U.S. rules to transactions that *are being cleared within the United States*. Certain foreign authorities nonetheless perceive an extraterritorial element to U.S. sanctions rules because the rules apply to U.S. dollar transactions that have no connection to the United States other than the fact that they *are being cleared within the United States*. At bottom, however, this antipathy is a problem of power, the power that comes from the commanding position that the U.S. dollar enjoys as the medium of international trade and finance. The "exorbitant privilege" (in the words of Valéry Giscard D'Estaing) that attaches to the position of the U.S. dollar may be accepted by other countries, but not without resentment.[203]

Additional factors are at work at the level of the individual financial

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to "exit" under the terms of the NYDFS settlement agreement).

[202] *In the Matter of Standard Chartered Bank, New York Branch*, Consent Order Under New York Banking Law §§ 39 and 44, at 4 (Aug. 19, 2014), *available at* http://www.dfs.ny.gov/about/ea/ea140819.pdf.

[203] *Compare* Barry Eichengreen, *France lacks the moral authority to depose the dollar*, FIN. TIMES, July 8, 2014, http://www.ft.com/cms/s/0/4b51cc12-0689-11e4-ba32-00144feab7de.html, *with* Rachel Evans, *Russia Sanctions Accelerate Risk to Dollar Dominance*, BLOOMBERG, Aug.

institutions. In a recent speech, Thomas C. Baxter, Executive Vice President and General Counsel of the Federal Reserve Bank of New York, shared his personal observations on the failure of foreign banks to comply with U.S. sanctions regimes.[204] He offered the following explanation:

> [Foreign] institutions looked at [U.S.] economic sanctions very differently [than U.S. institutions]. They looked at economic sanctions as technical "American" rules that were not seen as consistent with the organization's and the home country's larger value system. In Europe, they found no similar sanctions, and there it was perfectly legal at the time to do business with these sanctioned jurisdictions. Some European bankers almost naturally adopted the view that there was no value system underlying the technical American legal rule.[205]

The point that he makes finds reinforcement in the case studies discussed in this article. For example, the proclivity of foreign institutions to regard the U.S. sanctions as "technical" rules may have been unwittingly reinforced by the approach taken by U.S. counsel in rendering legal advice, which in some instances may have been too technical and not sufficiently policy oriented. In the early stages of analysis of OFAC sanctions, could one safely draw a distinction between the deletion of information in a payment message relating to an Iranian entity by the foreign bank and the omission of information in a payment message by the Iranian entity at the request of the foreign bank? Could one appropriately draw a distinction between sending payment messages for sanctioned entities to an unaffiliated financial institution and sending such messages to a branch or affiliated financial institution? From a policy perspective, the answer should have been "no" then—as it clearly is now. Yet in some instances these distinctions were drawn.

As suggested in Part I, the legal advice rendered would have benefitted from a more robust dialogue between the financial institutions and OFAC. It appears that foreign institutions were *less* forthcoming in seeking OFAC guidance on their sanctions practices than was advisable. For its own part, OFAC might have

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6, 2014, http://www.bloomberg.com/news/2014-08-06/russia-sanctions-accelerate-risk-to-dollar-dominance.html.

[204] Thomas C. Baxter, Exec. Vice Pres. & Gen. Counsel of the Federal Reserve Bank of New York, Remarks at "The New Compliance Landscape: Increasing Roles—Increasing Risks" Conference, New York City (Jul. 23, 2014), *available at* http://www.ny.frb.org/newsevents/speeches/2014/bax072314.html.

[205] Thomas C. Baxter, Exec. Vice Pres. & Gen. Counsel of the Federal Reserve Bank of New York, Remarks at "The New Compliance Landscape: Increasing Roles—Increasing Risks" Conference, New York City (Jul. 23, 2014), *available at* http://www.ny.frb.org/newsevents/speeches/2014/bax072314.html.

been *more* forthcoming itself on certain of these issues. The failure to provide timely public guidance on the requirements for the U-turn exemption, and particularly the appropriateness of exclusive reliance on offshore due diligence, allowed faulty practices to arise. Similarly, it is possible (but not certain) that a clear statement at the time of the adoption of the U-turn exemption in 1995 that foreign banks were not permitted to clear U.S. dollar transactions involving other sanctioned countries such as Cuba and Libya might have led some foreign banks to reconsider their prior practices for other sanctioned countries.

It is not possible on the basis of these counterfactuals to determine how the course of conduct by individual institutions might have been affected. But these counterfactuals nonetheless suggest that OFAC should be more aggressive in clarifying the ambiguities that regularly arise under its sanctions programs (unless of course OFAC actually believes that such ambiguity is constructive because it tends to discourage parties from dealing with sanctioned entities).

Other lessons initially identified in the case studies in Part I are affirmed by the case studies in Part II. The need for a stronger "voice" for the compliance function is affirmed by virtually every case study in Part II as is the need for real independence of the compliance function. Another lesson learned from the case studies in Part II is the importance of an effective enterprise-wide compliance risk management program. In several cases, for example, the Dubai offices of foreign banks appeared to be running their own operations aiding Iranian banks. In other cases, admittedly, the Dubai offices were simply using the same procedures that were codified in head office operating manuals. In still other cases, the head office of a foreign bank promulgated a directive on OFAC compliance, but with little follow-up to determine whether the directive was in fact being observed in its various offices. An empowered role for the compliance function is one that the international supervisory bodies have declaimed for more than a decade.[206] Despite the recurring discussion of the need for a stronger compliance culture, prominent enforcement actions against banking institutions by the U.S., the U.K. and the E.U. authorities across a range of issues have recently confirmed that there is substantial room for improvement in the compliance culture of the banking sector. The U.S. law enforcement and regulatory authorities have concluded that high-profile law enforcement actions and large fines are more likely to produce results than hortatory speeches and consultative papers.

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[206] *See*, *e.g.*, *Consultative Document, The compliance function in banks*, BASEL COMMITTEE ON BANKING SUPERVISION (Oct. 2003), *available at* http://www.bis.org/publ/bcbs103.pdf.