

Conscripting the Global Banking Sector: Assessing the Importance and Impact of Private Policing in the Enforcement of U.S. Economic Sanctions

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ABSTRACT

Tasked with enforcing U.S. economic sanctions promulgated by the White House, the U.S. Department of the Treasury's Office of Foreign Asset Control (OFAC) administers dozens of active sanctions programs. In implementing those programs, it has designated thousands of individuals and entities as threats to the national security, foreign policy, or economy of the United States. The agency simply does not have the capacity, however, to review the billions of global financial transactions that flow through the banking industry for potential sanctions violations.

This article seeks to illustrate how the U.S. economic sanctions framework operates and how OFAC enlists large financial institutions (LFIs) to the cause. In fact, in the last decade OFAC issued its ten largest penalties for alleged violations of U.S. sanctions against LFIs, vastly increasing the risk of non-compliance for global financial entities. In fear of, and in response to, these hefty financial penalties, LFIs have come to occupy an important role in complying with, and privately enforcing, U.S. economic sanctions. In light of OFAC's approach of incentivizing the establishment of private policing capabilities at LFIs, this article analyzes the current U.S. economic sanctions framework, the significant leverage LFIs have in the global enforcement of these sanctions, and, in turn, the impact the U.S. economic sanctions framework has had on constructing and transforming LFIs' internal compliance programs. Ultimately, the regulatory threat OFAC has at its disposal allows it to enforce an evolving compliance requirement—incentivizing LFIs to develop and adopt increasingly complex compliance practices, voluntarily or otherwise.

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INTRODUCTION

In the last decade, the Office of Foreign Asset Control (OFAC) has employed the private policing capabilities of large financial institutions (LFIs)¹ as an enforcement mechanism for the U.S. government’s long list of sanctioned entities and individuals. It has done so principally by assessing large sanctions

1. For purposes of this article, the definition of Large Financial Institution (LFI) will be taken from recently promulgated Federal Reserve regulations. The Federal Reserve considers the following two categories of entities to be LFIs: (1) domestic bank holding companies and non-insurance, non-commercial savings and loan companies with more than \$100 billion in total consolidated assets, and (2) U.S. intermediate holding companies of foreign banking organizations with more than \$50 billion in total consolidated assets. Large Financial Institution Rating System; Regulations K and LL, 83 Fed. Reg. 58,724 (Nov. 21, 2018). The analysis provided below, however, need not be isolated to such institutions: it is relevant to different banking entities, regardless of size.

against those institutions, raising the financial stakes involved, and forcing the establishment of comprehensive internal compliance controls and private-sector review of potentially sanctioned transactions.

Between 2010 and 2019, OFAC assessed nearly \$4.9 billion in civil penalties for U.S. sanctions² violations, the vast majority of which were directed at LFIs.³ In fact, the ten largest OFAC sanctions arose from comprehensive settlements with global banking entities, and those ten settlements alone accounted for nearly \$4.3 billion of the \$4.9 billion OFAC sought in civil sanctions in the last decade.⁴

The top-heavy enforcement of sanctions is perhaps unsurprising, however, given the mission of the agency to eliminate financial transfers to certain blocked recipients.⁵ This sanctions regime poses particular risks for financial institutions, whose client services include processing numerous monetary transactions between international parties.⁶ In light of these risks, this article seeks to explore the complex civil enforcement framework for U.S. economic sanctions and explain the factors OFAC takes into account in determining the size of the penalty it will assess against LFIs—including recommendations in its newly published compliance guide.⁷

These factors incentivize LFIs to establish and maintain comprehensive compliance programs. These programs, in turn, serve at the vanguard of U.S. sanctions enforcement, tracking and flagging suspicious transactions out of an abundance of caution. After all, compliance efforts can significantly mitigate any potential financial penalty. This “private policing” by LFIs through the sanctions framework has two predominant impacts: (1) it reinforces OFAC efforts to

2. OFFICE OF FOREIGN ASSETS CONTROL, OFAC FAQs: GENERAL QUESTIONS, https://www.treasury.gov/resource-center/faqs/Sanctions/Pages/faq_general.aspx (last visited Feb. 4, 2020) [hereinafter OFAC General Questions] (defining “sanctions” and noting sanctions operate by “using the blocking of assets and trade restrictions to accomplish foreign policy and national security goals.”).

3. OFFICE OF FOREIGN ASSETS CONTROL, CIVIL PENALTIES AND ENFORCEMENT INFORMATION, <https://www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx> (last visited Feb. 4, 2020). The settlement agreements for the ten largest civil enforcement actions over the past decade are available at OFFICE OF FOREIGN ASSETS CONTROL, Additional Select Settlement Agreements, <https://www.treasury.gov/resource-center/sanctions/CivPen/Pages/Additional-Select-Settlement-Agreements.aspx> (last visited Feb. 4, 2020). The ten largest civil enforcement actions over the past decade were assessed against the following ten entities (listed in order of largest sanction to smallest): BNP Paribas SA, Standard Chartered Bank, ING Bank N.V., UniCredit Bank AG, HSBC Holdings plc, Crédit Agricole Corporate and Investment Bank, Commerzbank AG, Barclays Bank PLC, Clearstream Banking, S.A., and Standard Chartered Bank.

4. OFFICE OF FOREIGN ASSETS CONTROL, CIVIL PENALTIES AND ENFORCEMENT INFORMATION, <https://www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx> (last visited Feb. 4, 2020) (providing that of approximately \$4,875,000,000 in sanctions assessed in the last decade, \$4,273,000,000 came from settlement agreements with the banking entities listed in *supra* note 3).

5. See OFAC GENERAL QUESTIONS, *supra* note 2.

6. See, e.g., BNP Paribas SA Settles Potential Civil Liability for Apparent Violations of Multiple Sanctions Programs 1 (June 30, 2014), https://home.treasury.gov/system/files/126/20140630_bnp.pdf [hereinafter BNP OFAC Settlement].

7. OFFICE OF FOREIGN ASSETS CONTROL, A FRAMEWORK FOR OFAC COMPLIANCE COMMITMENTS (2019), https://home.treasury.gov/system/files/126/framework_ofac_cc.pdf [hereinafter 2019 OFAC Compliance Policy].

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implement its sanctions framework, and (2) creates the need for continuously evolving compliance programs at LFIs that capture the newest technological advances, so as to satisfy shifting OFAC regulatory expectations.

This article will proceed in three parts. The next section will discuss the history and current legal framework of economic sanctions in the United States. It likewise will examine the mechanics for calculating OFAC civil sanctions and steps that LFIs can take to limit financial exposure. Subsequently, the article will discuss the merits and practicality of economic sanctions as the U.S. government has used them in recent decades. Finally, it will discuss the impact of private policing efforts by LFIs, highlighting the institutions' indispensable role in the legal framework. It will also discuss the impact of U.S. economic sanctions enforcement on the standardization of compliance efforts at LFIs, and explore the issue of evolving compliance expectations for the global banking sector, in light of potential future technological advancements in the field.

I. U.S. ECONOMIC SANCTIONS AND THE OFFICE OF FOREIGN ASSET CONTROL

The United States has employed economic sanctions in the pursuit of foreign policy goals since the founding of the Republic.⁸ Sometimes referred to as a tool of “coercive international diplomacy,” these sanctions were implemented against England before the Revolutionary War, and have retained their political importance ever since.⁹ Of course, sanctions policy has become more sophisticated and targeted since then. Long gone are the days where U.S. trade embargoes were defined solely by legislation that “prohibited American ships from leaving for foreign ports and banned the carriage of American goods by other vessels,” without a reliable means of enforcement.¹⁰ But at its core, economic sanctions and trade restrictions have been an instrument for foreign policy advocacy for centuries.

The United States executive branch developed the “modern” sanctions framework in the early stages of the Cold War,¹¹ in response to economic policy needs that arose during the Korean War.¹² Upon entry of China into the war in 1950, President Truman declared a national emergency and blocked access to all Chinese and North Korean assets subject to U.S. jurisdiction.¹³ The executive branch needed a centralized agency that would be in charge of implementing

8. See SaraBeth Egle, *The Learning Curve of Sanctions—Have Three Decades of Sanctions Reform Taught Us Anything?*, 19 CURRENTS: INT’L TRADE L.J. 34, 38 (2011).

9. *Id.* at 34, 38.

10. *Id.* at 38 (internal citation omitted).

11. See OFAC GENERAL QUESTIONS, *supra* note 2.

12. *Id.*

13. *Id.*

such a wide range of asset restrictions, and thus the Department of Treasury formally carved out a role for OFAC.¹⁴

The agency's role has since evolved to cover a significant number of conflict regions, entities, and designated people.¹⁵ Its primary mission is to administer and enforce economic and trade sanctions in accordance with U.S. foreign policy.¹⁶ It does so by carrying out two broad functions: (1) prohibiting economic transactions between U.S. citizens and targeted nations, entities, and individuals, and (2) freezing specific assets subject to agency sanctions.¹⁷

A. *Legal Framework for U.S. Civil Sanctions*

I. *Legal Authority for Economic Sanctions*

OFAC has been described as “the most powerful yet unknown agency in the U.S. government.”¹⁸ Its broad range of functions “include rulemaking, the blocking of foreign assets and property in the United States, criminal enforcement, civil penalties, administrative summons authority, licensing, compliance, intelligence liaison, and recordkeeping.”¹⁹ To assess the impact of OFAC sanctions on large financial institutions, this article focuses on OFAC's civil penalties enforcement power—therein lies the agency's most significant leverage for promoting LFI compliance with U.S. sanction regimes.²⁰

OFAC draws its authority from presidential national emergency powers and takes direction from specific legislation and Executive Orders.²¹ The International Emergency Economic Powers Act (IEEPA)²² and the Trading with the Enemy Act (TWEA)²³ serve as the principal statutory bedrock for the exercise of presidential authority, although there are other acts that play minor roles in this legal framework.²⁴ The TWEA provides authority during wartime,

14. *Id.*; see also Samuel Rubinfeld, *OFAC Rises as Sanctions Become a Major Policy Tool*, WALL ST. J. (Feb. 5, 2014), <http://blogs.wsj.com/riskandcompliance/2014/02/05/ofac-rises-as-sanctions-become-a-major-policy-tool> (highlighting the notable powers granted to OFAC by the executive branch, including to freeze assets, bar companies and individuals from accessing the U.S. financial system, and imposing substantial fines in order to further U.S. foreign policy).

15. *Infra* note 33 and accompanying discussion.

16. See OFAC GENERAL QUESTIONS, *supra* note 2.

17. Rudolph Lehrer, *Unbalancing the Terrorists' Checkbook: Analysis of U.S. Policy in Its Economic War on International Terrorism*, 10 TUL. J. INT'L & COMP. L. 333, 336 (2002).

18. Rubinfeld, *supra* note 14.

19. Kian Arash Meshkat, *The Burden of Economic Sanctions on Iranian-Americans*, 44 GEO. J. INT'L L. 915, 928 (2013).

20. See Section IV(B) below.

21. Vanessa Ortblad, *Criminal Prosecution in Sheep's Clothing: The Punitive Effects of OFAC Freezing Sanctions*, 98 J. CRIM. L. & CRIMINOLOGY 1439, 1442–43 (2008).

22. International Emergency Economic Powers Act, Pub. L. No. 95-223, § 202, 91 Stat. 1625, 1626 (1977) (codified at 50 U.S.C. § 1701).

23. Trading with the Enemy Act of 1917, ch. 106, § 1, 40 Stat. 411 (codified at 50 U.S.C. § 4301).

24. See, e.g., International Security and Development Cooperation Act of 1985, Pub. L. No. 99-83, §§ 501, 503–05-, 99 Stat. 190, 219–22.

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while the IEEPA, enacted 60 years after the TWEA, provides explicit presidential authority to issue economic sanctions during peacetime.²⁵

To exercise the authority granted by Congress under the IEEPA, the president must declare a national emergency related to the assets and persons the administration seeks to target.²⁶ The declaration must show an “unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.”²⁷ In accordance with the declared national emergency, the president (or a designated executive agency, like OFAC) has the power to sanction foreign nations, organizations, or persons identified as contributing to the threat.²⁸ Specifically, the executive branch can regulate or prohibit transactions involving property or interests in property of those specified foreign countries, entities, or individuals.²⁹ The OFAC is authorized to designate certain individuals and entities as Specifically Designated Nationals and Blocked Persons (SDNs).³⁰ Such designation effectively freezes the property, and interests in property, of persons on the SDN List and prohibits U.S. persons from transacting with those persons.³¹ For the sake of easing external compliance efforts, OFAC provides the publicly available SDN List on its website.³²

Every U.S. president in the last 40 years, since the Iranian Revolution and hostage crisis, has established, or expanded upon, a sanctions regime enforced by OFAC.³³ Between November 1979 and January 2020, the various White House administrations issued over 90 Executive Orders to directly create or modify targets of the U.S. economic sanctions framework.³⁴ As of January 2020, there are 32 active sanctions regimes comprised of a diverse set of regulations aimed at addressing complex international problems, including narcotics trafficking, the distribution of rough diamonds, and a variety of regional and

25. Danielle Stampley, Comment, *Blocking Access to Assets: Compromising Civil Rights to Protect National Security or Unconstitutional Infringement on Due Process and the Right to Hire an Attorney?*, 57 AM. U. L. REV. 683, 688–89 (2008). The IEEPA serves as the predominant source of statutory authority, as the U.S. government has not officially declared war in decades.

26. *Id.* at 689; see 50 U.S.C. § 1701(b).

27. 50 U.S.C. § 1701(b).

28. Stampley, *supra* note 25, at 689.

29. Victoria Anglin, Note, *Why Smart Sanctions Need a Smarter Enforcement Mechanism: Evaluating Recent Settlements Imposed on Sanction-Skirting Banks*, 104 GEO. L.J. 693, 702 (2016).

30. See OFAC GENERAL QUESTIONS, *supra* note 2.

31. *Id.*

32. OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, SPECIALLY DESIGNATED NATIONALS AND BLOCKED PERSONS LIST (SDN) HUMAN READABLE LISTS, <https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx> (last visited Feb. 4, 2020).

33. See OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, EXECUTIVE ORDERS (EO), <https://home.treasury.gov/policy-issues/financial-sanctions/additional-ofac-resources/ofac-legal-library/executive-orders-EO> (last visited Feb. 4, 2020).

34. *Id.* (noting that the list only includes a selection of certain Executive Orders; it is not a non-exhaustive list of every Executive Order that may be related to U.S. sanctions programs).

country-specific conflicts in places like Syria and Iran.³⁵ The scope of OFAC regulations depends largely on the text of the Executive Order that sets the parameters of the particular sanctions regime.³⁶ The following sections discuss the mechanisms by which this sanctions framework operates, including the agency's jurisdiction to enforce the sanctions and the activities subject to such enforcement. They also discuss the relationship between the agency and the judiciary, as well as the constitutional concerns these sanctions raise.

Though there are 32 distinct sanctions regimes, a discussion of all of them would exceed the scope of this article. Thus, for purposes of condensing the relevant analysis, the discussion of OFAC jurisdiction and the activities prohibited under U.S. sanctions law will focus on the specifics of the Iranian Transactions and Sanctions Regulations (ITSR).³⁷ This selection is not without reason. In fact, the ITSR served as a basis, at least in part, for each of the ten largest OFAC enforcement actions in the last decade—all assessed against LFIs.³⁸

35. See OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, SANCTIONS PROGRAMS AND COUNTRY INFORMATION, <https://www.treasury.gov/resource-center/sanctions/programs/pages/programs.aspx> (last visited Feb. 4, 2020); see also 31 C.F.R. § 510–598 (2020).

36. See, e.g., Reimposing Certain Sanctions With Respect to Iran, Exec. Order No. 13846, 83 Fed. Reg. 38939 (2018) (providing the contours of the newly reimposed Iranian sanctions).

37. 31 C.F.R. § 560.

38. See BNP OFAC Settlement, *supra* note 6, at 1; U.S. DEP'T OF THE TREASURY, *Barclays Bank PLC Settles Allegations of Violations of Multiple Sanctions Programs 1* (Aug. 18, 2010), <https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Documents/barclays08182010.pdf>; U.S. DEP'T OF THE TREASURY, *HSBC Holdings PLC Settles Potential Liability for Apparent Violations of Multiple Sanctions Programs* (Dec. 11, 2012), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/121211_HSBC_posting.pdf; U.S. DEP'T OF THE TREASURY, *Standard Chartered Bank Settles Potential Liability for Apparent Violations of Multiple Sanctions Programs* (Dec. 10, 2012), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/12102012_scb.pdf; U.S. DEP'T OF THE TREASURY, *ING Bank N.V. Settles Potential Liability for Apparent Violations of Multiple Sanctions Programs* (June 12, 2012), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/06122012_ing.pdf; U.S. DEP'T OF THE TREASURY, *Clearstream Banking, S.A. Settles Potential Liability for Apparent Violations of Iranian Sanctions 1* (Jan. 23, 2014), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20140123_clearstream.pdf; U.S. DEP'T OF THE TREASURY, *Crédit Agricole Corporate and Investment Bank Settles Potential Civil Liability for Apparent Violations of Multiple Sanctions Programs* (Oct. 20, 2015), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20151020_cacib.pdf; U.S. DEP'T OF THE TREASURY, *Commerzbank AG Settles Potential Civil Liability for Apparent Violations of Multiple Sanctions Programs* (Mar. 12, 2015), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20150312_commerzbank.pdf; U.S. DEP'T OF THE TREASURY, *Standard Chartered Bank Settles Potential Civil Liability for Apparent Violations of Multiple Sanctions Programs* (Apr. 9, 2019), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20190408_scb_webpost.pdf [hereinafter 2019 Standard Chartered Settlement]; U.S. DEP'T OF THE TREASURY, *UniCredit Bank AG Settles Potential Civil Liability for Apparent Violations of Multiple Sanctions Programs* (Apr. 15, 2019), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20190415_uni_webpost.pdf.

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2. OFAC Jurisdiction and Global Reach

Perhaps unsurprising, the impact of OFAC sanctions is felt on a global scale. OFAC outlines the scope of its jurisdictional reach as follows:

U.S. persons must comply with OFAC regulations, including all U.S. citizens and permanent resident aliens regardless of where they are located, all persons and entities within the United States, all U.S. incorporated entities and their foreign branches. In the cases of certain programs, foreign subsidiaries owned or controlled by U.S. companies also must comply. Certain programs also require foreign persons in possession of U.S.-origin goods to comply.³⁹

There are thus several categories of persons (both legal and natural) subject to OFAC's broad authority: (1) U.S. persons,⁴⁰ (2) foreign entities owned or controlled by U.S. persons, including foreign subsidiaries of U.S. LFI's,⁴¹ (3) individuals or entities that import goods or services into the United States,⁴² (4) foreign nationals that act *from* the United States,⁴³ and (5) foreign governments or instrumentalities thereof.⁴⁴ The extraterritoriality of the OFAC legal framework is clearly delineated as the sanctions regulations explicitly state that the restrictions and prohibitions apply outside the United States.⁴⁵

Even the most attenuated connections to the U.S. market can suffice for purposes of OFAC jurisdiction.⁴⁶ In one instance, the Office sought to establish jurisdiction over a Taipei-based shipping company called B Whale Corporate (BWC) exclusively on the company's court proceedings in the United States.⁴⁷ OFAC issued a Finding of Violation, the mechanics of which are discussed below, based on a determination that BWC was a "U.S. person" because it was "present in the United States for the bankruptcy proceedings when the transaction

39. . See OFAC General Questions, *supra* note 2 (addressing "who must comply with OFAC regulations?").

40. See, e.g., 31 C.F.R. § 560.204.

41. *Id.* § 560.215. For purposes of this section, an entity is "owned or controlled" by a U.S. person if that person (a) holds a 50% or greater equity interest by vote or value, (b) holds a majority of seats on the board, or (c) otherwise controls the actions, policies, or personnel decisions of the entity.

42. *Id.* § 560.201.

43. See, e.g., *id.* § 560.204; see also *United States v. All Funds on Deposit in United Bank of Switz.*, No. 01 Civ. 2091 (JSR), 2003 WL 56999, at *2 (S.D.N.Y. Jan. 7, 2003) (noting the prohibitions of the ITSR "reaches domestic activities by anyone, whether or not a 'U.S. person'").

44. *650 Fifth Ave. v. Alavi Found.*, 830 F.3d 66, 89–90 (2d Cir. 2016) (noting that 40% ownership by the Iranian government made the entity in question an instrumentality of the Iranian government and thus subjected it to U.S. sanctions).

45. See *generally*, *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247 (2010) (explaining there is no presumption that federal law is meant to have extraterritorial effect without explicit wording to the contrary); see also *RJR Nabisco, Inc. v. European Cmty.*, 136 S. Ct. 2090 (2016) (discussing the limited scope of implied extraterritoriality in the Racketeer Influenced and Corrupt Organizations Act). An in-depth discussion of implied extraterritoriality is not necessary for purposes of this article, as the text of the sanctions regulations explicitly extend the prohibitions to U.S. persons "regardless of where they are located." See *supra* note 39 and accompanying text.

46. See Christine Abely, *Causing a Sanctions Violation With U.S. Dollars: Differences in Regulatory Language Across OFAC Sanctions Programs*, 48 GA. J. INT'L & COMP. L. 29, 45 (2019).

47. See SHEARMAN & STERLING LLP, SANCTIONS ROUNDUP: FIRST HALF OF 2017 22-23 (2017), <https://www.shearman.com/-/media/Files/NewsInsights/Publications/2017/07/Sanctions-Round-Up-First-Half-2017-LIT-07062017.pdf> [hereinafter SHEARMAN Sanctions Roundup 2017].

occurred.”⁴⁸ Such an expansive view of jurisdiction indicates that OFAC has the potential to assert authority over any party in a U.S. court proceeding.⁴⁹ Other instances exemplify this dramatic increase of OFAC jurisdiction as well.

The agency’s 2017 civil enforcement action against CSE Global Limited (CSE) and CSE TransTel Pte. Ltd. (TransTel), both located in Singapore, for violations of the ITSR serves as an additional illustration of the extent of OFAC jurisdiction.⁵⁰ TransTel, a wholly-owned subsidiary of CSE, maintained a U.S. dollar-denominated bank account at a non-U.S. financial institution located in Singapore and transferred funds from that bank account to multiple third-party vendors that supplied goods or services to Iran.⁵¹ As a Singapore company transacting through a Singapore financial institution with third parties located in Iran, the sole initial connection to the United States was the designated currency of the company’s bank account and the transactions in question.⁵² Due to the U.S. dollar denomination, however, the transactions “were processed through the United States and caused multiple financial institutions—including several U.S. financial institutions—to engage in the prohibited exportation or re-exportation of financial services from the United States to Iran.”⁵³ OFAC deemed such foreign transactions to have “caused a violation” of the ITSR sanctions regime, and accordingly exposed TransTel to enforcement penalties.⁵⁴

Notably, in *Jesner*, a Supreme Court case addressing the vast jurisdictional reach of the Alien Tort Statute (ATS), Justice Kennedy explains the common nature of such U.S. dollar transactions at foreign financial institutions, stating “[f]oreign banks often use dollar-clearing transactions to facilitate currency exchanges or to make payments in dollars from one foreign bank account to another.”⁵⁵ The U.S. government’s reliance on this attenuated jurisdictional hook is not without controversy, however. Kennedy, writing for the majority noted in *dicta* that “it could be argued . . . in this case the activities of the defendant corporation and the alleged actions of its employees have insufficient

48. U.S. DEP’T OF THE TREASURY, *OFAC Issues a Finding of Violation to B Whale Corporation, a Member of the TMT Group of Shipping Companies, for a Violation of the Iranian Transactions and Sanctions Regulations* (Feb. 3, 2017), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20170203_bwc.pdf.

49. SHEARMAN, *supra* note 47, at 23 (noting OFAC asserted jurisdictional grounds on the basis of the bankruptcy proceedings as well as that the ship was property within the jurisdiction of the U.S. bankruptcy court).

50. U.S. DEP’T OF THE TREASURY, *CSE Global Limited and CSE TransTel Pte. Ltd. Settle Potential Civil Liability for Apparent Violations of the International Emergency Economic Powers Act and the Iranian Transactions and Sanctions Regulations* (July 27, 2017), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20170727_transtel.pdf.

51. *Id.* at 2.

52. U.S. DEP’T OF THE TREASURY, *CSE Global Limited and CSE TransTel Pte. Ltd. Settlement Agreement* (Jul. 15, 2017), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/transtel_settlement.pdf [hereinafter *Transtel OFAC Settlement Agreement*].

53. *Id.* at 3.

54. *Id.*; see also 31 C.F.R. § 560.204; 50 U.S.C. § 1705(a).

55. *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1394 (2018).

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connections to the United States to subject it to jurisdiction under the ATS.”⁵⁶ This leaves the door open for future litigants to dispute the jurisdictional reaches of the U.S. sanctions framework. But, as it stands, OFAC jurisdiction extends even to foreign transactions routed through the United States by virtue solely of their currency designation. Accordingly, LFIs located in foreign jurisdictions must remain wary of the lengthy grasp of the U.S. sanctions framework.

With the global reach of OFAC sanctions established above, the next section explores the prohibited activities covered by U.S. sanctions policy—looking again at the statutory language of the ITSR. While this list is not exhaustive and applies only to the ITSR sanctions regime, it provides a close look at an archetypal legal framework for purposes of this discussion.

3. *Financial Activities Subject to Enforcement*

In an attempt to isolate Iran’s financial systems, the United States prohibits a variety of different activities, including: (1) the importation of goods or services from Iran,⁵⁷ (2) the export, re-export, sale, or supply of goods, technology, or services to Iran,⁵⁸ (3) trade-related transactions with the Government of Iran,⁵⁹ (4) any investment or transfer by a U.S. person in Iran or in property owned or controlled by the Government of Iran,⁶⁰ (5) any financing or facilitating of a transaction by a foreign person where the transaction would be prohibited if performed by a U.S. person or within the United States,⁶¹ and (6) contracting for the supervision and management responsibility for the development of petroleum resources in Iran.⁶² Notably, such transactions are subject to civil enforcement penalties even if the investigated entity did not take the action willfully, as U.S. sanctions operate on a strict liability standard.⁶³

56. *Id.* at 1398. Notably, such an expansive notion of jurisdiction is also common in Foreign Corrupt Practices Act (FCPA) enforcement by the Department of Justice and Securities and Exchange Commission. In the Snamprogetti FCPA enforcement action in 2010, for example, the jurisdictional hook rested on transfers from a bank account in Amsterdam, the Netherlands, to bank accounts in New York, to be further credited to bank accounts in Switzerland and Monaco. The funds were then used to bribe Nigerian officials, but at no point were funds transferred directly from a U.S. financial institution to foreign officials. See Deferred Prosecution Agreement, *United States v. Snamprogetti Netherlands B.V.*, No. 4:10-CR-00460 (S.D. Tex. July 7, 2010), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/02/16/07-07-10snamprogetti-dpa.pdf>.

57. 31 C.F.R. § 560.201.

58. *Id.* § 560.204.

59. *Id.* § 560.206.

60. *Id.* §§ 560.207, 560.211.

61. *Id.* § 560.208.

62. *Id.* § 560.209.

63. See Sidne Koenigsberg & Gregory Vianesi, *The EU and U.S. Russia and Ukraine Sanctions Programs: Comparisons and Perspectives*, 1 REVUE DE DROIT FINANCIER 71, 78 (2018). Willfulness is taken into account, as discussed in Section II(C)(1) below, as an aggravating factor for calculating the sanction penalty, but a lack thereof ultimately does not sever liability. See also, e.g., 31 C.F.R. § 560.201 (lacking intent requirement in respect of the prohibition on the importation of goods or services from Iran).

a. Exempted Transactions & OFAC Licenses

Transactions of the kind listed above, while otherwise prohibited, can be exempted in two ways. First, the applicable regulation can spell out specific categories of transactions that are not punishable by OFAC.⁶⁴ Under the ITSR, the following actions are exempted: (1) personal communications that do not involve the transfer of anything of value,⁶⁵ (2) humanitarian donations intended to be used to relieve human suffering,⁶⁶ (3) informational material,⁶⁷ (4) transactions incident to travel to and from any country,⁶⁸ (5) any official business of the U.S. government by its employees or contractors,⁶⁹ and (6) certain noncommercial, personal remittances.⁷⁰

Second, OFAC can issue a license to authorize a transaction that would be prohibited otherwise.⁷¹ There are two types: “general licenses” and “specific licenses.”⁷² General licenses issued by OFAC authorize a particular type of transaction for a class of persons without the need to apply for individual licenses, whereas a specific license is a written document issued by OFAC to a person or entity, authorizing a particular transaction in response to a written application.⁷³

General licenses are published on the OFAC website and authorize designated actors to engage in specified activities. However, they do not provide blanket protections, as only certain official activities are covered by such general licenses, and they are associated exclusively with the sanctions regime under which they are issued.⁷⁴ For example, general licenses associated with the ITSR allow U.S. depository institutions to provide and be compensated for maintaining Iranian accounts, other than blocked accounts, as would be relevant to some LFIs.⁷⁵ General licenses also permit certain academic exchanges by U.S. educational institutions,⁷⁶ or transactions necessary and ordinarily incident to

64. 31 C.F.R. § 560.210.

65. *Id.*

66. *Id.*

67. *Id.*; 31 C.F.R. § 560.315. The exemption for information and informational material is limited in scope. The text of the regulation restricts the exemption for informational materials used for marketing or business consulting services, the provision of services to market or create the informational material, and payment of royalties in relation to the informational materials. *See also* 31 C.F.R. § 560.210(c)(2).

68. 31 C.F.R. § 560.210.

69. *Id.*

70. *Id.* § 560.550; *see also* *United States v. Banki*, 685 F.3d 99, 109 (2d Cir. 2012).

71. 31 C.F.R. § 501.801.

72. *Id.*

73. *See* 31 C.F.R. § 501.801 (noting the mechanics of issuing general and specific licenses).

74. *See, e.g.*, 31 C.F.R. § 560.539 (noting that certain official activities of certain International Organizations, including the United Nations and the World Bank, are authorized as part of a general license).

75. *Id.* § 560.517.

76. *Id.* § 560.544.

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publishing manuscripts, books, journals, and newspapers—with important exceptions that include working for the benefit of the Government of Iran.⁷⁷

Specific licenses, on the other hand, permit a named licensee to engage in particular conduct that would otherwise constitute a sanctions violation.⁷⁸ Unlike general licenses, they must be applied for.⁷⁹ Federal regulations can provide some guidance on what specific licenses OFAC may issue. For instance, “[s]pecific licenses may be issued with respect to the operation of Iranian accounts that constitute accounts of . . . foreign government missions and their personnel in Iran, or diplomatic missions of the Government of Iran to international organizations.”⁸⁰ These published regulations by no means serve as the only guideposts for the issuance of specific licenses; in fact, each application is reviewed on a “case-by-case basis” and no license issuance is guaranteed.⁸¹

Ultimately, these licenses provide OFAC with flexibility to tailor the various sanctions regimes to reflect evolving U.S. foreign policy objectives.⁸² Importantly, taking advantage of the licensing authorization still requires compliance with the terms and limits as defined by the general and specific licenses, which may include additional reporting requirements.⁸³

b. Statute of Limitations

OFAC enforcement of these activities is further constrained by statutory time restrictions. The statute of limitations for OFAC to bring civil penalty actions is five years from the date of the offending conduct,⁸⁴ although some tolling arrangements can be made between the agency and the investigated entity to show a willingness to cooperate with the investigation.⁸⁵ For example, such an arrangement was agreed to in OFAC’s investigation of the British Arab Commercial Bank plc in 2019, and it served as a mitigating factor for deciding the sanction penalty amount.⁸⁶ The bank fully cooperated with the agency and agreed to toll the statute of limitations for the duration of the investigation, thus

77. *Id.* § 560.538. Other notable exceptions include providing or receiving individualized or customized services, exporting goods from Iran other than embedded software necessary for reading a written publication, or operating a publishing house in Iran.

78. Perry S. Bechky, *Sanctions and the Blurred Boundaries of International Economic Law*, 83 MO. L. REV. 1, 8 (2018); 31 C.F.R. § 501.801.

79. 31 C.F.R. § 501.801.

80. 31 C.F.R. § 560.517(c).

81. 31 C.F.R. § 501.801

82. Bechky, *supra* note 78, at 7-8.

83. *Id.* at 8.

84. *See Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 774 (9th Cir. 2006) (citing 28 U.S.C. § 2462) (noting that OFAC must bring a civil enforcement action in five years from the date of the act).

85. 31 C.F.R. § 501, App. A § III(G)(6).

86. U.S. DEP’T OF THE TREASURY, *British Arab Commercial Bank PLC Settles Potential Liability for Apparent Violations of the Sudanese Sanctions Regulations 2* (Sept. 17, 2019), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20190917_bacb.pdf.

extending the statute past the original five years.⁸⁷ In the absence of such an agreement, however, OFAC generally cannot penalize conduct from more than five years ago.⁸⁸ Additional limits to OFAC power are discussed in the next section, which explores the limited role of the federal judiciary in checking OFAC's vast authority.

4. Agency Review & Judicial Intervention

Individuals and entities seeking to enlist judicial intervention for sanctions issued by OFAC can do so under the Administrative Procedures Act (APA). As with other administrative actions, the APA provides a person adversely affected by an OFAC action “judicial review thereof.”⁸⁹ The agency's action would be set aside if it is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or afoul of constitutional obligations.⁹⁰ There has been remarkably limited success on this front, however, with only a few marquee cases leading the way.⁹¹

a. Successful Challenges to OFAC Sanction Decisions

Only two cases have successfully challenged OFAC civil sanctions, and neither defendant was an LFI.⁹² One such case arose from a sanction decision issued by OFAC against Exxon Mobil Corporation (Exxon) in 2017 for its business in Russia, which the corporation vehemently contested.⁹³ Exxon argued that it did not have “fair notice” that its specific conduct was prohibited under OFAC regulations, and, perhaps surprisingly, given OFAC's track record in front of the federal judiciary, the District Court judge agreed with Exxon's claim.⁹⁴ In

87. *Id.*

88. *See* Sacks, 466 F.3d at 774.

89. 5 U.S.C. § 702.

90. *See* Elena Chachko, *Due Process Is in the Details: U.S. Targeted Economic Sanctions and International Human Rights Law*, 113 AM. J. INT'L L. UNBOUND 157, 160 (2019) (quoting 5 U.S.C. § 706(2)(A)).

91. *See* SHEARMAN & STERLING LLP, SANCTIONS ROUNDUP: FOURTH QUARTER 2019 12-13 (2020), <https://www.shearman.com/-/media/Files/Perspectives/2020/01/Sanctions-Round-Up-Fourth-Quarter-2019-LIT-11420.pdf> [hereinafter SHEARMAN Sanctions Roundup Q4 2019] (noting that the Exxon Mobil case, discussed below, “represent[s] a rare loss for OFAC.”); *see also* Epsilon Electronics, Inc. v. U.S. Dep't of the Treasury, 857 F.3d 913 (D.C. Cir. 2017) (reviewing a civil penalty of \$4,073,000 for exportation of certain audio equipment to Iran in violation of U.S. sanctions).

92. Search of WESTLAW, Federal Cases database (search terms: “Administrative Procedure Act” & TI (“Office of Foreign Assets Control”)) (last visited Oct. 17, 2020). The author reviewed and analyzed the cases that fit the WestLaw search terms, which narrows down federal cases that have cited the Administrative Procedures Act and have a party-name that includes the Office of Foreign Assets Control. Of the thirty-two results, only two cases fit the criteria.

93. U.S. DEP'T OF THE TREASURY, *ExxonMobil Corporation Assessed a Penalty for Violating the Ukraine-Related Sanctions Regulations* 1 (July 20, 2017), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20170720_exxonmobil.pdf; *see also* Exxon Mobil Corp. v. Mnuchin, 430 F.Supp.3d 220 (N.D. Tex. 2019) (noting the agency issued its \$2,000,000 penalty nearly three years after OFAC issued an administrative subpoena based on its “reason to believe” Exxon violated U.S. sanctions).

94. *Exxon*, 430 F.Supp.3d 220 (N.D. Tex. 2019) at 232.

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2014, the Obama Administration, in response to Russia’s invasion and annexation of Crimea, issued two Executive Orders that laid out the specifics of a new Ukraine-Russia sanctions regime.⁹⁵ Under the authority of the Executive Orders and the newly-minted Ukrainian sanctions, OFAC designated Igor Sechin, the president and chairman of the board of Russian petroleum giant Rosneft, as a SDN.⁹⁶ In a press release, OFAC specifically stated, however, that Rosneft “[had] not been sanctioned,” even though OFAC regulations specify that entities “owned or controlled by persons” on the SDN List are designated as their owner would be.⁹⁷ Continuing a decades-long business relationship, Exxon executed eight contracts with Rosneft after the Ukrainian sanctions had been implemented and, notably, Igor Sechin signed each of those eight contracts even though he was on the SDN List. Exxon never sought guidance from OFAC prior to executing the contracts with Sechin as a representative of Rosneft.⁹⁸ The court found that because OFAC had not designated Rosneft, and Sechin did not own or control Rosneft, Exxon had no fair notice of its wrongdoing.⁹⁹ After all, the “burden of providing fair notice remains with the agency—not the regulated party.”¹⁰⁰ This gave Exxon its sought-after judicial relief from OFAC’s sanction decision.

In another recent case, the D.C. Circuit Court issued an order remanding an OFAC civil penalty decision issued against Epsilon Electronic, Inc. (Epsilon).¹⁰¹ On remand, the court instructed the agency to recalculate its original penalty in accordance with the order.¹⁰² The regulatory regime implicated in *Epsilon*, the ITSR, prohibits exports to a third country if the person has “knowledge or reason to know that the goods are intended specifically for reexportation to Iran.”¹⁰³ The mens rea requirement of this particular prohibition was central to Epsilon’s challenge; the company claimed that OFAC’s determination that Epsilon knew or had reason to know that the final five shipments in question were intended for reexport to Iran was “arbitrary and capricious.”¹⁰⁴ The court found this claim credible,¹⁰⁵ pointing to the agency’s failure to adequately explain why it

95. SHEARMAN, *supra* note 911 at 12.

96. *Id.*

97. *Exxon*, 430 F.Supp.3d at 241.

98. *Id.* at 227.

99. *Id.* at 230, 242.

100. *Id.* at 237 (noting OFAC must “state with ascertainable certainty what is meant by the standards it has promulgated.”) (citing *Diamond Roofing Co. v. Occupational Safety and Health Review Comm’n*, 528 F.2d 645, 649 (5th Cir. 1976)).

101. *Epsilon Elecs, Inc. v. U.S. Dep’t of the Treasury*, 857 F.3d 913 (D.C. Cir. 2017) (reviewing a civil penalty of \$4,073,000 for exportation of certain audio equipment to Iran in violation of U.S. sanctions).

102. *Id.* at 929.

103. *Id.* at 917.

104. *Id.* at 927 (noting that “[a]lthough a court applying the APA’s arbitrary-and-capricious standard is not to substitute its judgment for that of the agency, the agency must articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” (internal citations omitted)).

105. *Id.* at 929.

discounted certain evidence that the company lacked knowledge, including emails suggesting the goods were supposed to be sold in Dubai, rather than in Iran.¹⁰⁶ The court ruled that OFAC would have to reconsider the liability associated with the final five shipments and recalculate the total monetary penalty imposed for all shipments in question.¹⁰⁷

These mild blemishes on OFAC's otherwise spotless judicial record serve as a reminder of the role of the judiciary—albeit a limited one—in protecting persons subject to OFAC sanctions. In a similar vein, the next section discusses the constitutional protections associated with OFAC civil penalties.

b. Addressing the Constitutionality of OFAC Civil Sanctions

As with other civil enforcement investigations, several constitutional provisions define the outer boundaries of acceptable agency action. There are interesting constitutional questions regarding OFAC's designation power (its authority to place individuals and entities on various sanctions lists),¹⁰⁸ but such an analysis falls outside the scope of this article. The constitutional clauses relevant for the imposition of civil sanctions are the Due Process Clause and the Excessive Fines Clause.¹⁰⁹ Notwithstanding the overwhelming tendency of corporate entities to settle civil or criminal sanctions behind closed doors rather than challenging such penalties in court,¹¹⁰ these clauses provide an explicit avenue for judicial review of agency fines.¹¹¹

106. *Id.* at 927.

107. *Id.* at 930.

108. *See, e.g.,* KindHearts for Charitable Humanitarian Dev. v. Geithner, 647 F. Supp. 2d 857 (N.D. Ohio 2009) (challenging OFAC determination that non-profit was Specially Designated Global Terrorist (SDGT) on Fourth and Fifth Amendment grounds); *see also* LON E. MUSSLEWHITE, A FEDERAL COURT LIMITS TREASURY'S INVESTIGATIVE POWERS, 20 TAX'N EXEMPTS 17 (2010) (providing a succinct analysis of the Kindhearts case); Fares v. Smith, 249 F. Supp. 3d 115 (D.D.C. 2017) (unsuccessfully challenging Specially Designated Narcotics Trafficking (SDNT) designation based on due process violations); Chichakli v. Szubin, 546 F.3d 315 (5th Cir. 2008) (unsuccessfully challenging OFAC freezing of assets based on due process violation); Capital Cities/ABC, Inc. v. Brady, 740 F. Supp. 1007 (S.D.N.Y. 1990) (unsuccessfully challenging amendment to Cuban sanctions on First Amendment grounds); Al Haramain Islamic Foundation, Inc. v. U.S. Dep't of the Treasury, 686 F.3d 965 (9th Cir. 2012) (noting OFAC violations of procedural due process were harmless); Marshall v. Jerrico, Inc., 446 U.S. 238, 243 (1980) (noting "there are 'constitutional constraints applicable to the decisions of an administrator performing prosecutorial functions.'").

109. U.S. CONST. amends. V, VIII; *see also* PAUL D. CLEMENT, CONSTITUTIONAL CONSTRAINTS: PROVISIONS LIMITING EXCESSIVE GOVERNMENT FINES, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM 2 (2015) (noting that chief among restraints on the government ability to impose civil fines are the Excessive Fines Clause and the Due Process Clause).

110. *See, e.g.,* Peter J. Henning, *The Organizational Guidelines: R.I.P.?*, 116 YALE L.J. POCKET PART 312 (2007), <http://yalelawjournal.org/forum/the-organizational-guidelines-rip> ("[T]he mere threat of criminal prosecution is enough to cause even the largest corporation to cower. Few companies are willing to risk an indictment, much less a criminal trial . . . alternatives do exist: deferred and non-prosecution agreements offer corporations the chance to avoid indictment altogether.").

111. CLEMENT, *supra* note 109, at 18 ("[A] due process right to have the scope of constitutional rights determined by an independent judicial body" has been "long recognized.").

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The Constitution guarantees due process in the face of a deprivation of property, which includes the government's issuance of civil penalties.¹¹² The Fifth Amendment's due process guarantee limits OFAC's ability to seize assets without providing the target with notice or a meaningful opportunity to rebut the agency's evidence in a proceeding or hearing.¹¹³ However, there are few insights into what a successful defense in a hearing or proceeding might look like given the dearth of constitutional challenges—especially successful ones.

Nevertheless, the fair notice requirement gave rise to some judicial relief in *Exxon v. Mnuchin*, one of two cases where OFAC civil sanctions were successfully challenged. In *Exxon*, the court noted that the Due Process Clause requires that laws provide fair notice of conduct that is forbidden or subject to penalty.¹¹⁴ Therefore, OFAC regulations must state which actions fall within the scope of sanctionable conduct, such that an entity reviewing the regulations in good faith could identify, with ascertainable certainty, the agency's standards.¹¹⁵ In the absence of clear guidance, where a target could not identify what constituted a prohibited transaction, this lack of fair notice may violate the Due Process Clause and warrant a rare finding in favor of the penalized company.¹¹⁶

In addition to the Fifth Amendment protections, the Excessive Fines Clause of the Eighth Amendment confines the scope of agency actions against targets of OFAC investigations.¹¹⁷ It requires, under the principle of proportionality, that the amount of the civil sanction bears some relationship to the gravity of the illicit conduct.¹¹⁸ The burden of proving such disproportionality, and thus negating the penalty, rests with the targeted entity.¹¹⁹ No target has successfully challenged an OFAC sanctions penalty under this Clause. Nonetheless, it remains an important protection against arbitrary and abusive government conduct at its extremes.¹²⁰ Mindful of these constitutional boundaries, OFAC has a multitude of constitutional options it can pursue at the end of its investigations, which are discussed in the next section.

112. *Id.* at 14.

113. *See* *Epsilon Electronics, Inc. v. U.S. Dep't of the Treasury*, 857 F.3d 913, 931 (D.C. Cir. 2017).

114. *Exxon Mobil Corp. v. Mnuchin*, 430 F.Supp.3d 220, 229 (N.D. Tex. 2019) (citing *FCC v. Fox Television Stations, Inc.* 567 U.S. 239, 253 (2012)).

115. *Id.* at 230.

116. *Id.* at 243.

117. CLEMENT, *supra* note 109, at 8.

118. *Sanders v. Szubin*, 828 F. Supp. 2d 542, 554 (E.D.N.Y. 2011) (finding the plaintiff's Excessive Fines argument against OFAC's sanction determination lacked merit).

119. *Id.* at 553 (noting the court looks at four factors: “[1] the essence of the crime of the defendant and its relation to other criminal activity, [2] whether the defendant fit[s] into the class of persons for whom the statute was principally designed, [3] the maximum sentence and fine that could have been imposed, and [4] the nature of the harm caused by the defendant's conduct.”).

120. CLEMENT, *supra* note 109, at 11.

B. *Potential Outcomes of OFAC Investigations*

The guidelines appended to the statutory foundation for OFAC investigations provide that the Office can pursue one or more of the following steps: (1) take no action, (2) request additional information, (3) issue a cautionary letter, (4) issue a “Finding of Violation,” (5) assess a civil monetary penalty, (6) refer the matter to appropriate law enforcement agencies for criminal investigation, (7) deny, suspend, modify, or revoke an OFAC license, and/or (8) issue a “Cease and Desist Order.”¹²¹ Given this menu of options, OFAC’s course of action is individualized and fact-specific.¹²² All of these options are self-explanatory, except the Finding of Violation. Within the hierarchy of options—between taking no action and issuing a sanctions penalty—OFAC uses the Finding of Violation option as an intermediate response. This option largely serves as a reporting mechanism¹²³ that the agency uses when it uncovers a sanctions violation, but does not believe a civil penalty would be appropriate.¹²⁴ As a result, this outcome amounts to a mere slap on the wrists of the investigated entity, and in the face of the considerable size of many sanctions penalties, as discussed in the next section, this outcome can present the best case scenario for the investigated entity.

C. *Calculating OFAC Sanctions*

The IEEPA, the legal basis for the vast majority of OFAC’s active sanctions programs, provides statutory maximums for any violation of OFAC regulations issued under the purview of the Act.¹²⁵ For every violation, the Act authorizes OFAC to assess civil penalties not to exceed the greater of \$250,000, or twice the amount of the punishable transaction.¹²⁶ However, this statutory cap provides little cover for LFIs subject to OFAC investigations. The cap applies to *every* illicit transaction the banking entity has processed, which means multiple transactions compound the final penalty determination.

An example of this statutory cap in action best illustrates this point. In 2014, OFAC concluded its investigation into a global financial institution for apparent violations of multiple sanctions programs.¹²⁷ In assessing the civil penalty associated with violations of the ITSR, OFAC reviewed 318 wire transfers and determined a base penalty of nearly \$2.4 billion for that set of violations.¹²⁸ The entire settlement agreement included thousands more transactions and the

121. 31 C.F.R. § 501, App. A § II(A)-(G) (2020).

122. *Id.*

123. *Id.* § 510.705(a)(1)(ii) (2020).

124. See Danforth Newcomb & Tammy Bieber, *New Enforcement Guidelines for Economic Sanctions Violations*, 27 BANKING & FIN. SERVICES POL’Y REP. 6, 8 (2008).

125. 50 U.S.C. § 1705.

126. *Id.*

127. See BNP OFAC Settlement, *supra* note 6, at 1.

128. *Id.* at 2.

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statutory maximum penalty associated with the bank's conduct added up to over \$19 billion, more than thirty-five percent of the bank's revenue for that year.¹²⁹ Notably, OFAC reduced the penalty based on mitigating factors, discussed in the next section, which meant the bank *only* had to pay \$963,619,900 to settle the civil charges OFAC leveled against it.¹³⁰ This example illustrates that the IEEPA's statutory cap provides little cover for LFIs.

1. Aggravating Factors Affecting OFAC Penalty Decisions

Several factors determine the egregiousness of a sanctions violation and the penalty OFAC may assess to punish the underlying conduct.¹³¹ Although OFAC can enforce its sanctions framework without alleging any intent,¹³² willful or reckless disregard for violating OFAC laws will prompt a heftier penalty from the agency.¹³³ Likewise, efforts to hide or purposely obfuscate conduct to mislead the agency, a pattern of illicit conduct, or prior notice that the conduct constituted a violation of law will factor negatively in OFAC's penalty determination.¹³⁴ Importantly, OFAC will review at what organizational level the conduct occurred, noting that supervisory or managerial level involvement or awareness of the illicit conduct supports larger financial penalties.¹³⁵ OFAC also evaluates the benefit conferred to blocked individuals, entities, or countries, as well as the negative implications for the integrity of U.S. sanctions programs and related foreign policy and national security objectives.¹³⁶

Further, OFAC considers past violations when making adjustments to the sanctions amount. It looks at the target's sanctions history for the five years before the transaction in question and increases the penalties of repeat offenders.¹³⁷ Individual characteristics of the investigated entity likewise factor into the calculation. OFAC considers the commercial sophistication, size of operations, and financial condition of the targeted entity, as well as the volume

129. *Id.* at 1; *see also* BNP PARIBAS, 2014 REGISTRATION DOCUMENT AND ANNUAL FINANCIAL REPORT 4 (2014), https://invest.bnpparibas.com/sites/default/files/documents/ddr_2014_gb.pdf (noting the 2014 revenue was €39.168 billion). This calculation is based on an average euro-dollar conversion rate for 2014 of 1.33. *See* STATISTA, *Euro (EUR) to U.S. dollar (USD) annual average exchange rate from 1999 to 2019*, <https://www.statista.com/statistics/412794/euro-to-u-s-dollar-annual-average-exchange-rate/> (last visited Feb. 7, 2020).

130. BNP OFAC Settlement, *supra* note 6, at 1. Importantly, the OFAC civil sanctions regime does not operate in isolation. To resolve its criminal charges, BNP settled with the Department of Justice for nearly \$9 billion. For a succinct analysis of the case, *see* SHEARMAN & STERLING LLP, *supra* note 91.

131. *See* 31 C.F.R. § 501, App. A § III(A). Appendix A provides the Economic Sanctions Enforcement Guidelines, a general framework for enforcement of all OFAC sanctions programs.

132. *See supra* note 63 and accompanying discussion.

133. 31 C.F.R. § 501, App. A § III(A).

134. *Id.* § III(A)(3)-(5).

135. *Id.* § III(A)(6), (B).

136. *Id.* § III(C)(1)-(2).

137. *See* 31 C.F.R. § 501, App. A § III(D)(4); *see also* 2019 Standard Chartered Settlement, *supra* note 38, at 2. Even though Standard Chartered Bank had been sanctioned by OFAC in 2012, the 2019 settlement did not include the earlier sanction because it occurred earlier than 5 years preceding the transactions in question.

of transactions the entity undertakes annually in relation to the apparent violations.¹³⁸ Under this category of aggravating factors, large, commercially sophisticated financial institutions face the greatest scrutiny from OFAC and risk larger penalties.¹³⁹

2. *Mitigating Factors Affecting OFAC Penalty Decisions*

Importantly, the absence of circumstances otherwise considered aggravating factors functions as a mitigating factor for that relevant category. Mitigating factors additionally include: whether the entity self-disclosed the possible violations to OFAC,¹⁴⁰ whether the transactions were made in support of humanitarian activity,¹⁴¹ and whether the investigated entity had an adequate compliance program.¹⁴² If the investigation uncovers the target's first violation, the lack of prior penalties will generally reduce the base penalty amount by up to twenty-five percent.¹⁴³ Further, OFAC strongly considers subsequent remedial actions by the entity upon learning of an apparent violation and the nature of the entity's cooperation with the agency's investigation.¹⁴⁴ Such post-transgression actions serve as important avenues for reducing the financial exposure of OFAC penalties.

Ultimately, these factors provide some guidance as to what OFAC may *consider*, but most of these factors do not set out an exact mathematical formulation as to what the financial exposure for OFAC violations will actually be. OFAC guidelines provide no insight as to how each of the above factors is weighed against the others in its final penalty assessment. Nevertheless, these factors are important for limiting an entity's financial exposure to OFAC sanctions for violations that have already occurred.

D. *Limiting Financial Exposure from Past Actions: Cooperation and Self-Disclosure*

Once LFI's discover their financial services may have been used to process transactions in breach of U.S. sanctions, OFAC provides compelling incentives for voluntary self-disclosure and cooperation.

138. 31 C.F.R. § 501, App. A § III(D)(1)-(2).

139. See 2019 Standard Chartered Settlement, *supra* note 38, at 2 (listing "SCB is a large, commercially sophisticated financial institution" as an aggravating factor in determining Standard Charter Bank's civil penalty).

140. 31 C.F.R. § 501, App. A § V(B)(2)(a)(i)-(iv).

141. *Id.* § III(C)(4).

142. *Id.* § III(E).

143. *Id.* § V(B)(2)(b)(ii).

144. *Id.* § III(F), (G).

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It is important to note that cover-ups of sanctionable conduct, more so than the actual crimes, invite the stiffest OFAC penalties.¹⁴⁵ In addition, cover-ups further risk criminal referral by OFAC to the Department of Justice.¹⁴⁶ Voluntary self-disclosure, including to other agencies, alleviates some of these risks.¹⁴⁷ OFAC may elect to not bring a civil enforcement proceeding against a self-reporting entity, and, even where it does bring an action, OFAC considers self-disclosure for purposes of calculating its final civil penalty.¹⁴⁸ For example, in cases where OFAC deems the conduct to be non-egregious (which remains a subjective agency determination), voluntary self-disclosure caps the maximum penalty at around \$150,000 per violation or half of the transaction value, rather than the statutory cap of \$250,000 per violation or *twice* the transaction value.¹⁴⁹ For high-value transactions, this regulatory guideline can thus reduce the penalty amount by seventy-five percent.

Further incentivizing target entities to work with OFAC to determine the scope and extent of the underlying misconduct, substantial cooperation generally reduces the base penalty amount by twenty-five to forty percent.¹⁵⁰ The determination of substantial cooperation requires the target to voluntarily provide relevant information regarding the apparent violation in question, as well as information about other apparent violations caused by the same course of illegal conduct, rather than to provide such information in response to an administrative subpoena.¹⁵¹ The cooperative effort required to qualify for such a penalty reduction remains subject to individual facts and circumstances; OFAC retains significant flexibility in making such a determination.¹⁵² With this legal framework in mind, this article next discusses the importance and limitations of U.S. sanctions policy.

II. ANALYZING THE MERITS OF U.S. ECONOMIC SANCTIONS POLICY

Rather than espousing a particular view, this article seeks to detail arguments on both sides of the sanctions debate, leaving the ultimate decision on the merits of U.S. sanctions policy to the reader. Supporters of economic sanctions note that

145. See Stephen A. Miller, Matthew A. Glazer & Jeffrey M. Monhait, *Potential Benefits of Cooperation with OFAC*, INSIDE COUNSEL 1 (2014), https://www.cozen.com/Templates/media/files/Miller_Glazer_Monhait_OFAC.pdf.

146. *Id.* at 3.

147. 31 C.F.R. § 501, App. A § I(I).

148. KIRKLAND & ELLIS, VOLUNTARY SELF-DISCLOSURE OF SANCTIONS VIOLATIONS: HOW IT WORKS IN THE U.S. (PART 2) (Jan. 19, 2018), <https://www.kirkland.com/publications/article/2018/01/voluntary-selfdisclosure-of-sanctions-violations-h>.

149. 31 C.F.R. § 501, App. A § V(B)(2)(a)(i).

150. *Id.* § V(B)(2)(b)(i).

151. *Id.* § III(G)(1)-(5).

152. See Miller, Glazer & Monhait, *supra* note 145, at 1; see also 31 C.F.R. § 501, App. A § III (noting OFAC will consider “some or all” of a list of seven factors in determining the penalty amount, without prescribing any meaningful restrictions on OFAC with respect to how to apply the factors in determining the amount of any monetary penalty imposed).

the legal framework operates as a diplomatic means of reshaping bad behavior.¹⁵³ In circumstances where the alternative would be military incursion, economic sanctions peacefully disincentivize behavior antithetical to the operation of a particular world order, one defined by the country whose sanctions target such actions.¹⁵⁴ This framework can serve to protect human rights or counter activities that do not respect the rule of law or core international values, like narcotics trafficking or terrorism.¹⁵⁵ Moreover, sanctions offer “non-violent and non-destructive ways of implementing international policy,” serving as an inexpensive and intermediate alternative to more drastic actions.¹⁵⁶ In some instances, sanctions can function as a unified (or near-unified) response to egregious violations of international norms, allowing the international community to speak with one voice.¹⁵⁷

That said, despite the widespread use of economic sanctions by every U.S. presidential administration in the last forty years,¹⁵⁸ there are certain criticisms of the legal framework as it now operates. Central to this critique is the oft-unilateral nature of economic sanctions. The United States government has imposed economic sanctions on more occasions than all other countries combined, and some argue this coercive framework has been used to impose the U.S. government’s ideological view of the world on weaker states perceived as threats to U.S. interests.¹⁵⁹ Likewise, the OFAC model of calculating penalties based, in part, on internal compliance efforts, as discussed below in Section IV(B), can lead to the “Americanization of compliance.”¹⁶⁰ Particularly for LFIs, the financial risks associated with non-compliance with OFAC sanctions make it impossible to ignore U.S. sanctions laws—even for those LFIs with no direct connection to the U.S. market.¹⁶¹ The increased costs thus associated with conducting business in regions subject to sanctions prohibitions can lead to “de-risking,” a phenomenon that has had a chilling effect on the operation of the

153. Anglin, *supra* note 29, at 699 (noting “[b]y linking the pursuit of harmful conduct with higher economic costs, economic sanctions seek to discourage the targeted entity from engaging in that conduct.”).

154. See Egle, *supra* note 8, at 34-35 (“Most international experts around the world consider sanctions to be an intermediate-level foreign policy tool since sanctions do not rise to the level of armed conflict yet still involve a shift in diplomatic relations due to their coercive nature.”).

155. *Id.* at 35, 39.

156. See Elizabeth Clark Hersey, *No Universal Target: Distinguishing Between Terrorism and Human Rights Violations in Targeted Sanctions Regimes*, 38 BROOK. J. INT’L L. 1231, 1238 (2013).

157. See, e.g., Egle, *supra* note 8, at 44 (describing the international community’s response to Iran’s refusal to comply with nuclear restrictions in 2006).

158. See OFAC, *supra* note 33 and accompanying discussion.

159. See Egle, *supra* note 8, at 39.

160. David Restrepo Amariles & Matteo M. Winkler, *U.S. Economic Sanctions and the Corporate Compliance of Foreign Banks*, 51 INT’L LAW. 530, 532 (2018) (noting “the necessity for corporations and executives doing business in the United States to be thoroughly familiar with the rules of the game and the country’s legal culture.”).

161. See, e.g., TransTel OFAC Settlement Agreement, *supra* note 52 (highlighting that the mere use of a U.S. dollar-denominated bank account was sufficient for meeting OFAC jurisdictional requirements).

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financial sector in areas with already limited access to formal banking services.¹⁶² In developing countries, the imposition of economic sanctions can limit access to formal banking services that are necessary for a thriving economy, as sanction risks overshadow financial incentives for new businesses.¹⁶³ This lack of financial capacity can generate persistent income inequality and lead to slower economic growth.¹⁶⁴ Additionally, an expansive sanctions policy can further incentivize poorly regulated money service businesses to step into the roles abandoned by reputable financial institutions, removing an important mechanism for monitoring international transactions for illicit conduct.¹⁶⁵

Furthermore, the actual effectiveness of sanctions is a matter of some debate. While the actual policy successes of economic sanctions may seem difficult to quantify, several international law experts have attempted to do just that.¹⁶⁶ Of the cases of sanctions reviewed by preeminent scholars Hufbauer, Schott, and Elliot that set out modest policy changes, more than half of the cases met their narrow goals.¹⁶⁷ However, in all 204 cases that were a part of this survey, including sanctions aimed at regime change and democratization, the sanctions programs met their respective objectives around only thirty-four percent of the time.¹⁶⁸ Importantly, the survey did not consider sanctions that were implemented as a result of domestic pressure rather than for a discrete policy goal—which means that the results may not fully reflect the additional practical failures of politically-oriented programs.¹⁶⁹

Some have thus argued that “operationally, in many instances, the results are more economically harmful than beneficial.”¹⁷⁰ In countrywide sanction programs, for example, the target regime is often most insulated from the policy’s effects, forcing the general population to bear the brunt of the crippling sanctions.¹⁷¹ That said, sanctions do not have to operate as indiscriminate, comprehensive policies leveled at a whole country; rather, “smart sanctions,” or targeted sanctions lists, can mitigate the unintended collateral damage of the policy to innocent people.¹⁷² Such smart sanctions may minimize the

162. See Anglin, *supra* note 29, at 715-17.

163. *Id.* at 717, 720 (“as the largest financial institutions are being hit with the largest OFAC settlement penalties, there is little incentive for them to operate in poor countries”).

164. Thorsten Beck, Asli Demirgüç-Kunt & Patrick Honohan, *Access to Financial Services: Measurement, Impact, and Policies*, WORLD BANK, INT’L BANK FOR RECONSTRUCTION AND DEV. 120, 122, (2009).

165. Anglin, *supra* note 29, at 721.

166. Egle, *supra* note 8, at 46 (citing GARY CLYDE HUFBAUER, JEFFREY SCHOTT & KIMBERLY ELLIOT, *ECONOMIC SANCTIONS RECONSIDERED* 158 (3rd ed. 2007)).

167. *Id.* at 48 tbl. 1.

168. *Id.*

169. *Id.* at 46.

170. See *id.* at 34.

171. Angelo M. Codevilla, *Do Economic Sanctions Work?*, HOOVER INSTITUTION (Mar. 29, 2018), <https://www.hoover.org/research/do-economic-sanctions-work>.

172. Anglin, *supra* note 29, at 699.

humanitarian impact of enclosing the country in an ever-shrinking financially restrictive net.¹⁷³

Thus, there is a multitude of relevant arguments for assessing the viability and advisability of economic sanction programs, all of which should be considered by policy architects. The merits of individual programs, however, have little impact on the entities subject to the sanctions prohibitions. Therefore, the article next delves into the impact of OFAC enforcement policy on LFIs and the incentives for those entities to privately police U.S. sanctions.

III. PRIVATE POLICING AT LARGE FINANCIAL INSTITUTIONS

The U.S. sanctions enforcement framework operates in two complementary ways: (1) with the proverbial carrot of cooperation, self-disclosure, and compliance credit, and (2) with the stick of financially crippling penalties. Both incentivize LFIs to monitor suspicious financial transactions and engage the banking sector in the business of enforcing U.S. economic sanctions as a way to privately police its transactions. After all, the reach of OFAC regulation is well and truly global, as even transactions from dollar-denominated accounts and an entity's mere presence in the U.S. for the purpose of contesting U.S. judicial claims can suffice to meet the jurisdictional hook.¹⁷⁴

A. The Importance of LFIs for the Enforcement of U.S. Sanctions

Former Deputy U.S. Treasury Secretary Kenneth Dam noted, “[o]ver the long term, the continued cooperation of banks and financial institutions is essential.”¹⁷⁵ OFAC, agency-wide, only employs around 200 individuals—a number that pales in comparison to the number of compliance personnel at individual banks.¹⁷⁶ The agency cannot, by itself, be expected to conduct due diligence and approve the billions of financial transactions made every day.¹⁷⁷ Its enforcement structure instead incentivizes LFIs to flag all transactions that

173. *Id.* at 701 (highlighting that “smart sanctions are more effective than comprehensive sanctions in affecting the behaviors of the targeted entities”).

174. *See supra* Section II(A)(2).

175. Press Release, U.S. Dep’t of the Treasury, Money that Kills: The Financial Front on the War on Terrorism, Remarks by Deputy Treasury Secretary Kenneth W. Dam (Sept. 22, 2001), <https://www.treasury.gov/press-center/press-releases/Pages/po709.aspx>.

176. *See* Saleha Mohsin, *Trump’s Sanctions Staff Defects as U.S. Expands Economic War*, BLOOMBERG NEWS (Mar. 22, 2019), <https://www.bloomberg.com/news/articles/2019-03-22/trump-sanctions-staff-defects-even-as-u-s-expands-economic-war> (noting that 20 OFAC staffers, around 10% of the agency’s workforce, left under the Trump Administration); *see also* Mengqi Sun, *BNP Paribas Revamps Compliance After Sanctions Violations Settlement*, WALL ST. J. (Nov. 19, 2019), <https://www.wsj.com/articles/bnp-paribas-revamps-compliance-after-sanctions-violations-settlement-11574204524> (noting that the Americas compliance team at BNP alone employs over 500 people); Amariles & Winkler, *supra* note 160, at 527 (noting HSBC Group has over 7,000 employees working in risk and compliance).

177. *See* Ryan Browne, *Digital Payments Expected to Hit 726 Billion by 2020 – But Cash Isn’t Going Anywhere Yet*, CNBC (Oct. 9, 2017), <https://www.cnbc.com/2017/10/09/digital-payments-expected-to-hit-726-billion-by-2020-study-finds.html> (noting people around the world are expected to make 726 billion transactions using digital payment technologies in 2020).

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could contravene sanctions regulations.¹⁷⁸ Given the strict liability associated with violations of U.S. sanctions, LFIs are expected to root out misconduct even if those institutions have no direct culpability in the financing of blocked entities or individuals.¹⁷⁹

In assessing the impact LFIs have on the global enforcement of the U.S.'s sanctions policy, one need only look at the scale of the conduct subject to sanctions prohibitions. Often operating as an intermediary between senders and recipients, LFIs provide financial services to the global business community. The predominant sources of information relevant to these services come from internal data provided to consummate the transactions, as well as from data submitted to the Society for Worldwide Interbank Financial Telecommunication (SWIFT) by transferees.¹⁸⁰ Financial institutions produce, process, and review similar transaction messages for billions of daily transactions.¹⁸¹

Of note, in one of its major investigations, OFAC discovered sanctions violations because certain wire transfer messages referenced blocked Cuban entities.¹⁸² Financial institutions, prompted by the ever-present threat of crippling financial sanctions, are thus incentivized to screen all transaction messages, including the identities of the sending and receiving parties, and flag any suspicious behavior. And LFIs will likely provide their compliance teams with resources to do so, even if they face investor pushback for excess spending, as the failure to adequately fund compliance efforts comes at a significant risk.¹⁸³ As such, these private sector entities are better placed than a small government agency to review the transactions they process themselves.

The threat of sanctions comes at considerable cost for LFIs. Banks spend approximately \$270 billion per year on compliance,¹⁸⁴ although it is difficult to determine how much of that is attributable to OFAC sanctions compliance. The next section will discuss the impact of U.S. economic sanctions on internal

178. Suzanne Katzenstein, *Dollar Unilateralism: The New Frontline of National Security*, 90 IND. L.J. 293, 293 (2015) (“Relying on the special status of the U.S. dollar, the government has enlisted foreign banks to isolate targeted entities and track illicit financial flows.”).

179. See Koenigsberg & Vianesi, *supra* note 63 and accompanying discussion.

180. See Anglin, *supra* note 29, at 705-06. SWIFT operates as an international financial messaging service, processing transfer instructions through its interface software. See also SOC’Y FOR WORLDWIDE INTERBANK FINANCIAL TELECOMM., DISCOVER SWIFT: MESSAGING AND STANDARDS, <https://www.swift.com/about-us/discover-swift/messaging-standards> (last visited Feb. 12, 2020) (noting SWIFT currently serves more than 11,000 financial institutions in over 200 different countries, sending transfer instructions and internal messages between those banks—messages that can contain important information about suspicious transactions).

181. See Koenigsberg & Vianesi, *supra* note 63 and accompanying discussion.

182. See Anglin, *supra* note 29, at 707.

183. See, e.g., Laura Noonan, *Banks Face Pushback Over Surging Compliance and Regulatory Costs*, FIN. TIMES (May 28, 2015), <https://www.ft.com/content/e1323e18-0478-11e5-95ad-00144feabdc0> (noting that in the face of large civil fines for compliance breaches, some banks provide their compliance and regulatory personnel with a “blank cheque” for their costs).

184. See Stuart Brock, *The Cost of Compliance*, INT’L BANKER (Nov. 7, 2018), <https://internationalbanker.com/technology/the-cost-of-compliance/>.

compliance policies at LFIs, largely without regard to the institution's location or connection to the U.S. market.

B. The Impact on LFIs: Implementing Compliance Controls as Defined by U.S. Government "Best Practices"

OFAC vastly increases its sanctions enforcement capacity by forcing the establishment of comprehensive internal compliance controls in the global banking sector and requiring the private-sector to thoroughly review financial transactions. The expansive reach of OFAC sanctions has contributed to a cascade of compliance changes across the global business community—what some have dubbed the possible “Americanization of compliance.”¹⁸⁵ After all, as OFAC writes in its 2019 Compliance Policy, it “strongly encourages organizations subject to U.S. jurisdiction, as well as foreign entities that conduct business in or with the United States, U.S. persons, or using U.S.-origin goods or services” to update their respective sanctions compliance programs in accordance with U.S. standards.¹⁸⁶ Global banking entities have found that their only reasonable option is to shape internal compliance policies in accordance with U.S. promulgated standards. OFAC's sanctions agreements also match its commitment to the U.S. government's own interpretation of effective compliance policies. For example, in the UniCredit Settlement Agreement, in which three of the Italian bank's foreign entities agreed to pay over \$611 million to settle sanctions violation charges, OFAC required the international bank to establish and maintain a fully functional sanctions compliance program according to a set of narrowly defined principles.¹⁸⁷ OFAC's ability to reopen the investigation and assess additional financial penalties (up to the statutory maximum) forced the banks to weigh the costs of implementing compliance controls against the substantial cost of ignoring them.¹⁸⁸ Importantly, OFAC has stated its intention to follow the precedent set by the UniCredit Settlement Agreement as a model for future negotiations—establishing numerous compliance expectations for LFIs to follow.¹⁸⁹

185. See Amariles & Winkler, *supra* note 160, at 525, 529, 530-34.

186. 2019 OFAC Compliance Policy, *supra* note 7, at 1.

187. OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, Settlement Agreement: UniCredit Bank AG 13 (Apr. 15, 2019), https://home.treasury.gov/system/files/126/20190415_unicredit_bank_ag.pdf.

188. *Id.* at 17.

189. Paul Marquardt & Nathanael Kurcab, *New OFAC Guidance on Compliance Programs*, CLEARY GOTTlieb STEEN & HAMILTON LLP, at 4 (May 9, 2019), <https://www.clearygottlieb.com/-/media/files/alert-memos-2019/new-ofac-guidance-on-compliance-programs.pdf> (citing a statement by Alexandre Manfull, OFAC Assistant Director for Sanctions Compliance and Evaluation).

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1. *Current OFAC Compliance Expectations*

OFAC notes that no compliance policy will look the same, particularly given the diverse corporate structures of entities in the global banking sector.¹⁹⁰ But the agency has provided some guidance on what it expects of the financial entities it regulates. The 2019 OFAC Compliance Manual lists five essential elements of a successful compliance program: (1) management commitment, (2) risk assessment, (3) internal controls, (4) testing and auditing, and (5) training.¹⁹¹ The agency expects adequate senior management involvement in any organization's compliance program, both to ensure adequate resources for the program and to foster a culture of compliance.¹⁹² It further urges an organization to conduct a holistic review of its external connections and identify potential areas of increased risk for sanctions violations.¹⁹³ This review will vary widely depending on the scope of the organization's financial services, the region in which it operates, and its transaction counter-parties—it must be tailored to specifically uncover the conspicuous points of contact with designated entities and individuals, as well as with countries subject to OFAC's sanctions regimes.¹⁹⁴ Furthermore, the agency highlights the importance of setting internal policies and procedures to identify, report, and record specific transactions that may be illegitimate.¹⁹⁵ OFAC suggests that LFI should independently test and audit their compliance programs to identify weaknesses and assess the effectiveness of internal policies.¹⁹⁶ Finally, an LFI cannot implement an effective compliance program without training its employees as to the scope and requirements of the program.¹⁹⁷ OFAC guidelines encourage the spending of adequate resources on an organization's compliance training program, as this will prepare the employees to effectively handle their compliance responsibilities.¹⁹⁸ However, these broad compliance guidelines do not necessarily set out what technological implementations are required to satisfy OFAC regulators in the future, as the next section explains.

2. *The Technological Evolution of Compliance Programs at LFIs*

The use of information technology to assist compliance efforts in the financial industry is largely a development of the last few decades.¹⁹⁹ Financial institutions have built out their own technology systems in-house in order to

190. 2019 OFAC Compliance Policy, *supra* note 7, at 1.

191. *Id.*

192. *Id.* at 2.

193. *Id.* at 3.

194. *Id.* at 3-4.

195. *Id.* at 5.

196. *Id.* at 6.

197. *See id.* at 7.

198. *Id.* at 8.

199. Tom C. W. Lin, *Compliance, Technology, and Modern Finance*, 11 BROOK. J. CORP. FIN. & COM. L. 159, 164, 177 (2016).

facilitate compliance monitoring,²⁰⁰ particularly as those companies react to a “dynamic, complicated market and regulatory environment.”²⁰¹ Currently, LFIs employ software to cross-reference transactions against the OFAC designated entity and individuals lists.²⁰² As compliance technology systems become standard tools for ensuring that financial institutions meet their regulatory burden,²⁰³ banks continue to spend significant resources to incorporate technological developments in their compliance programs.²⁰⁴

Improving technological capabilities provide a springboard for future compliance success,²⁰⁵ a budding development not lost on the regulators tasked with enforcing U.S. sanctions. For instance, in a status update filed with the federal court monitoring the deferred prosecution of a global financial institution in connection with the bank’s violations of the IEEPA and TWEA in Cuba, Iran, Libya, Sudan, and Burma, one of the biggest impediments to establishing a sustainable compliance program was that its “compliance technology systems continue[d] to suffer from fragmentation and lack of connectivity.”²⁰⁶ The report acknowledged that implementation of an updated compliance technology system would be “difficult, expensive, and time consuming,” but noted this would be critical to the bank’s commitment to meeting its government-mandated compliance obligations.²⁰⁷ As this status report indicates, even as the costs of regulatory compliance programs increase,²⁰⁸ U.S. sanctions regulators place an emphasis on increased spending on technology to strengthen compliance programs at LFIs.²⁰⁹ Further, as new technological developments aimed at rooting out illicit transactions come to market, including the potential role of artificial intelligence in compliance programs, as discussed in the next section, regulatory pressure from sanction enforcers may prompt rolling adoption of such new technologies.

200. *Id.* at 178.

201. *Id.* at 177; *see also* Jimmy Skoglund & Wei Chen, *Financial Risk Management: Applications in Market, Credit, Asset and Liability Management and Firmwide Risk*, (John Wiley & Sons 2015) (“Regulation is of course a strong driver for banks’ evolution in risk management practices and the implementation of sound risk management systems.”).

202. Anglin, *supra* note 29, at 707.

203. Lin, *supra* note 199, at 178 (“Governance, risk, and compliance (GRC) technology systems are now standard tools at major financial institutions.”).

204. *Id.* (noting one LFI spent over \$600 million annually on compliance technology alone).

205. *Id.* at 178-179 (“having a good compliance system at a financial firm will be synonymous with having a good information technology system.”).

206. Letter from Loretta Lynch et al., U.S. Attorney, to the Hon. John Gleeson, Justice for the U.S. Dist. Court, E. Dist. of N.Y. at 4, *United States v. HSBC Bank USA, N.A.*, No. 12-763 (E.D.N.Y. Apr. 1, 2015), ECF No. 33 [hereinafter HSBC Status Report].

207. *Id.* at 5.

208. Skoglund & Chen, *supra* note 201, at 4 (“The costs of meeting regulatory compliance for banks have been significantly increasing over the years. The costs are both direct and operational related to implementation of sophisticated risk and compliance systems, disclosure processes, and retaining skilled people.”).

209. *See* HSBC Status Report, *supra* note 206, at 4.

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3. *The Issue of Evolving Compliance Standards: Machine Learning and Big Data in Compliance*

In early 2020, global brewer Anheuser-Busch InBev SA (AB InBev) may have set the new gold standard of internal compliance by employing machine learning to root out corrupt conduct in the corporation's global dealings.²¹⁰ This technology seeks to proactively monitor legal developments in risk-prone business relationships and to prevent violations of the corporation's global legal obligations,²¹¹ a technological advancement LFI may also be able to use to more easily detect sanctions violations among their countless financial transactions. Three years in the making, AB InBev's new compliance program, which it calls BrewRight, cuts compliance costs by taking charge of the expensive and time-consuming review of the company's millions of daily payment transactions, of which compliance personnel previously would have only been able to review a subset of suspect payments.²¹² This nascent use of data-driven strategies to ensure compliance with international regulations could forge a new path forward for international compliance monitoring. Just as OFAC's compliance policy evolved to reflect improved compliance capabilities in the UniCredit Agreement, the agency may soon expect the broad use of data-driven compliance techniques. Indeed, as discussed above, U.S. sanctions regulators have not shown much sympathy for the vast expenses associated with the technological improvement of compliance programs, pressing for such improvements even if the process will be "difficult, expensive, and time consuming."²¹³

Ultimately, technological improvements of corporate compliance programs would strengthen the capabilities of the global banking sector to enforce U.S. sanctions. Because of the considerable leverage of LFI in the global financial sector, the capacity of the U.S. government to enforce its economic sanctions framework will concurrently expand. After all, as OFAC expectations evolve, so do the incentives for the global banking sector to follow suit.²¹⁴ Ultimately, in future investigations, there may be no excuse for LFI that use outdated compliance technology, which means that the private policing role of LFI in the sanctions framework will continue to evolve—at the exclusive cost of the financial institutions.

210. Dylan Tokar, *AB InBev Taps Machine Learning to Root out Corruption*, WALL ST. J. (Jan. 17, 2020), <https://www.wsj.com/articles/ab-inbev-taps-machine-learning-to-root-out-corruption-11579257001>. Much to the credit of AB InBev—and Matt Galvin, the AB InBev executive who spearheaded the development of BrewRight—the new program seeks to develop a consortium of companies to work with it to better the analytic capabilities of the platform. This openness means that smaller companies will be able to model their compliance programs on BrewRight, without bearing the brunt of the development costs.

211. *See id.*

212. *Id.*

213. *See* HSBC Status Report, *supra* note 206, at 4.

214. *See* Marquardt & Kurcab, *supra* note 189, at 4.

CONCLUSION

Large financial institutions have become indispensable to OFAC's goal of enforcing and tracking illicit conduct relevant to U.S. economic sanctions policy. Sanction penalties aimed at LFIs incentivize comprehensive internal monitoring of potentially sanctioned transactions with blocked entities and persons, and thus the tracking of sanctionable conduct. Significantly, the regulatory burden of private policing at LFIs will continue to transform the compliance landscape and may prompt rolling adaptations of new technological developments that assist in rooting out illicit transactions. The U.S. economic sanctions framework, then, functions as an incentive structure first to standardize, and then to improve, corporate compliance programs at LFIs—and this impact cannot be ignored.