



OFAC Sanctions: A View From The Trenches

**New York City Bar Association
Regulation of Financial Institutions: Hot Topics and Key
Challenges**

June 14, 2019

Agenda

- Recent Enforcement Actions
 - UniCredit
 - Standard Chartered
- Tension Between Foreign HO and US Branches
- Recent Sanction Developments
 - OFAC Framework
 - Congressional Activity



Panelists

- Al Troncoso, General Counsel, [Mirae Asset Securities \(USA\) Inc.](#)
- Andrew McAdams, Deputy Head of Financial Crimes, [Agricultural Bank of China, New York Branch](#)
- Brandon C. Smith, The Acting Americas Regional Head of Sanctions, [UBS AG](#)
- Joe Lynyak, [Dorsey & Whitney LLP](#)

Recent Enforcement Actions

- UniCredit - April 2019
 - OFAC: \$611 million
 - DFS: \$405 million
 - Fed: \$158 million
 - DOJ: UniCredit Bank AG pled guilty and UniCredit Bank Austria AG entered into a DPA
- Multiple violations of U.S. sanctions programs
- Intentional program to evade U.S. sanctions, and they wrote it down!

UniCredit

28. In August 2004, the Project Embargo team deployed its Embargo Tool. Among other procedures designed to implement compliance with EU and German sanctions laws, the Project Embargo team, distributed a guide for “Transactions Affected by OFAC” (herein referred to as “the Guide”), and began implementing the procedures detailed by the Guide at the bank’s Munich branch. As part of the implementation process, the Project Embargo team disseminated the Guide to the UWC, each operational division that participated in the drafting process, and other operational departments (including, for example, the department responsible for Iranian banking relationships). The Guide provided step-by-step instructions for handling transactions that “hit” on an “OFAC-relevant term in the Embargo Tool. The Guide included “procedures/instructions on how transactions desired for reasons of business policy can be executed in an OFAC neutral manner.” The Guide offered two flow charts (collectively referred to herein as “the OFAC Neutral Process”) that detailed the steps a payment operator should take after the Embargo Tool flagged a payment for “OFAC suspicion” (i.e., because the payment contained a reference to an OFAC-sanctioned person or country). Specifically, the OFAC Neutral Process directed payment operators to engage in a “consultation with the specialist unit” (also referred to as the “relevant product unit”) prior to deciding what action to take. After the consultation step, the operator could take one of three options:

Option 1: “Change of the route”

Under this option (later referenced by a member of UniCredit Bank AG’s Legal department in an unrelated discussion as the “buffer bank structure”), the payment operator would cancel the existing payment order and create a new payment order that inserted a non-U.S. financial institution between the U.S. institution and the sanctioned party consistent with the then-applicable “U-turn” exception for Iran. The effect of this option was that the payment message sent to the U.S. financial institution would not reference the sanctioned party.

Option 2: “Correction by the HVB specialist unit”

Under this option, the payment operator would either edit the payment instructions to remove or alter an OFAC-relevant reference so that the payment would be “OFAC neutral,” or the operator would remove optional SWIFT data fields when they included an OFAC-relevant reference.

UniCredit (Cont.)

Option 3: “Return to originator and new customer order, if necessary”

Under this option, the payment operator would contact UniCredit Bank AG’s customer to see whether the customer would like to re-submit the payment order to “evaluate alternative transactions that are not objectionable with regards to OFAC and submit a new transaction in the form of a new customer order. The customer must issue a new order without the OFAC connection. Otherwise the order cannot be issued via HVB Group.”

The Guide included the following instruction: “In case there is no way to execute the payment OFAC neutral then you have to obtain a safe replacement order from the customer. The sender bank’s OFAC-relevant payment order must be cancelled and resubmitted in that case.”

Standard Chartered

- Standard Chartered – April 2019
- Violations involving principally Iran occurring subsequent to the violations which triggered the 2012 enforcement actions
 - Fed: \$164 million, plus required SCB to undertake additional remedial action, and restricted the bank from re-employing any individuals involved in the violations
 - DFS: \$180 million, required additional remedial action, including continuing the engagement of the independent consultant/monitor, and prohibited SCB from rehiring key officials both in New York and in London, involved in the violations
 - OFAC: \$639 million

Standard Chartered (Cont.)

- DOJ took the following actions:
 - Forfeiture of \$240 million
 - Fine of \$480 million
 - Amendment and extension of the DPA for an additional two years
 - Obtained a guilty plea by an unnamed former employee of SCB's Dubai branch
 - Indicted a named Iranian national who was a former customer of SCB's Dubai branch
- The Manhattan DA imposed a fine of \$292 million and took action parallel to the actions taken by DOJ
- The UK Financial Conduct Authority fined SCB £102 million for its AML controls failures

Tension Between Foreign HO & US Branches

- Compliance emphasizes the “tone from the top” in establishing a culture of compliance within an organization
- The EU does not agree with the U.S. withdrawal from the JCPOA
 - Dislike of Extraterritoriality & Secondary Sanctions
 - INSTEX
- Who remembers Walmart in the 1990s?
- U.S. penalties on Foreign Head Offices not for negligence or incompetence
 - UniCredit
 - Standard Chartered
 - BNP Paribas
 - Habib Bank

In The Trenches—Practical Issues

- How do the **panelists** handle the tension?
- Who or what is the biggest threat?
- Who do you represent? The Head Office? Or the U.S. branch?
- Should the legal and compliance functions be separate? Do they serve different functions?

Facilitation

- The general rule is that non-U.S. operations of a foreign financial institution are not covered by the U.S. sanctions program
- However, OFAC has expanded coverage via the concept of facilitation
- Facilitation means that OFAC will impose the sanctions requirements on any non-U.S. person **that uses any of its U.S. offices, U.S. personnel or other U.S.-based operations to assist a transaction** that would be prohibited if done directly by the U.S. offices, U.S. personnel or U.S.-based operations

Facilitation (Cont.)

- There are practical considerations – where is the line drawn?
 - What is training for the Head Office vs. Facilitation?
 - What legal advice, if any, can you provide?
- What happens if your bank suddenly is added to the sanctions list?

Recent Sanctions Developments

- OFAC—A Framework for OFAC Compliance Commitments
 - May 2, 2019
 - A copy can be found in your materials
 - It can also be found here: https://www.treasury.gov/resource-center/sanctions/Documents/framework_ofac_cc.pdf

OFAC's Framework

- A risk-based approach comprised of five essential components of compliance—
 - Management commitment
 - Risk assessment
 - Internal controls
 - Testing and auditing
 - Training
- The Framework closely tracks the U.S. Sentencing Commission's Guidelines
 - <https://www.ussc.gov/guidelines/2015-guidelines-manual/2015-chapter-8>

OFAC's Framework

- Management commitment
 - Includes senior leadership
 - Requires review and approval
 - Adequate delegation of authority to OFAC compliance function/team
 - Periodic meetings
 - Providing adequate resources
 - Promotes a “culture of compliance”
 - Recognition of seriousness of apparent violations

OFAC's Framework

- Risk assessment
 - Timely and sufficiently identify risks
 - Updated to address violations and compliance failures
 - Adequate risk assessment methodology

OFAC's Framework

- Internal controls
 - Written policies and procedures
 - Adequate to address identified risk
 - Verified by internal and external audits
 - Organizational structure authorized to take immediate action for identified internal control weaknesses
 - Controls clearly communicated to all applicable staff
 - Required integration into all daily operations

OFAC's Framework

- Testing and auditing
 - Accountable to senior management
 - Independent
 - Possessing appropriate skills and authority
 - Audit procedures appropriate to risk assessment and internal controls
 - Requirement to initiate compensating controls upon the identification of a weakness

OFAC's Framework

- Training
 - Commitment to resources for adequate information and instruction to employees
 - Scope of training
 - Adequate for risk assessment
 - Frequency appropriate to operational functions
 - Training adjusted to address weaknesses and violations identified
 - Resources available to affected employees

Common OFAC Compliance Deficiencies

- Lack of a formal sanctions compliance program
- Misinterpreting or failing to understand OFAC obligations
- Facilitation
- Exporting or re-exporting U.S.-origin goods
- Employing the U.S. financial system (*i.e.*, processing payments, etc.)
- Inadequate sanctions screening software or filter faults
- Improper or inadequate due diligence for customers/clients
- Decentralized compliance functions
- Utilizing non-standard payment practices and transactions

Congressional Activity

- Few things cut across party lines like sanctions and AML
- Draft bipartisan legislation unveiled on Monday, June 10, 2019: The Improving Laundering Laws and Increasing Comprehensive Information Tracking of Criminal Activity in Shell Holdings (**ILLICIT CASH**) Act
- The **ILLICIT CASH** Act would, among other things:
 - “Prevent foreign banks from obstructing money laundering or terrorist financing investigations by requiring these banks to produce records in a manner that establishes their authenticity and reliability for evidentiary purposes, and compelling them to comply with subpoenas.”
 - “Create a hub of financial expert investigators at FinCEN to investigate potential AML-CFT activity in collaboration with federal government agencies.”

Q&A

Questions?