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2014 Year-End Review of U.S. BSA/AML and Sanctions Developments and Their Importance to Financial Institutions

BSA/AML and Sanctions Compliance Continued to Be a Focus of Boards of Directors and Management of Financial Institutions as 2014 was Marked by Record-Setting Fines and Precedent-Setting Criminal Prosecutions and Enforcement Actions for Violations of BSA/AML and Sanctions Laws

This memorandum highlights what we believe to be the most significant developments during 2014 for financial institutions with respect to U.S. Bank Secrecy Act/anti-money laundering (“BSA/AML”) and U.S. sanctions programs, including sanctions administered by the U.S. Department of the Treasury’s Office of Foreign Assets Control (“OFAC”), and identifies significant trends. The overarching trend that is likely to continue for the foreseeable future is an intense focus on BSA/AML and sanctions compliance by multiple government agencies, combined with increasing regulatory expectations and significant enforcement actions and penalties.

This memorandum to clients represents the first in a series of tools and materials we plan to introduce in the coming months aimed at keeping clients and practitioners informed of regulatory and enforcement developments in the areas of BSA/AML and OFAC sanctions. We encourage you to contact us if you have any questions about the information and issues presented in this memorandum or how the developments and trends we highlight may be relevant to your organization.

EXECUTIVE SUMMARY

The year 2014 was marked by record-setting fines and precedent-setting criminal prosecutions and enforcement actions against financial institutions for violations of BSA/AML and sanctions laws. In addition, individuals faced personal liability and public accountability for their actions and for compliance-related deficiencies within their areas of responsibility. In light of the increased risk environment, and new and heightened expectations of regulators and enforcement agencies, compliance and risk management must be a focus of boards of directors and senior management of financial institutions.

We discuss in Part I the new and heightened expectations with regard to compliance risk management and the culture of compliance. Risk management-related weaknesses associated with BSA/AML and OFAC compliance are at the core of several of the most high-profile and costly enforcement actions taken by regulators and law enforcement in 2014, and the banking regulators have repeatedly cited them as among the issues driving Matters Requiring Attention (“MRAs”), Matters Requiring Immediate Attention, and enforcement actions.

These developments leave no room for doubt that BSA/AML and OFAC sanctions compliance are of critical importance in structuring a risk-governance framework that is consistent with regulatory expectations. In 2014, the Board of Governors of the Federal Reserve System (the “Federal Reserve”) and the Office of the Comptroller of the Currency (the “OCC”) both established formal heightened risk management expectations for certain large financial institutions. Although those expectations do not specifically reference BSA/AML and OFAC compliance risks, it is imperative that financial institutions properly account for those risks in developing, maintaining, and updating their risk-management frameworks. The regulatory emphasis on BSA/AML and OFAC compliance risk-management seems unlikely to abate in the near term.

At the same time, regulators and law enforcement expressed concern in 2014 that some institutions are “de-risking,” or exiting whole business lines that carry increased risk, instead of improving risk management and controls and evaluating customers individually. In 2014, regulators placed particular emphasis on relationships with money services businesses (“MSBs”) and third-party payment processors (“TPPPs”). Concerns were also voiced by foreign businesses and countries that believe themselves excluded from the U.S. banking system. The concerns regarding “de-risking”—when juxtaposed with the intense regulatory scrutiny risk management practices are now receiving and the potentially severe consequences institutions and individuals face for BSA/AML and OFAC compliance-related lapses—present financial institutions with a dilemma. It is costly to maintain BSA/AML and OFAC compliance systems and controls sufficient to properly manage risks associated with these businesses (which typically are not significant revenue generators for banks), and, as mentioned, there are potentially severe consequences for mismanaging those risks. Weighing the costs and benefits, a financial institution could

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reasonably conclude that the potential down-sides of maintaining MSBs, TPPPs, or other potentially high-risk businesses as customers outweigh the possible rewards. Until benefits come to better align with costs, “de-risking” will continue to be an issue.

For these and other reasons, including protestations from businesses and even countries that believe themselves excluded from the U.S. banking system, we believe regulatory interest in the “de-risking” phenomenon with respect to MSBs and TPPPs will likely continue for the foreseeable future. Further, as the social and technological landscapes in the United States continue to evolve, this interest will almost certainly expand to other business lines and customers that may carry increased risk. In this regard, we see digital wallet services, mobile and other alternative payment systems, virtual currencies, and newly legal (at the state or local level) marijuana businesses as possible targets in 2015 for, simultaneously, risk-related regulatory focus and regulatory “de-risking” concerns. In 2015, financial institutions will almost certainly be presented with novel challenges related to properly identifying and managing the risks associated with these and other advancements, requiring institutions to make complex, but important, risk-related decisions. Although regulators have in the past shown a willingness to address risk management-related issues presented by advancements when they arise, including by issuing several pieces of guidance in 2014 pertaining to MSBs, TPPPs, and virtual currency, it seems doubtful that guidance will be able to keep pace—all the more reason for financial institutions to have in place a robust risk-management framework.

This year also focused institutions on the importance of maintaining a “culture” of compliance and risk management. Regulators sent a strong signal that a robust risk-management framework that is consistent with regulatory expectations will not be enough by itself; rather, to be truly effective, the framework must be reinforced by the proper “tone at the top.” In 2014, regulators placed the responsibility squarely on the shoulders of management (and, to a meaningful extent, boards of directors) to build and maintain (and in the case of boards, to oversee) a strong risk culture that promotes responsible business practices and safety and soundness. On a similar note, throughout 2014, various factions within the U.S. government and members of the media called repeatedly—and vocally—for accountability for BSA/AML and OFAC compliance failures, up to and including potential criminal liability. Further, 2014 continued to demonstrate that the consequences of BSA/AML weaknesses, even where there are less serious enforcement actions, are likely to lead to supervisory ratings downgrades, which can preclude expansion and other activities.

We see one additional BSA/AML-related development in 2014 as presenting particular challenges to financial institutions. In July, the Financial Crimes Enforcement Network (“FinCEN”) proposed amendments to existing BSA regulations that would impose explicit customer due diligence (“CDD”) requirements, including a new beneficial ownership requirement (the “Proposed CDD Rule”). The Federal Financial Institutions Examination Council BSA/AML (“FFIEC BSA”) Examination Manual and

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other guidance identify CDD as the cornerstone of a strong BSA/AML compliance program, but FinCEN regulations currently do not include explicit CDD requirements. The codification of CDD suggests that CDD will be an area of continued regulatory interest and a prospective enforcement focus. The new beneficial ownership requirements, in particular, would pose challenges to financial institutions, particularly where legal entity customers have complex or opaque ownership and control structures or are domiciled in secrecy jurisdictions. These and other significant BSA/AML-specific developments during 2014 are discussed in Part II.

In Part III, we discuss U.S. sanctions developments. The year 2014 was active in this regard. Of perhaps most significance, the United States, in response to the Russian intervention in Ukraine, established several sanctions programs targeting various persons and entities—generally in Russia—with the goal of stabilizing the situation in Ukraine and of influencing the policy of the Russian Federation towards the situation in Ukraine. Although these programs generally continued the recent trend in sanctions administered by OFAC towards the use of targeted and list-based sanctions, in December 2014, the United States imposed a broad and comprehensive ban on trade and investment in the Crimea region of Ukraine.

The targeted sanctions under the Ukraine-related sanctions programs, and questions thereunder, appeared to lead OFAC to revisit prior guidance issued in 2008 regarding the approach that U.S. persons must take when dealing with entities that are owned or controlled by one or more sanctions-targeted persons or entities. The new guidance had the effect of making dealings with such entities more likely to be problematic, and also heightened the importance of due diligence by financial institutions and others as to matters of beneficial ownership.

After several years of seemingly constant change, most particularly as a result of legislative initiatives, Iran-related sanctions stayed relatively constant in 2014 while the U.S. and the other P5+1 nations continue a dialogue with Iran over its nuclear ambitions. However, in December 2014, President Obama announced a major change in U.S. policy towards Cuba, announcing that the United States and Cuba would move to normalize diplomatic and economic relations and the United States would implement significant changes to its sanctions policies and regulations with respect to Cuba. These changes were [implemented](#) in January 2015.

Although Congress did not enact material new Iran-related sanctions, Congress remained active in the sanctions area. Congress passed additional Ukraine-related sanctions, in the Ukraine Freedom and Support Act, and adopted for the first time legislation that requires the President of the United States to impose sanctions on officials of the Government of Venezuela or their proxies if the President determines they have engaged in human rights abuses in response to anti-government protests that began in February 2014.

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Finally, this year has also been groundbreaking in the area of sanctions and BSA/AML enforcement. We have now seen the first guilty pleas in federal and New York state courts with respect to violations of OFAC sanctions regimes by a large, globally important financial institution, BNP Paribas S.A. (“BNP Paribas”), and the imposition of money penalties—roughly \$8.9 billion—that were exponentially larger than amounts previously imposed. BNP Paribas was also subject to the first suspension imposed on U.S. dollar clearing services in connection with settling sanctions violations. There was also increased sanctions enforcement activity against entities providing custody and other financial intermediary services, in particular a multi-million settlement between OFAC and Clearstream Banking S.A. (“Clearstream”). In the BSA/AML sphere, JPMorgan Chase Bank, N.A. (“JPMC”), entered into a deferred prosecution agreement and was assessed over \$2 billion in penalties in an action that gave rise to concerns that the government could impose severe sanctions for failure to file a single suspicious activity report (“SAR”) in the absence of broader BSA/AML program failures. In both the BSA/AML and sanctions areas, enforcement actions increasingly focused on publicly identifying individuals involved in wrongdoing and holding those individuals, including compliance officers, accountable.

In summary, 2014 saw increasing compliance burdens coupled with increasingly stringent enforcement measures in an environment where regulatory expectations remain both increasing and not clearly articulated. Taken together, it appears that compliance-related risk has increased substantially when measured against periods prior to 2014.

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I. HEIGHTENED EXPECTATIONS

During 2014, financial institutions became subject to heightened expectations on several fronts.¹

A. RISK MANAGEMENT AND FOCUS ON CULTURE OF COMPLIANCE

In 2014, the Federal Reserve and OCC both established formal risk-management expectations that promise to impact regulators' expectations for management of BSA/AML and sanctions risk. Early in the year, Thomas J. Curry, Comptroller of the Currency, [identified](#) risk-management deficiencies as one of four issues underlying BSA/AML "infractions" that can "almost always be traced back to decisions and actions of the institution's board and senior management"—the other three being the institution's culture of compliance (a theme discussed in greater detail shortly), resources committed to BSA/AML compliance, and information technology and monitoring processes.² Further, [according to Comptroller Curry](#), "[i]t speaks volumes that some of the most significant losses banks have sustained in the last several years were attributable . . . to lapses in operational risk management and the ensuing legal judgments, regulatory fines and reputational damage."³ He identifies BSA/AML program weaknesses as among "high profile examples" of risk management-related lapses. As recently as December 2014, the OCC [identified](#) risk-management weaknesses associated with BSA/AML and compliance as among the issues driving MRAs and enforcement actions.⁴

At the same time, regulators (and legislators) [expressed concern](#) that some institutions are "de-risking," or exiting business lines that may carry increased risk and require additional resources to manage those risks.⁵ Several recent high-profile BSA/AML enforcement actions are commonly understood as contributing to the "de-risking" phenomenon, among them the actions against MoneyGram and its Chief Compliance Officer. Rather than wholesale exiting business lines and no longer banking those customers, regulators [encouraged](#) institutions to improve risk management and controls and evaluate customers individually.⁶ Particular focus was placed by regulators on relationships with MSBs and TPPPs, with the Federal Deposit Insurance Corporation (the "FDIC") issuing a letter to financial institutions pertaining to TPPPs in July 2014 and FinCEN and the OCC separately issuing statements pertaining to MSBs in November 2014. In December 2014, the federal banking regulators updated the sections of the FFIEC BSA Examination Manual pertaining to MSBs and TPPPs to incorporate this recently issued regulatory guidance, and in January 2015 the FDIC issued a second letter to financial institutions pertaining to the "de-risking" phenomenon.⁷ Concerns were also voiced by foreign businesses and countries that believe themselves excluded from the U.S. banking system.

In its July 2014 letter to financial institutions, the FDIC clarified that the previously issued guidance that included examples of merchant categories that had been associated by the payments industry with higher-risk activity had led to misunderstandings regarding the FDIC's supervisory approach to TPPPs.

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[According to the FDIC](#), the prior guidance created the misperception that the examples of merchant categories were prohibited or discouraged when it is the “FDIC’s policy that insured institutions that properly manage customer relationships are neither prohibited nor discouraged from providing services to any customer operating in compliance with applicable law.”⁸ Accordingly, the FDIC removed the examples from the guidance. The FDIC letter followed a [Congressional hearing](#) focused on “Operation Choke Point,” an initiative by the Department of Justice (the “DOJ”), “focused on banks and payment processors because these institutions are the ‘so-called bottlenecks, or choke-points,’ for financing merchants from ‘high-risk’ industries.”⁹ The federal banking regulators recognized the FDIC guidance in the updated FFIEC BSA Examination Manual, while also providing financial institutions with updated guidance on how they can better assess the risks associated with TPPPs and manage those risks.

The [OCC bulletin](#) on relationships with MSBs, which is consistent with statements made by OCC officials during that hearing,¹⁰ provides: “As a general matter, the OCC does not direct banks to open, close, or maintain individual accounts, nor does the agency encourage banks to engage in the termination of entire categories of customer accounts without regard to the risks presented by an individual customer or the bank’s ability to manage the risk MSBs present varying degrees of risk to an institution. Not all MSBs should be considered high risk.”¹¹ Senior [Federal Reserve](#) and [FDIC](#) officials testified along similar lines, although those agencies did not issue formal guidance pertaining to MSBs in 2014.¹²

The FinCEN statement on MSBs is consistent with the OCC bulletin and the testimony of the other regulators. In particular, FinCEN [reiterated](#) that it does not support the wholesale termination of MSB accounts without regard to the risks presented or the bank’s ability to manage the risk.¹³ FinCEN urged the adoption of a case-by-case approach focused on whether customer risks can be managed appropriately and, if so, what controls are warranted for the risks presented. Along similar lines, Jennifer Shasky Calvery, Director of FinCEN, [stated](#) in the context of “de-risking” and MSBs, that “[i]t is not the intention of the AML regulations to shut legitimate business out of the financial system. . . . Rather, the goal is to provide banking services to legitimate businesses by understanding the applicable risks and managing them appropriately.”¹⁴ David S. Cohen, Under Secretary of the Treasury, similarly [commented](#) on “de-risking,” observing that the practice “can undermine financial inclusion, financial transparency and financial activity, with associated political, regulatory, economic and social consequences ‘De-risking’ is the antithesis of an appropriate risk-based approach.”¹⁵

In October 2014, the Financial Action Task Force (the “FATF”) released a [statement](#) echoing the guidance from FinCEN, the OCC and other banking regulatory officials.¹⁶ In its statement, the FATF emphasized that its recommendations require financial institutions to terminate customer relationships, on a case-by-case basis, only “where the money-laundering and terrorist-financing risks cannot be mitigated.”¹⁷ The statement noted that FATF standards do not permit the “wholesale cutting loose of entire classes of customer[s], without taking into account, seriously and comprehensively, their level of

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risk or risk mitigation measures for individual customers within a particular sector.”¹⁸ In its statement, the FATF also highlighted that “de-risking” could introduce risk and opacity to the global financial system by forcing certain entities and persons into less regulated or unregulated channels.¹⁹

As noted in the Executive Summary, these concerns regarding “de-risking”—when juxtaposed against intense scrutiny of risk-management practices and the potentially severe consequences meted out for BSA/AML and OFAC compliance-related lapses—present financial institutions with a dilemma. The downsides to banking potentially higher-risk customers such as MSBs and TPPPs are plentiful. Considering the risks, a financial institution could reasonably conclude that the potential down-sides of maintaining MSBs, TPPPs, or other potentially high-risk businesses as customers outweigh any possible rewards. This “de-risking” dilemma is almost certain to continue for the foreseeable future and, as the social and technological landscapes in the United States continue to evolve, will likely expand to other business lines and customers that may carry increased risk. It is critical for financial institutions to have in place a robust risk-management framework in the face of these challenges.

Potentially just as critical to having in place an effective risk-management framework is ensuring that the framework is reinforced by the proper “tone at the top.” Accordingly, a related theme sounded by regulators and FinCEN during 2014 is the importance of an institution’s attitude or “culture” towards risk management and compliance. Director Shasky Calvery emphasized this theme in several different forums, recently observing that, “without a doubt,” in the enforcement cases she saw while at the DOJ and FinCEN, “a strong culture of compliance could have made all the difference.”²⁰ Comptroller Curry noted “that a strong risk culture that promotes responsible business practices is important not just for its own sake, but is essential to safety and soundness” and that “the full responsibility for building and maintaining a strong risk culture belongs, first and foremost, with the bank and its management and board of directors. They clearly need to set the tone at the top.”²¹ Governor Daniel K. Tarullo of the Federal Reserve contrasted an institution where the aims of regulatory expectations pertaining to risk management have been “internalized” with an institution that views those expectations as a “mere compliance exercise.”²² According to Governor Tarullo, at the former, the institution engages in reflection; it considers how identified shortcomings fit into its overall risk decision-making and management processes and whether changes in other areas are needed. At the latter, the identified deficiencies are addressed by the institution “in a discrete, almost check-the-box fashion” and the institution wants to simply move on when the specific issues have been remedied. Governor Tarullo suggested that supervisors are likely to subject these latter institutions to greater scrutiny, and encouraged institutions to choose the attitude of the former institutions—an attitude of “good compliance, not mere compliance”—with senior management supporting and reinforcing that attitude. Both Governor Tarullo and Comptroller Curry emphasized the roles compensation and incentives play in determining employee behavior.

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1. Federal Reserve and OCC Heightened Risk-Management Expectations

On February 18, 2014, the Federal Reserve approved a [final rule](#) implementing certain of the “enhanced prudential standards” mandated by section 165 of Dodd-Frank (the “FRB Standards” or “Standards”).²³ The final rule implements, among other things, section 165’s risk-management requirements for U.S. bank holding companies. In addition, all foreign banking organizations with at least \$10 billion in worldwide consolidated assets are subject to a layered and escalating set of risk-management requirements, depending on their respective amounts of worldwide consolidated assets and U.S. assets. The FRB Standards impose specific risk-management-related obligations on boards of directors, including the requirement to establish an independent risk committee, with at least one member that has risk-management expertise commensurate with the size and complexity of the company. The FRB Standards also impose new responsibilities on senior management, including the requirement to designate a Chief Risk Officer. Additional discussion concerning the FRB Standards may be found in our previous [memorandum to clients](#) entitled “‘Enhanced Prudential Standards’ for Large U.S. Bank Holding Companies and Foreign Banking Organizations: Federal Reserve Approves Final Rule Implementing Certain Provisions of Section 165 of the Dodd-Frank Act Increasing Supervision and Regulation of Large U.S. Bank Holding Companies and Foreign Banking Organizations.”²⁴

Several months later, on September 3, 2014, the OCC issued final [“guidelines”](#) establishing minimum standards for the design and implementation of “risk governance frameworks” by certain large banks and minimum standards for the boards of directors of those banks in overseeing the frameworks’ design and implementation (the “OCC Guidelines” or “Guidelines”).²⁵ The Guidelines apply broadly to any insured national bank, insured Federal savings association, or insured Federal branch of a foreign bank (each a “bank”), with \$50 billion or more in average total consolidated assets, as well as to any bank (as previously defined) with average total consolidated assets of less than \$50 billion if that bank’s parent company “controls” at least one other bank that is subject to the Guidelines (a “covered bank”). The Guidelines impose specific risk-management-related roles and responsibilities on a covered bank’s front-line units, independent risk management, and internal audit; require those three functions to maintain independence from one another (including by imposing a particular reporting structure); and place substantial risk-management-related and other responsibilities on a bank’s Chief Executive Officer and board. Significantly, consistent with the emphasis in 2014 on an institution’s risk and compliance culture, the Guidelines require a covered bank to describe in its risk appetite statement a safe and sound risk culture.²⁶ In this regard, “setting an appropriate tone at the top is critical[.]”²⁷

Although BSA/AML and OFAC sanctions programs are not specifically mentioned in the FRB Standards or OCC Guidelines, risk-management-related weaknesses associated with BSA/AML and OFAC compliance are at the core of several of the most high-profile and costly enforcement actions taken by regulators and law enforcement in 2014. Indeed, there can be no doubt that BSA/AML and OFAC

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sanctions programs are critical considerations in structuring a risk-governance framework that is consistent with the FRB Standards and OCC Guidelines. Further, to properly fulfill the risk-management-related responsibilities imposed on them by the FRB Standards and OCC Guidelines, it will be necessary for boards and senior management to be aware of and appreciate BSA/AML and OFAC sanctions-compliance-related risks to the institution.

2. FinCEN Advisory to U.S. Financial Institutions on Promoting a Culture of Compliance

On August 11, 2014, FinCEN issued an [advisory](#) “to highlight general principles illustrating how financial institutions and their leadership may improve and strengthen organizational compliance with BSA obligations.”²⁸ In the advisory, FinCEN articulates six principles, the first of which emphasizes the importance of “tone at the top.” FinCEN [states](#) that an institution can strengthen its BSA/AML “compliance culture” by ensuring, first, that leadership (which FinCEN says may include the board of directors, senior and executive management, owners and operators) remains engaged—that it shows commitment to and support for the BSA/AML compliance program, receives periodic training, understands BSA/AML obligations and compliance, and remains informed of the state of BSA/AML compliance within the institution;²⁹ second, that revenue interests do not compromise efforts to effectively manage and mitigate BSA/AML deficiencies and risks—a principle that can be fostered by the institution’s governance structure; third, that relevant information in the possession of the institution is made available to BSA/AML compliance staff;³⁰ fourth, that leadership devotes human and technological resources to the BSA/AML compliance program commensurate with the institution’s risk profile; fifth, that leadership ensures that the party conducting independent testing of the BSA/AML compliance program is “independent, qualified, unbiased and does not have conflicting business interests that may influence the outcome” of testing; and, sixth, that leadership and staff understand the purpose that BSA reports serve and how the information is used—a principle that can be encouraged through training.³¹

B. ELEVATED RESPONSIBILITY AND ACCOUNTABILITY

Throughout 2014, various factions of the U.S. government and members of the media called repeatedly—and vocally—for individuals and institutions to be held accountable for BSA/AML and OFAC compliance failures, up to and including potential criminal liability. Enforcement measures taken during the year against institutions and individuals demonstrate the heightened risk in the current environment.

1. Personal Responsibility

a. Public Statements

Throughout 2014, banking regulators, the DOJ, local prosecutors, and members of Congress emphasized in public statements the need for individual accountability for BSA/AML and OFAC compliance failings. Early in the year, Comptroller Curry [stated](#) that it has “often been very difficult to attribute” institutional failures resulting from the “collective decision making” of numerous people over an extended period “to

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the acts of a single individual within a bank.”³² [According to Comptroller Curry](#), “[t]hat has to be changed. . . . [S]omeone has to be accountable.”³³ Also early in the year, Benjamin Lawsky, Superintendent of the New York Department of Financial Services (the “DFS”), [commented](#) that he “do[es] [not] think we have done nearly enough as regulators—the DFS included—to hold individuals on Wall Street accountable for misconduct.”³⁴ Observing that “[i]f there is wrongdoing at a corporation, that wrongdoing was committed by *people*,” and “if in any particular instance we cannot find someone, some person, to hold accountable, then we are doing something wrong.”³⁵ Later in the year, Federal Reserve Governor Tarullo [noted](#) that regulators “can, and do, require dismissal of employees as part of our enforcement actions against firms. And we do have the authorities to remove malefactors from their positions in any institution that we regulate and to prohibit them from working in the banking industry.”³⁶

Similar statements were made by DOJ officials. Attorney General Eric Holder, for example, observed that “corporate misconduct must necessarily be committed by flesh-and-blood human beings. So wherever misconduct occurs within a company, it is essential that we seek to identify the decision-makers at the company who ought to be held responsible.”³⁷ Another senior DOJ official stated that “the heart of effective corporate cooperation” is, in many ways, “whether that cooperation exposed, and provided evidence against, the culpable individuals who engaged in criminal activity.”³⁸ Similar to Attorney General Holder, the official [observed](#) that “[c]orporations do not act criminally, but for the actions of individuals,” and DOJ “intends to prosecute those individuals.”³⁹

Senator Elizabeth Warren [remarked](#) during a September 2014 hearing that “[n]o corporation can break the law unless the individual within that corporation broke the law.”⁴⁰ Yet, despite large settlements in which the three largest banks in the U.S. “admitted to breaking the law,” Senator Warren expressed concern that “[n]ot a single senior executive at these banks has been criminally prosecuted.”⁴¹ Senator Shelby, later in the same hearing, similarly noted a perceived disconnect between the large “fines and settlements because of criminal conduct” and the absence of “justice,” stating that “people . . . shouldn’t be able to buy their way out of . . . culpability.”⁴²

BSA/AML compliance is an area ripe with complexities and is constantly undergoing change. If compliance officers in this area perceive an increased personal risk for missteps, the individuals best suited to handle BSA/AML-related challenges may decide that the risks outweigh the rewards, leaving all but the largest and most well-heeled institutions with an inability to find qualified individuals. There is some suggestion that the trend has already begun, as it is becoming increasingly difficult to find and retain qualified, experienced individuals to serve as BSA/AML compliance officers.

b. Enforcement Actions

This year saw two significant actions in which AML compliance officers were held personally accountable for BSA/AML program-related deficiencies.

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i. Global AML Compliance Officer, Brown Brothers Harriman

On February 5, 2014, the Financial Industry Regulatory Authority, Inc. (“FINRA”) took [action](#) against Brown Brothers Harriman (“BBH”) and its former Global AML Compliance Officer for BSA/AML-related failures. FINRA suspended the AML Compliance Officer for one month and fined him \$25,000, for, among other things, the failure to have an adequate AML program in place at BBH to monitor and detect suspicious penny stock transactions—transactions that, according to FINRA, “typically pose[] a higher than average risk, because of the possibility of low trading volumes and relative lack of information regarding issuers.”⁴³

FINRA’s action states that the AML Compliance Officer “was responsible for ensuring that the AML program was adequately tailored to [BBH’s] business and appropriately monitoring, detecting and reporting suspicious activity.” Further, according to FINRA, the officer managed BBH’s AML staff, “was personally, or through his designee, responsible for making determinations as to whether to file Suspicious Activity Reports (‘SARs’) on behalf of [BBH] and was ultimately responsible for establishing and implementing a program reasonably expected to detect and cause the reporting of suspicious activity when appropriate.”

FINRA alleged that both BBH and the AML Compliance Officer were aware that BBH’s Swiss bank clients could offer their “underlying clients” anonymous access to U.S. securities markets,⁴⁴ as well as of the heightened risks associated with penny stock activity and BBH’s “severely limited ability” to obtain beneficial ownership information, yet failed to have an adequate surveillance system to monitor penny stock transactions and did not tailor BBH’s AML procedures to adequately detect, investigate, and report suspicious activity.

The action against the AML Officer vividly demonstrates the significant risks faced in today’s environment by compliance officers for BSA/AML-related deficiencies.

ii. Chief Compliance Officer, MoneyGram

On December 18, 2014, FinCEN [announced](#) a \$1 million penalty and related criminal complaint against the former Chief Compliance Officer (“COO”) of MoneyGram, a financial services provider with extensive operations in the United States and internationally. In the complaint, DOJ, which is prosecuting the claims on behalf of FinCEN, seeks to reduce FinCEN’s assessment to a judgment and to enjoin the COO from participating in the conduct of the affairs of any U.S. financial institution.⁴⁵ In the complaint, the COO is accused broadly of having, during his tenure with MoneyGram, “failed to ensure that MoneyGram implemented and maintained an effective AML program and fulfilled its obligation to timely file SARs.”⁴⁶ Specific failures cited in the complaint include not ensuring that MoneyGram implemented a policy for disciplining agents the company knew or suspected were involved in fraud or money laundering and failing to ensure that such agents were terminated. Reminiscent of the FinCEN Advisory to U.S. Financial

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Institutions on Promoting a Culture of Compliance discussed in section I.A.2 of this memorandum, the complaint also alleges that the COO did not ensure that individuals responsible for filing SARs were provided with information possessed by other company units that should have resulted in the filing of SARs.⁴⁷ As a result of these failures, agents that MoneyGram personnel knew or suspected were involved in fraud or money laundering were allowed to continue using MoneyGram to facilitate illegal conduct that defrauded customers.

In the press release accompanying FinCEN's announcement, U.S. Attorney for the Southern District of New York, Preet Bharara is [quoted](#) as saying: "Compliance officers perform an essential function in our society, serving as the first line of defense in the fight against fraud and money laundering. Unfortunately, as the complaint alleges, Mr. Haider violated his obligations as MoneyGram's Chief Compliance Officer."⁴⁸ Although FinCEN has taken actions against individuals in the past, the action against the MoneyGram COO for his conduct as CCO appears to mark the first substantial penalty assessment and related DOJ complaint against the CCO of a large, globally active financial services firm for BSA/AML-related failures.

2. Criminal Prosecutions

This year also was marked by a strong signal from law enforcement that even the largest financial institutions are not immune from criminal prosecution. Again, this theme was often heard in public statements by high-level officials, but also was evidenced by DOJ actions in obtaining guilty pleas from two large financial institutions—Credit Suisse AG ("Credit Suisse") and BNP Paribas.

In terms of public statements, Attorney General Holder stated, "[a]fter years of speculation that some firms might be considered too systemically important to face criminal charges, the cases against Credit Suisse and BNP [Paribas] proved that no institution is too large to prosecute. We have put that myth to rest once and for all."⁴⁹ In accepting BNP Paribas's guilty plea in federal court, Judge Schofield [stated](#) that the case "will surely have a deterrent effect on others that may be tempted to engage in similar conduct, all of whom should be aware that no financial institution is immune from the rule of law."⁵⁰ U.S. Attorney Bharara [suggested](#) it is time to "usher in a new age of institutional accountability and responsibility."⁵¹ BNP Paribas also entered a guilty plea in New York state court.

Although it is not unprecedented for a bank to plead guilty to or be convicted of a crime, Credit Suisse was the first financial institution of its size and significance to plead guilty in the U.S. to criminal wrongdoing since the 2005 guilty plea of Riggs Bank. Although Credit Suisse was not charged with violations of BSA/AML or sanctions laws, the guilty plea reflects the current enforcement environment. The plea, together with the guilty pleas of BNP Paribas the following month, suggest a shift in prosecutorial tactics—demanding that banks plead guilty to avoid a potentially broader, more damaging indictment rather than entering into non-prosecution or deferred prosecution agreements, which allow

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banks to avoid a conviction. The frequency with which the DOJ intends to insist on resolutions of this type going forward remains to be seen.

3. Enforcement Actions

This year saw several notable actions in which financial institutions were held accountable for BSA/AML or OFAC sanctions program-related deficiencies. Further, 2014 marked a shift in approach by banking regulators towards naming individuals in formal enforcement actions against institutions.

a. Brown Brothers Harriman

In the matter discussed above relating to BBH's Global AML Compliance Officer, FINRA also censured and fined the company \$8 million for, among other things, the failure to have an adequate AML program in place to monitor and detect suspicious penny stock transactions—transactions that, according to FINRA, “typically pose[] a higher than average risk, because of the possibility of low trading volumes and relative lack of information regarding issuers.”⁵²

In its action, FINRA alleged that BBH conducted penny stock transactions through omnibus accounts for “undisclosed underlying customers” of foreign banks in “known bank secrecy havens” such as Switzerland, Guernsey and Jersey.⁵³ According to FINRA, BBH allowed these transactions to occur “even though [BBH] could not generally obtain critical information such as the identity of the stock’s beneficial owner, how the stock was obtained, and the beneficial owner’s relationship with the issuer.” FINRA further alleged that BBH was aware that its Swiss bank clients could offer their “underlying clients” anonymous access to U.S. securities markets, as well as of the heightened risks associated with penny stock activity and BBH’s “severely limited ability” to obtain beneficial ownership information, yet failed to have an adequate surveillance system to monitor penny stock transactions and did not tailor BBH’s AML procedures to adequately detect, investigate, and report suspicious activity.

This action evidences another trend discussed in greater detail in section II.A of this memorandum—a trend towards transparency in beneficial ownership.

b. BNP Paribas

On June 30, 2014, the DOJ [announced](#) that BNP Paribas agreed to enter a guilty plea to conspiring to violate U.S. sanctions regimes by processing billions of dollars of transactions through the U.S. financial system on behalf of Sudanese, Iranian, and Cuban entities subject to U.S. economic sanctions. According to the DOJ, the agreement to plead guilty was the first time a global bank has agreed to plead guilty to large-scale, systematic violations of U.S. economic sanctions.⁵⁴ On the same date, BNP Paribas agreed to enter a guilty plea to two New York state criminal charges brought by the Office of the District Attorney of the County of New York.

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The regulators of BNP Paribas' New York branch, the Federal Reserve and the DFS, also issued parallel orders. The Federal Reserve's [order](#) prohibits BNP Paribas from re-employing or otherwise engaging 11 individuals who were involved in the actions that resulted in the violations of U.S. sanctions laws.⁵⁵ The Federal Reserve did not publicly name those individuals in its action, but identified the capacities in which they served, and indicated that it may pursue separate enforcement actions against them.⁵⁶ The DFS [required](#) 13 individuals to be terminated by or separated from the Bank as a result of the investigation.⁵⁷ Although the DFS's action also did not publicly name those individuals, five individuals were identified in the DFS's press release. The DFS's action also banned BNP Paribas's New York branch from conducting U.S. dollar-clearing transactions for certain clients in specified jurisdictions for one year, included a two-year suspension of U.S. dollar-clearing as a correspondent bank for unaffiliated third-party banks in New York and London, and required BNP Paribas to extend, for an additional two years, the term of an independent monitor the DFS installed at BNP Paribas's New York branch in August 2013 to conduct a review of BSA/AML and sanctions compliance. Notably, in issuing the order, the DFS stated that "the monitor's review will help inform the potential imposition and degree of similar penalties by the DFS at other banks—where appropriate."

The actions against BNP Paribas are significant for several reasons. In addition to marking the first guilty plea to violations of the OFAC sanctions regimes by a large, global financial institution and the first such ban on U.S. dollar clearing, they further reflect the shift in approach by regulators towards holding individuals accountable in formal enforcement actions against institutions. One practical consequence of this shift is that individuals may not be afforded the same due process protections they would receive if the regulators were to take formal action against each of them directly.⁵⁸ In addition, the actions, particularly when coupled with the actions against Standard Chartered Bank ("Standard Chartered") and Bank of Tokyo Mitsubishi UFJ ("BTMU"), are evidence of a trend towards requiring institutions to engage independent monitors for extended periods of time. One can debate the merits and disadvantages of this trend, but there is no question that the presence of an independent monitor demands significant dedicated institutional resources.

c. Standard Chartered

On September 21, 2012, Standard Chartered settled allegations by the DFS that it violated various laws and regulations in connection with transactions on behalf of Iranian parties. In the settlement, Standard Chartered was required, among other things, to engage an independent monitor for a two-year term.⁵⁹ The monitor was to report directly to the DFS and was charged with conducting a comprehensive review of the BSA/AML and OFAC compliance programs, policies, and procedures in place at Standard Chartered's New York branch, as well as assessing BSA/AML operations performed outside the United States on behalf of the branch. Based on that review, the monitor was to identify needed corrective measures and oversee their implementation. As part of the settlement, the DFS also required Standard

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Chartered to pay a \$340 million civil penalty. Separately, on December 10, 2012, the Federal Reserve, Standard Chartered's primary U.S. federal banking regulator, criminal authorities (the DOJ and the New York County District Attorney, in the form of Deferred Prosecution Agreements (the "DPAs")), and OFAC separately took action against Standard Chartered.

On August 19, 2014, the DFS announced a second [settlement](#) with Standard Chartered for "failures to remediate anti-money laundering compliance problems as required in the Bank's 2012 settlement with the [DFS]."⁶⁰ According to the DFS, these failures were uncovered by the independent monitor required under the 2012 settlement. The DFS's August 2014 order requires Standard Chartered to, among other things, extend the independent monitor's engagement for another two years; suspend dollar clearing through its New York branch for high-risk retail business clients at its Hong Kong subsidiary; exit high-risk client relationships within certain business lines at its branches in the United Arab Emirates; not accept new dollar-clearing clients or accounts across its operations without prior approval from the DFS; and appoint a competent and responsible executive who will report directly to the CEO to oversee the remediation.⁶¹ The 2014 order places numerous requirements regarding the New York branch's U.S. dollar-clearing operations, including that: (i) cross-border payments of \$3,000 or more that originate from the account of a customer held at a non-U.S. Standard Chartered branch or subsidiary include the identity, address and country of the originator, and any beneficiary identification information received by the non-U.S. branch in the payment instruction; (ii) Standard Chartered instruct third-party foreign correspondent banking clients of the New York branch that the country of the originator and beneficiary must be included in cross-border payments of \$3,000 or more; and (iii) the New York branch engage in post-transaction monitoring to identify payments that lack information on the originator and beneficiary, including country information, and, in certain instances, obtain information on the country of the originator. The DFS also required Standard Chartered to pay an additional \$300 million civil money penalty. Parallel action was not taken by other authorities in August; however, in December 2014, it was announced that as a result of an ongoing U.S. sanctions-related investigation of Standard Chartered, the initial two-year term of Standard Chartered's DPAs had been extended by an additional three years and a monitor would be appointed to evaluate Standard Chartered's sanctions-compliance program.

The DFS's recent action against Standard Chartered is notable for several reasons. First, it demonstrates that the DFS is not reluctant to rely on the findings of independent monitors as a basis for taking significant enforcement action against an institution. In addition, like the action against BNP Paribas, the action against Standard Chartered is evidence of the apparent trend towards requiring institutions to engage independent monitors for extended periods of time. The requirements regarding the New York branch's U.S. dollar-clearing operations go beyond published regulatory requirements in at least two ways. First, while interagency guidance provides that originator's banks are expected to include complete customer information in cross-border funds transfers, the [guidance](#) does not categorically require that

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address and country information of the originator be included.⁶² Second, while the agencies expect intermediary banks to implement a “risk-based method to identify incomplete fields or fields with meaningless data,” they do not require the intermediary bank to identify payments that lack address and country-level data but otherwise contain meaningful data regarding originators and beneficiaries. Moreover, the 2014 action by the DFS against Standard Chartered was not accompanied by parallel actions by other banking regulators. Finally, the independent monitor’s work is ongoing, and the DFS has only released Standard Chartered from further action with respect to the conduct set forth in the DFS’s order, thus leaving open the possibility of additional sanctions if the independent monitor identifies further deficiencies.

d. BTMU/PwC

In June 2013, the DFS took action against BTMU in connection with its clearing, through BTMU’s New York State-licensed branch, of U.S. dollar payments involving certain countries and entities subject to OFAC sanctions. The action required BTMU to, among other things, retain an independent consultant for a one-year term. BTMU’s independent consultant was to report directly to the DFS and was charged with conducting a comprehensive review of the BSA/AML-related sanctions compliance programs, policies and procedures at the New York branch, as well as assessing BSA/AML operations performed outside the United States on behalf of the branch. Based on that review, the consultant was to identify any needed corrective measures and oversee their implementation. BTMU was also required to pay a \$250 million civil money penalty.

PricewaterhouseCoopers (“PwC”) had previously performed a historical transaction review for BTMU. PwC’s report was presented in 2008 to the DFS’s predecessor agency and several other U.S. regulators. On August 18, 2014, the DFS entered into an agreement with PwC regarding PwC’s provision of certain consulting services for BTMU in 2007 and 2008. Under the settlement, PwC’s Regulatory Advisory Services Group was required to abstain from any new engagement that would require DFS approval for PwC to act as independent consultant or the disclosure of confidential information to PwC, to implement a series of changes, and to pay a \$25 million civil money penalty. The August 2014 action against PwC followed a similar 2013 [action](#) against Deloitte Financial Advisory Services, LLP (“Deloitte”) regarding “the company’s misconduct, violations of law, and lack of autonomy” during Deloitte’s work at Standard Chartered on AML issues in which Deloitte agreed to implement a set of changes “designed to help address conflicts of interest in the consulting industry.”⁶³

On November 18, 2014, the DFS entered into another [settlement](#) with BTMU.⁶⁴ The DFS’s press release stated that the DFS directed BTMU to take disciplinary action against individual BTMU compliance personnel, and further indicated that two individuals “will be banned from conducting business involving any New York banks (or other financial institutions) regulated by the Department, including BTMU’s New York branch.” The DFS also required BTMU to pay an additional \$315 million civil money penalty and to

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agree to allow the DFS to extend the engagement of the independent consultant required under the 2013 order past March 2015 for up to an additional 18 months if the DFS determines an extension is required.

4. Collateral Consequences

As the severity of penalties increase, including possible criminal liability, the potential consequences of those actions under U.S. laws and regulations beyond the laws under which a civil or criminal settlement or enforcement action occurs (“collateral consequences”) also increase in severity. Although it was widely reported that DOJ undertook efforts to mitigate the collateral consequences that could impact Credit Suisse and BNP Paribas as a result of their guilty pleas, suggesting a willingness on the part of regulators and enforcement authorities to work with institutions and each other to achieve an outcome that minimizes risk to the safety and soundness of the institution and the broader markets, that trend has shown recent signs of reversing as pressure from U.S. Congress, the media and other commentators for not being tough enough on banks has led to an increasingly difficult environment for financial institutions facing enforcement actions or settlements. This pressure could make regulators, including the Securities and Exchange Commission (“SEC”) and Department of Labor (“DoL”), more likely to take adverse discretionary actions and less likely to grant waivers or exemptions from automatic disqualifications.

a. SEC

In a highly publicized dissent to a request for a waiver of ineligible issuer status under Rule 405 of the Securities Act of 1933 (a so-called “Well-Known Seasoned Issuer waiver” or “WKSI waiver”) by The Royal Bank of Scotland Group, plc (“RBS”), SEC Commissioner Kara M. Stein [expressed concern](#) that the SEC’s “action to waive [its] own automatic disqualification provisions arising from RBS’s criminal misconduct may have enshrined a new policy—that some firms are just too big to bar.” In the wake of Commissioner Stein’s dissent, Senator Sherrod Brown, Chairman of the Banking Subcommittee on Financial Institutions and Consumer Protection, sent a letter to SEC Chair Mary Jo White, further expressing concern that “the SEC’s policy appears to make waivers the rule rather than the exception,” and requesting information on the waiver process, including the policies and procedures used in making determinations. In her response, Chair White reiterated that “a party seeking a waiver from a disqualification bears the burden of establishing appropriate justification that a waiver should be granted.” In another [recent SEC action](#) that attracted significant attention, Bank of America, N.A. (“Bank of America”) was granted a requested waiver from the so-called “bad actor” disqualification provision of Rule 506 of Regulation D under the Securities Act of 1933; however, the SEC imposed significant conditions, including the requirements that the bank: (i) retain a “qualified independent consultant . . . not unacceptable” to the SEC to conduct a comprehensive review of Rule 506 compliance and (ii) reapply to the SEC for an additional waiver covering the second half of the five-year disqualification. Commissioner Stein has suggested that the approach taken in the Bank of America matter may be a model the SEC will

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look to going forward, as it reflects an “individualized, detailed, and careful analysis based on all of the relevant facts and the particular waiver policy.”

b. Department of Labor

In November 2014, the DoL, following a letter from three members of Congress, including Representative Maxine Waters, the ranking Democrat on the House Financial Services Committee, [elected to hold a public hearing](#) on whether, and under what conditions, affiliates of Credit Suisse should be granted an exemption that would allow them to continue providing certain asset management services as a Qualified Professional Asset Manager (“QPAM”) following Credit Suisse’s guilty plea. The hearing took place on January 15, 2015 and no action has been taken by the DoL as of the date of this memorandum. In any case, the exemption the DoL had proposed for Credit Suisse included stringent new conditions not seen in prior QPAM exemptions, aimed at ensuring the separation of the affiliates’ asset-management decisions from the influence of the rest of Credit Suisse.

The SEC and DoL actions demonstrate that waivers of collateral consequences should not be viewed as a foregone conclusion—even when the consequence is wholly unrelated to the sanctioned conduct. In particular, financial institutions that are repeat offenders—that is, they have previously sought waivers for prior settlements—are likely to find the next waiver more difficult to obtain. Further, one regulator’s refusal to grant a waiver or opting to take discretionary action could influence or create pressure for other regulators to follow suit.

Institutions that are faced with an impending enforcement action or settlement should undertake a careful and thorough assessment of the potential collateral consequences and engage with the relevant regulators early in the process.

C. HEIGHTENED SUSPICIOUS ACTIVITY REPORTING EXPECTATIONS

It is generally understood that even the most diligent of institutions will necessarily miss some suspicious activity. Indeed, “FinCEN and the federal banking agencies recognize that, as a practical matter, it is not possible for a bank to detect and report all potentially illicit transactions that flow through the bank.”⁶⁵ The standard against which financial institutions have historically been assessed is whether “[a]ppropriate policies, procedures, and processes [are] in place to monitor and identify unusual activity.”⁶⁶ With respect to the SAR decisioning process (*i.e.*, whether to file a SAR or not file a SAR), regulators and FinCEN acknowledge that “[t]he decision to file a SAR is an inherently subjective judgment.”⁶⁷ The emphasis, therefore, is to be placed on “whether the bank has an effective SAR decision-making process, not individual SAR decisions.”⁶⁸ Where a bank has an established process, has followed that process, and has determined not to file a SAR, “the bank should not be criticized for the failure to file a SAR unless the failure is significant or accompanied by evidence of bad faith.”⁶⁹

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In January 2014, JPMC entered a DPA with the DOJ and separate settlements with FinCEN and the OCC and was collectively assessed \$2.05 billion in penalties. The DOJ and regulatory settlements centered on JPMC's conduct with respect to accounts at the bank that were used to facilitate Bernard L. Madoff's Ponzi scheme. JPMC was charged with having in its possession information that should have prompted it to file SARs but failing to do so. Among other things, it was found that JPMC had filed the equivalent of a SAR with U.K. authorities, and suspicions about Madoff were shared with U.S. compliance officers, but those compliance officers did not investigate the suspicions and they were not raised with U.S.-based AML compliance staff.

The OCC action followed a January 2013 action by the OCC against JPMC for BSA/AML compliance program deficiencies. The Federal Reserve issued a parallel order at that time. The OCC cited as the basis for the January 2014 action, in which the OCC assessed \$350 million in penalties, deficiencies referenced in the January 2013 action as well as several additional BSA/AML-related issues. The Federal Reserve did not issue a parallel action in January 2014. In announcing FinCEN's parallel action, Director Shasky Calvery stated, "[T]oday's action against JPMorgan is not just about a SAR reporting violation: it's about lost opportunities and the catastrophic consequences that can flow. When JPMorgan failed to file a SAR with FinCEN, an opportunity to stop this fraud was missed."⁷⁰ She also identified this as "an instance where a culture of compliance was lacking at the bank."⁷¹

The actions against JPMC in January 2014 prompted speculation that the government may sanction an institution for failing to file a single SAR in the absence of a systemic failure if the conduct that went unreported is ultimately determined to be sufficiently egregious—even if the bank took appropriate measures to monitor, identify, and report suspicious activity.

Responding to concerns that "the BSA's risk-based regime has become a zero-tolerance regulatory regime," a senior Treasury official recently [explained](#), "Let me be clear. We recognize that it is not possible or practical for a financial institution to detect and report every single potentially illicit transaction that flows through the institution. The BSA and its regulations require financial institutions to, among other things, establish and implement anti-money laundering programs reasonably designed to detect, prevent, and report suspicious activity. As the FATF recently put it 'this does not imply a 'zero-failure' approach'. But it does [demand](#) that financial institutions take seriously the variety of illicit finance risks that different clients present, and design and implement effective [AML] programs that assess and address risk on a client-by-client basis."⁷²

The actions against JPMC also highlight the importance of making sure that the AML compliance function has access to information necessary to satisfy BSA/AML-related obligations and suggest that it is the view of regulators and law enforcement that failing to ensure such access impedes a bank's ability to comply with BSA/AML-related obligations and constitutes a BSA/AML program weakness.

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D. MERGER-AND-ACQUISITION ACTIVITY

During 2014, it was apparent that BSA/AML compliance has become a key factor in a financial institution's ability to receive regulatory approval for merger-and-acquisition ("M&A") transactions. Although BSA/AML compliance has always been a statutory factor to be considered in certain applications, in a [February 2014 Supervisory Letter](#),⁷³ the Federal Reserve noted that a less-than-satisfactory BSA/AML compliance program presents "substantial barriers" to approval of an application. There have been at least two prominent examples of BSA/AML issues causing either the failure or delay of planned acquisitions:

- In August 2014, Bancorp South [disclosed](#) that it expected to enter a Consent Order with the FDIC to address weaknesses in the bank's BSA/AML program. At the same time, the company announced that it had withdrawn applications for two then-pending acquisitions—Ouachita Bancshares and Central Community Corp.—after the Federal Reserve said it would not consider regulatory approval for the acquisitions until the company addressed the issues identified by the FDIC.⁷⁴
- On December 9, 2014, M&T Bancorp ("M&T") and Hudson City Bancorp [announced](#) that they agreed to further extend the date to complete their merger to April 30, 2015. According to the press release, in early 2013, M&T learned that the Federal Reserve identified certain regulatory concerns with M&T's procedures, systems and processes relating to M&T's BSA/AML program, and M&T commenced a major initiative, which is ongoing, intended to fully address the Federal Reserve's concerns. The merger was originally entered into in August 2012.⁷⁵

These two examples show the severe impact that unresolved BSA/AML compliance issues can have on M&A transactions. Regulators have shown a willingness to use a pending application as an opportunity to require the resolution of any open regulatory matters. This has been true even when the open issue is with the target institution. For example, MB Financial's ("MB") acquisition of Taylor Capital Group was delayed while the target's bank subsidiary, Cole Taylor Bank, worked to resolve an outstanding issue with its regulators under the Federal Trade Commission Act. Cole Taylor eventually entered into a consent order with the Federal Reserve and the transaction with MB was consummated in August 2014, 13 months after signing.

In the current regulatory environment, specifically with respect to BSA/AML compliance, the importance of strong pre-signing due diligence cannot be understated. Acquiring institutions have been subjected to regulatory penalties and enhanced scrutiny for actions of entities they have acquired. These penalties include not only fines, but non-monetary sanctions such as ratings downgrades and written agreements, which could have a significant business impact across an acquirer's organization.

Additional discussion concerning the Federal Reserve's Supervisory Letter may be found in our previous [memorandum to clients](#) entitled "Banking Applications: Federal Reserve Provides New Insight Regarding Consideration of Banking Applications and Notices; Announces New Semi-Annual Publication of Banking Application Data."⁷⁶

E. IMPACT ON SMALLER INSTITUTIONS AND OTHER OBSERVATIONS

The heightened expectations by regulators and enforcement agencies around risk management, corporate governance and accountability with respect to BSA/AML and sanctions compliance appear, at least at first blush, to have the most direct impact on large financial institutions (e.g., those with assets of \$10 billion or greater). Only large institutions are formally required to comply with the OCC Guidelines and FRB Standards, and it is large institutions that are typically thought of as having the risk appetite to maintain certain high-risk customers and business lines, and that have been the subject of the most significant public enforcement measures. However, the heightened expectations also have several potential important consequences for smaller financial institutions.

One consequence stems from the “de-risking” phenomenon. When large institutions decide that certain businesses present too much risk in light of the heightened scrutiny and terminate or decline to establish those relationships, the businesses need to take their banking business somewhere. Many are reportedly turning to smaller institutions that may not be subject to similarly heightened scrutiny and may not be equipped to identify and properly manage that risk. Alternatively, these smaller institutions may, like their larger counterparts, simply decide that the benefits do not counterbalance the costs and consequently decide to end (or not establish) relationships with certain high-risk businesses.

Another consequence stems from the increased risk of personal liability for BSA/AML and OFAC compliance-related lapses. As these individuals—in particular AML Compliance Officers—perceive they are at increased personal risk for BSA/AML or OFAC weaknesses, the individuals best suited to handle BSA/AML- and OFAC-related challenges may decide that the risks outweigh the rewards. As a consequence, smaller institutions are bound to face difficulties in finding qualified individuals for their BSA/AML and OFAC functions and, once they find them, may find it hard to retain them. There is already some evidence this is occurring, as salaries for AML Compliance Officers are escalating. Much like the “de-risking” dilemma, for qualified individuals, deciding whether to serve as an AML Compliance Officer will largely turn on a cost-benefit analysis. Absent a realignment of risks and rewards, the difficulties in finding qualified BSA/AML and OFAC compliance staff are likely to continue and, indeed, increase.

II. BSA/AML REGULATORY DEVELOPMENTS

This memorandum has thus far touched on a number of BSA/AML-related regulatory developments, but several additional developments also merit discussion. Arguably the most significant such development is FinCEN’s Proposed CDD Rule, which would impose explicit CDD requirements on financial institutions. Other notable developments are aimed at helping institutions identify and manage BSA/AML-related risks associated with the evolving social and technological landscape in the United States and particular

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money-laundering typologies. Finally, at the end of the year, the FFIEC released an updated BSA Examination Manual.

A. FINCEN PROPOSED CDD REGULATION

After the issuance of an advanced notice of proposed rulemaking (“ANPRM”),⁷⁷ outreach with the industry and other regulatory agencies, and public hearings, on July 30, 2014, FinCEN issued proposed amendments to existing BSA regulations that would contain explicit minimum CDD requirements. CDD is a concept that has not been explicitly stated in the FinCEN regulations, but has been noted in the FFIEC BSA Examination Manual and other guidance as the cornerstone of a strong BSA/AML compliance program. Included in the proposal is a new regulatory requirement that banks and other financial institutions know and verify the identities of the beneficial owners of legal entities. Together with that new requirement, the [Proposed CDD Rule](#) includes four core elements: (1) identifying and verifying the identity of customers; (2) identifying and verifying the beneficial owners of legal entity customers; (3) understanding the nature and purpose of customer relationships; and (4) conducting ongoing monitoring to maintain and update customer information and to identify and report suspicious transactions.⁷⁸ Written comments on the Proposed CDD Rule were received by FinCEN on or before October 3, 2014, and the industry is awaiting FinCEN’s issuance of a final rule.

According to FinCEN, only the beneficial ownership element is new because the requirement to identify and verify the identity of customers is encompassed by the existing Customer Identification Program (“CIP”) rule and the requirements to understand the nature and purpose of an account in order to conduct ongoing monitoring there are inherent in the obligation to report suspicious activity. Under the Proposed CDD Rule, these heretofore implicit expectations would be added to the core provisions of the applicable AML program rules as a new fifth pillar.

With respect to the new beneficial ownership requirement, FinCEN has proposed a “beneficial owner” definition for legal entities that includes: (1) an ownership prong (*i.e.*, the identification of individuals with a 25% or more equity ownership interest) and (2) a control prong (*i.e.*, the identification of individuals with actual managerial control). FinCEN has also proposed that financial institutions be required to use a standard certification form to identify the beneficial owners of its legal entity customers at the time of account opening and to verify the identity of the individuals identified as beneficial owners on the form. The procedures for verification would be identical to the procedures provided under the existing CIP rules. Financial institutions would, however, not be required to verify that the natural persons identified on the form are in fact the beneficial owners. The Proposed CDD Rule would only apply to a legal entity customer that opens a new account with a financial institution, after the date of the implementation of the final rule.

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The codification of heretofore implicit expectations pertaining to CDD and the addition of a fifth pillar to the existing AML program rules suggest that CDD will be an area of continued regulatory interest and prospective enforcement interest. The new beneficial ownership requirements, in particular, would pose challenges to financial institutions, with the challenges perhaps greatest where legal entity customers have complex or opaque ownership and control structures or are domiciled in bank secrecy jurisdictions. It is notable that the Proposed CDD Rule would not require financial institutions to verify that the natural persons identified on the form as beneficial owners are in fact the beneficial owners—an undertaking that would be both difficult and expensive. That notwithstanding, in opening legal entity customer accounts and in conducting ongoing monitoring, institutions would be well advised to be alert to facts or circumstances raising questions or concerns about actual beneficial ownership. Moreover, FinCEN stated that the Proposed CDD Rule establishes *minimum* standards and that “existing or future guidance, regulations or supervisory expectations may provide for additional requirements or steps that should be taken to mitigate risk.” This leaves the door open for bank supervisors to impose even greater CDD requirements.

B. MARIJUANA BUSINESSES

In recent years, numerous states and localities have, to varying degrees, legalized marijuana, thus permitting under state or local law conduct that remains illegal under federal law. This trend is expected to continue, with bills and ballot measures to legalize marijuana garnering traction in several states.

Faced with the increasing decriminalization of marijuana by states and localities, in August 2013, the DOJ issued the [“Cole Memo,”](#)⁷⁹ which provided updated guidance to federal prosecutors on the DOJ priorities for enforcement of marijuana-related offenses under the Controlled Substances Act (the “CSA”).⁸⁰ The Cole Memo reiterates that the distribution and sale of marijuana is a federal offense, and that neither state nor local law provides a legal defense to a violation of federal law. The legalization of marijuana under state and local law and the contrast with its continued illegality under federal law and the DOJ guidance, left financial institutions with the difficult question whether to provide banking services to the newly legal marijuana businesses and, if so, how to do so in a manner consistent with their BSA obligations.

In an attempt to address this situation, in February 2014, FinCEN, in conjunction with the DOJ, issued [guidance](#) to financial institutions outlining how financial institutions can provide services to marijuana-related businesses in a manner consistent with their BSA obligations, including the obligation to report possible criminal activity.⁸¹ The guidance also sought to align the information reported by financial institutions regarding these businesses to the law enforcement priorities highlighted in the Cole Memo by requiring financial institutions to consider the Cole Memo priorities as part of their customer due diligence. Other aspects of customer due diligence on marijuana-related businesses highlighted by FinCEN include verifying the status of any state licenses, reviewing any license application materials, developing an

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understanding for the type of business and customers served, ongoing monitoring of public sources for adverse information and ongoing suspicious activity monitoring.

FinCEN reiterates that because federal law prohibits the distribution and sale of marijuana, financial transactions involving a marijuana-related business would generally involve funds derived from illegal activity and, therefore, require the filing of SARs. Accordingly, FinCEN includes guidance on the filing of SARs regarding these businesses that again attempts to align the information reported by financial institutions to the law enforcement priorities highlighted in the Cole Memo; specifically, a financial institution should file a: (i) "Marijuana Limited" SAR where the marijuana-related business does not implicate one of the Cole Memo priorities or violate state law, or (ii) "Marijuana Priority" SAR where the business implicates one of the Cole Memo priorities or violates state law, and provides a set of "red flags" to assist financial institutions in differentiating between a limited filing and a priority filing. Where a financial institution decides to terminate a relationship with a marijuana-related business, it should file a SAR, with the notation "MARIJUANA TERMINATION" in the narrative section of the SAR. To the extent the financial institution becomes aware that the marijuana-related business seeks to open an account with a second financial institution, FinCEN urges the first institution to use Section 314(b) voluntary information-sharing (if it qualifies) to alert the second financial institution of the potential illegal activity.

To make sure the guidance is implemented, FinCEN has been working closely with its regulatory partners to address the practical issues that may arise as financial institutions provide services to state-authorized marijuana businesses.⁸² The federal banking regulators have not issued formal guidance directly addressing the issue, but have included reference to the FinCEN guidance in the updated FFIEC BSA Examination Manual. FinCEN has indicated that it believes the guidance is having the intended effect of facilitating access to banking services, while increasing transparency. In August 2014, FinCEN Director, Shasky Calvery, noted that over 1,000 marijuana-related SARs were filed in the six months after the guidance was issued and that as of that date, 105 financial institutions appeared to be engaged in banking relationships with marijuana-related businesses.⁸³ FinCEN has also indicated that further guidance is likely in the near future. Regardless, the difficulties state-authorized marijuana businesses encounter in finding a banking partner, and the potential consequences to financial institutions that "bank" them should regulatory or law enforcement sentiment shift, continue to be frequent subjects of discussion.

C. VIRTUAL CURRENCY

On March 18, 2013, FinCEN issued guidance addressing the application of FinCEN's regulations to persons administering, exchanging or using virtual currencies. In the guidance, FinCEN explains that an administrator or exchanger of virtual currency that accepts and transmits a convertible virtual currency or buys or sells convertible virtual currency is a money transmitter (unless there is a limitation to or exemption from the definition that applies), which falls within FinCEN's definition of an MSB. As such, these persons are required to register with FinCEN and are subject to the full range AML program,

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record-keeping, and reporting requirements that apply to MSBs. In contrast, under the [guidance](#), “a user who obtains convertible virtual currency and uses it to purchase real or virtual goods or services is not an MSB under FinCEN’s regulations.”⁸⁴ The federal banking regulators acknowledged this guidance in the updated FFIEC BSA/AML Examination Manual.

On January 30, 2014, FinCEN issued [two rulings](#), interpreting the March 18, 2013 guidance.⁸⁵ The first ruling provides that, to the extent a user creates or “mines” a convertible virtual currency solely for a user’s own purposes and not for the benefit of another, the user is not an MSB under the BSA because these activities involve neither “acceptance” nor “transmission” of the convertible virtual currency and are not the transmission of funds within the meaning of FinCEN’s regulations. FinCEN explains in this [ruling](#) that “[w]hat is material to the conclusion that a person is not an MSB is not the mechanism by which a person *obtains* the convertible virtual currency, but what the person uses the convertible virtual currency for, and for whose benefit.”⁸⁶ Similarly, a user who converts virtual currency into a real currency or another convertible virtual currency will not be a money transmitter as long as the user is undertaking the conversion transaction solely for the user’s own purposes and not as a business service performed for the benefit of another. In the [second ruling](#),⁸⁷ FinCEN addresses whether the periodic investment by a company in convertible virtual currency, and the production and distribution of software to facilitate the company’s purchase of virtual currency for its own investment, would make such company an MSB. FinCEN concludes that such conduct by a company in and of itself does not mean the company is an MSB, even if the purpose of the software is to facilitate the sale of virtual currency. FinCEN also concludes that the periodic investment in convertible virtual currency by a company strictly for its own account would not make such company an MSB.

On October 27, 2014, FinCEN issued two more rulings on the application of FinCEN’s regulations to convertible virtual currency, further interpreting the March 18, 2013 guidance. In its [first ruling](#), FinCEN addresses whether a credit-card company is considered an MSB under the BSA where the payment mechanism between a merchant and the company is structured such that a customer’s payment goes to the company rather than the merchant, with the company later transferring the equivalent in virtual currency to the merchant.⁸⁸ FinCEN explains that, in this scenario, the company is an exchanger of convertible virtual currency under the March 18, 2013 guidance, and is, therefore, an MSB subject to the BSA, because it engages as a business in accepting and converting the customer’s real currency into virtual currency for transmission to the merchant, regardless of whether the company purchases and stores large quantities of the virtual currency that the company then uses to pay the merchant.

In its [second ruling](#), FinCEN addresses whether a company that sets up a convertible virtual currency trading and booking platform is an MSB subject to the BSA.⁸⁹ The platform is described as consisting of a trading system to match offers to buy and sell convertible virtual currency for currency of legal tender, and a set of book accounts in which prospective buyers or sellers of one type of currency or the other can

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deposit funds to cover their exchanges. A customer will submit an order to the company to purchase or sell the currency deposited at a given price. The platform will automatically attempt to match each purchase order of one currency to one or more sell orders of the same currency. FinCEN found that in each trade conducted through the platform, money transmission occurs between the company and the customer wishing to buy virtual currency, and another between the company and the customer wishing to sell such virtual currency at the same exchange rate, thereby making the company that set up the platform an MSB subject to the BSA.

On July 17, 2014, the DFS became the first state regulator to [release](#) a proposed “BitLicense” regulatory framework, by proposing that “BitLicenses” be required for firms engaging in certain virtual currency transactions and that certain requirements be imposed on firms holding BitLicenses.⁹⁰ The proposed framework contains consumer protection, AML compliance and cyber security rules tailored for virtual currency firms.

On December 16, the Conference of State Bank Supervisors (“CSBS”) followed with its own [policy statement](#) on state virtual currency regulation, and a draft model regulatory framework.⁹¹ CSBS adopted a policy that recommends that activities involving third-party control of virtual currency, including for the purposes of transmitting, exchanging, holding or otherwise controlling virtual currency, should be subject to state licensure and supervision. To support this policy on state regulation of virtual currency and to promote consistent state regulation of virtual currency activities, CSBS has developed a draft Model Regulatory Framework that includes licensing, consumer protection, market stability, AML, and cybersecurity requirements for state-licensed virtual currency firms. CSBS stresses the importance of applying the draft framework requirements in a manner that includes flexibility to adapt regulation and oversight to yet unforeseen changes, to address new risks and to facilitate and not inhibit continued innovation. CSBS has requested comments on the draft framework by no later than February 16, 2015.

In June 2014, the FATF published a [report](#) on virtual currencies, suggesting a conceptual framework for understanding and addressing the AML risks associated with virtual currencies by, among other things, identifying the potential risks of virtual currency, describing some recent investigations and enforcement efforts involving virtual currency, and presenting a sample of jurisdictions’ current regulatory approaches to virtual currency.⁹²

Several benefits are often cited in support of the legitimate use of virtual currency, including increased payment efficiency and lower transaction costs. At the same time, virtual currency is often touted for its anonymous nature, making it a prime target for exploitation by money launderers. As virtual currency gains greater mainstream acceptance, financial institutions will be faced with a number of interesting BSA/AML- and OFAC-related questions and challenges. For example, it is unclear how a financial institution should assess a customer’s balance sheet when assets or liabilities include virtual currency. It

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will be critical for financial institutions that choose to do business with virtual currency users, administrators, and exchangers to appropriately assess and manage the BSA/AML and OFAC-related risks associated with those relationships.

D. GUIDANCE ON FUNNEL ACCOUNTS AND TRADE-BASED MONEY-LAUNDERING SCHEMES

After currency restrictions were put into place in Mexico in 2010, thus limiting deposits of U.S. cash in Mexican banks, the U.S. federal government observed an increase in “funnel account” activity.⁹³ Funnel account activity occurs when a bank account in one geographic area receives multiple cash deposits, often in amounts below the \$10,000 threshold for reporting cash transactions, and those deposits are followed shortly thereafter by withdrawals in a different geographic area. The federal banking regulators referenced “funnel accounts” as one of the activities identified by law enforcement that may be associated with currency smuggling in the updated FFIEC BSA Examination Manual. Funnel accounts can be used to facilitate money-laundering activity, including to finance the purchase of goods as part of trade-based money-laundering (“TBML”) activity.

On May 28, FinCEN issued an advisory updating financial institutions on the increased use of funnel accounts as part of TBML schemes.⁹⁴ In the advisory, FinCEN lists the typical steps followed when funnel accounts are being used in conjunction with TBML. In short, an individual opens a bank account in the United States. Multiple individuals acting on behalf of a criminal organization then deposit the cash proceeds of narcotics sales, typically in amounts less than \$10,000, into the account at different, geographically distant branches of the bank at which the account was opened. After a number of deposits, an intermediary will transfer funds from the funnel account to a business to purchase goods that are then shipped to foreign countries for sale. When the purchased goods arrive at the destination country, they are sold and the sale proceeds, which are in the destination country’s currency, are transferred to the criminal organization.

This scheme is designed to make funds obtained illicitly in the United States look as though they are legitimate. In the advisory, FinCEN lists “red flags” that may be indicative of the use of funnel accounts in conjunction with a TBML scheme. FinCEN also provides guidance on completing SARs with respect to possible funnel account activity and TBML schemes, as well as when there is a possible connection between the suspicious activity being reported and the U.S. currency restrictions on Mexican financial institutions.

E. GUIDANCE ON HUMAN SMUGGLING AND HUMAN TRAFFICKING

In September 2014, FinCEN issued an advisory that includes a comprehensive list of red flags that financial institutions should be aware of when identifying and reporting suspicious activity connected to human smuggling and human trafficking.⁹⁵ These red flags occur at both the transactional level (behavior observed as part of account activity) and at the customer level (behaviors observed while interacting with

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the public, such as when a customer visits a branch). In the advisory, FinCEN encourages financial institutions to review transactions at the relationship level rather than just the account level, thus permitting the institution to analyze a customer's transactions across multiple accounts instead of reviewing transactions that are conducted solely through one account, and points to direct interactions between branch personnel and customers as a way to alert financial institutions to human smuggling- or trafficking-related activity.

F. BSA/AML EXAMINATION MANUAL UPDATE

On December 2, 2014, the FFIEC released the 2014 BSA Examination Manual.⁹⁶ The revised manual was done in collaboration with state regulators, FinCEN and OFAC. It provides current guidance on risk-based policies, procedures, and processes for banking organizations to comply with the BSA and safeguard operations from money-laundering and terrorist financing. The 2014 version further clarifies supervisory expectations and regulatory changes since the last update of the manual in 2010. These changes to the manual are summarized in the [Interagency Statement](#).⁹⁷

While most of the significant changes to the manual are summarized in the Interagency Statement, there are other notable updates to the manual that were not referenced in the statement. First, the federal banking regulators added a fifth component— “Monitoring and SAR filing on continuing activity”—to the existing four components that a bank should successfully implement in order to have an effective suspicious activity monitoring and reporting system. Second, the federal banking regulators state, in the context of evaluating a consolidated BSA/AML compliance program, that “[i]f dissemination of certain information [among affiliates] is limited and therefore transparency across the organization is restricted, audit [departments] should be aware and ensure AML controls are commensurate with those risks.” This, to a certain extent, reinforces the emphasis on ensuring that a bank's BSA/AML compliance function has access to pertinent information in the FinCEN Advisory to U.S. Financial Institutions on Promoting a Culture of Compliance. Third, in the updated manual, the regulators emphasize the importance of “independence” in conducting testing of a BSA compliance program, stating that banks that employ outside auditors or consultants to conduct the independent testing of the effectiveness of their BSA compliance program “should ensure that qualified persons doing the BSA/AML testing are not involved in other BSA functions such as training or developing policies and procedures that may present a conflict or lack of independence.” In addition, the manual now specifically directs banks to the advisories issued by regulatory or law enforcement agencies as a method they may use to identify potentially suspicious activity.

The updated manual also includes certain modifications related to OFAC compliance program expectations, including the addition of “concentration accounts”—which are defined as internal accounts established to facilitate the processing and settlement of multiple or individual customer transactions within the bank, usually on the same day,” and are known as special-use, omnibus, suspense, settlement,

intraday, sweep, or collection accounts—to the examples of products and services that may carry a higher level of OFAC risk.

III. U.S. SANCTIONS

A. PROGRAM DEVELOPMENTS

Over the course of 2014, the Obama Administration introduced three new sanctions programs of varying complexity—addressing situations in Ukraine, Central African Republic and South Sudan—and expanded sanctions regarding the Democratic Republic of Congo. OFAC introduced two new lists of sanctions targets—the Foreign Sanctions Evaders List and the Sectoral Sanctions Identification List.

With one notable exception—the sanctions program with regard to the Crimea region of Ukraine (“Crimea”)—these new programs followed the trend of other recent U.S. sanctions programs. These programs target select individuals, entities and industries in order to apply concentrated pressure on “bad” actors, isolating them and making it harder for them to continue their activities by making it very difficult or impossible to interact with U.S. persons and non-U.S. persons who have a significant U.S. presence or ties to the United States. In addition, other actors in the international financial system often also shun the bad actors as a matter of risk appetite, even if not required to do so by law. Although there are many positive aspects to the targeted sanctions approach, these programs have a tendency to be more complex in application, which can make compliance more challenging. As an illustration, when certain Russian nationals were identified as specially designated nationals (“SDNs”) under the new Ukraine-related sanctions, U.S. financial institutions needed to investigate and understand the level of ownership that those SDNs held in Russian companies with which those U.S. institutions may have business relationships. Under applicable OFAC guidance, entities may be treated as SDNs because of ownership by SDNs, even if the entity is not separately listed. In part prompted by questions that arose under the initial designations of Russian individuals in the Spring of 2014, OFAC revisited its SDN ownership guidance, and published a revision of that guidance in August 2014.

The Ukraine-related sanctions also marked the birth of a new OFAC-based sanctions program—so-called “sectoral sanctions” pursuant to which certain entities were identified as targets of sanctions not specifically because of their activities in connection with the situation in Ukraine, but because of the sector of the Russian economy in which they operate. The sectoral sanctions further sharpen targeted sanctions tools to target only certain activities of persons that are large and interconnected, for which a blanket prohibition on interaction with U.S. persons could have significant consequences for the broader economy. While avoiding these consequences, these sanctions can be quite complex in application.

With regard to Iran, enforcement remained a priority in 2014, but for the first time in a number of years, no material new sanctions were adopted. Although essentially comprehensive Iran-related sanctions have

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been in place since 1995, beginning in 2010 with the enactment of the Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010 (“CISADA”), the U.S. Congress has adopted a series of measures designed to use the threat of sanctions to present non-U.S. banks and other non-U.S. entities not directly subject to U.S. law with a stark choice—cease engaging in targeted activities with Iran and Iranian parties or face sanctions, including the denial of access to the U.S. financial system. CISADA was followed by the National Defense Authorization Act for Fiscal Year 2012 (the “NDAA”) and the Iran Threat Reduction and Syria Human Rights Act of 2012 (the “ITRSHRA”).⁹⁸ In addition to providing for additional sanctions provisions, the ITRSHRA created disclosure requirements for issuers required to file annual or quarterly reports under Section 13 of the Exchange Act of 1934. The required disclosure includes whether the issuer or its affiliates knowingly engaged in a number of the activities sanctionable under the Iran Sanctions Act of 1996, as amended (“ISA”) or conducted any transaction or dealing with persons whose assets are blocked under various sanctions related to Iran, or the Government of Iran. Additional discussion concerning these disclosure requirements may be found in our previous [memorandum to clients](#) entitled “Exchange Act Requires Issuers to Disclose Iran-Related Activities: Disclosures Required in Reports Due to Be Filed On or After February 6, 2013.”⁹⁹ Together, CISADA, the NDAA and ITRSHRA added strong disincentives for non-U.S. firms to provide energy-related services, insurance and reinsurance services, financial and shipping services to Iran.

In the face of these new U.S. sanctions, as well as new national sanctions in the member states of the European Union and elsewhere, on November 24, 2013, the United States and its partners in the P5+1 (China, France, Germany, Russia and the United Kingdom, coordinated by the European Union’s High Representative) reached an initial understanding with Iran, outlined in a Joint Plan of Action (“JPOA”). The JPOA included Iran’s commitment to place meaningful limits on its nuclear program, and the P5+1 committed to provide Iran with limited, targeted and reversible sanctions relief. In furtherance of the U.S. Government’s commitments under the JPOA, the U.S. Department of State and the U.S. Department of the Treasury implemented sanctions relief relating to certain activities and associated services taking place exclusively during the six-month period beginning on January 20, 2014, and ending July 20, 2014. The JPOA was renewed by mutual consent of the P5+1 and Iran on July 19, 2014 and again on November 24, 2014, and the temporary sanctions relief provided under the JPOA is currently scheduled to run through June 30, 2015. During this temporary relief period, there have been no material new Iran sanctions adopted by the Executive Branch and no material consideration of new Iran sanctions legislation in the U.S. Congress. However, at least some members of Congress have expressed a desire to move forward with additional Iran-related measures, and there may be legislative developments in the 114th Congress.

2014 also brought the promise, but not yet the actualization, of sanctions relief with respect to Cuba, although the details were released in revised regulations by OFAC and the Department of Commerce’s

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Bureau of Industry and Security on January 15, 2015. Although the easing of sanctions is designed to empower the Cuban people, promote business with the Cuban private sector and promote democratic change, the sanctions easing is at the margins of the overall Cuban embargo, which has been codified into U.S. statutory law and remains in effect.

Although the U.S. Congress refrained from adopting significant new sanctions measures with regard to Iran, the U.S. Congress remained active in the sanctions area generally. Most notably, the Ukraine Freedom Support Act of 2014 and the Venezuela Defense of Human Rights and Civil Society Act of 2014 were adopted, each of which require or authorize the President of the United States to impose new sanctions in certain conditions.

The discussion below highlights developments in U.S. sanctions programs that we believe are most likely to have a significant impact on financial institutions.

1. Ukraine/Russia/Crimea

Over the course of 2014, the Obama Administration imposed several rounds of sanctions that escalated in severity in an effort to address events in eastern Ukraine and Russia's perceived failure to take steps to stabilize the situation. Notable among these were the imposition of a new type of "sectoral sanctions" against certain entities operating in the financial, energy and defense sectors of the Russian economy, and a ban on new investment and trade with Crimea, which has been occupied by Russia since March 2014. The multiple rounds of sanctions have been undertaken in close coordination with the European Union, and that cooperation is expected to continue. In addition, in an effort to further pressure Russia to cease its support of separatists in Ukraine, Congress approved the Ukraine Freedom Support Act of 2014 ("UFSA") with broad bipartisan support. As discussed below, UFSA provides the Obama Administration with the authority to significantly expand the targets of Ukraine-related sanctions, including to non-Russian and Ukrainian foreign persons. Additional discussions concerning these Ukraine-related sanctions, which are addressed below, may be found in our previous memoranda to clients.¹⁰⁰

a. Executive Orders

During 2014, President Obama issued four executive orders authorizing the imposition of sanctions to address the conflict in Ukraine (the "Ukraine Executive Orders"). Of note, on March 20, 2014, President Obama issued an executive order authorizing sanctions to be imposed on certain sectors of the Russian economy identified by the Treasury, such as the defense and energy sectors. This was the first time that OFAC was authorized to target specific sectors of a nation's economy for sanctions, and OFAC has issued novel types of sanctions under this authority.

On March 6, 2014, President Obama issued [Executive Order 13660](#) ("E.O. 13660").¹⁰¹ E.O. 13660 authorizes the Department of the Treasury to impose "asset-blocking" sanctions, discussed below, on

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individuals and entities (collectively referred to as “persons”) determined, among other things: (i) to be responsible for or complicit in, or to have engaged in, various activities, including misappropriation of state or other assets in Ukraine,¹⁰² activities that undermine democratic processes or institutions in Ukraine or activities that threaten the peace, security, stability, sovereignty or territorial integrity of Ukraine; or (ii) to have asserted governmental authority over any part or region of Ukraine without the authorization of the Government of Ukraine.

On March 17, 2014, President Obama issued the second of the Ukraine Executive Orders, [Executive Order 13661](#) (“E.O. 13661”),¹⁰³ which addresses actions of the Russian Federation that threaten the stability of Ukraine, such as the deployment of Russian Federation military forces in Crimea. E.O. 13661 authorizes the imposition of asset-blocking sanctions against officials of the Government of the Russian Federation and persons operating in the arms and related material sectors of the Russian Federation, among others.

On March 20, 2014, President Obama issued the third Ukraine Executive Order, [Executive Order 13662](#) (“E.O. 13662”),¹⁰⁴ the authority under which OFAC has imposed sectoral sanctions, to address the Government of the Russian Federation’s purported annexation of Crimea and its use of force in Ukraine. E.O. 13662 authorized the Department of the Treasury to impose sanctions against persons determined to be operating in particular sectors of the Russian economy, such as financial services, energy, metals and mining, engineering and defense and related materials. OFAC’s implementation of the sectoral sanctions is discussed further in part b.ii of this section, below.

Finally, on December 19, 2014, President Obama issued the fourth executive order, [Executive Order 13685](#) (“E.O. 13685”),¹⁰⁵ to address Russia’s continued occupation of Crimea. E.O. 13685 prohibits: (i) new investment in Crimea by U.S. persons;¹⁰⁶ (ii) the importation into the United States of any goods, services or technology from Crimea; (iii) the exportation, reexportation, sale or supply from the United States or by a U.S. person, wherever located, of any goods, services or technology to Crimea; and (iv) the facilitation by a U.S. person of any transaction by a foreign person that would be prohibited for a U.S. person to engage in directly. E.O. 13685 further authorizes OFAC to impose asset-blocking sanctions on, among others, persons determined to be operating in Crimea or leaders of an entity operating in Crimea.

In connection with the release of E.O. 13685, OFAC has issued two Ukraine-related general licenses. [General License 4](#) allows, subject to conditions and limitations, the exportation and reexportation from the United States or by a U.S. person of agricultural commodities, medicine, medical supplies and replacement parts for medical supplies to Crimea or to persons in third countries for resale to Crimea, as well as transactions related to actions permitted by the license, such as shipping, insurance, financing and payments.¹⁰⁷ Subject to conditions, limitations and reporting requirements, [General License 5](#)

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authorizes, through 12:01 a.m. eastern daylight time on February 1, 2015, transactions and activities otherwise prohibited by E.O. 13685 that are ordinarily incident and necessary to the winding down of operations, contracts or other agreements that were in effect prior to December 20, 2014.¹⁰⁸

Generally, the Ukraine Executive Orders also authorize the Department of the Treasury to impose sanctions on any persons determined to have materially supported or provided goods or services to the persons and activities targeted by Ukraine-related sanctions in an attempt to discourage persons from providing such goods or support. The Ukraine Executive Orders also suspend entry into the United States of any aliens that are sanctioned pursuant to their authority.

b. Implementation of the Ukraine Executive Orders and the Sergei Magnitsky Rule of Law Accountability Act of 2012

i. Asset-Blocking Measures Under E.O. 13660 and E.O. 13661

To date, OFAC has designated 117 persons, consisting of 43 entities and 74 individuals, as subject to asset blocking under the authority of E.O. 13660 and E.O. 13661. Persons subject to asset blocking are identified by OFAC's [List of Specially Designated Nationals and Blocked Persons](#) (the "SDN List")¹⁰⁹ and are generally referred to as "SDNs." Notable persons designated as SDNs under the Ukraine Executive Orders include, among others: numerous senior officials of the government of the Russian Federation; members of President Putin's inner circle; several Russian banks, including Bank Rossiya, which reportedly is the personal bank for several senior officials of the Russian Federation, and several entities that appear to have ties to Bank Rossiya; numerous Russian arms firms; various separatist groups operating in Ukraine and individuals associated with such groups; and Igor Sechin, the President of Rosneft, Russia's leading petroleum company (although Rosneft itself is not designated as an SDN).

Absent an exemption or license, it is unlawful for any U.S. person (including any U.S. branch or agency of a foreign bank) to do business with any SDN, and any property that is in the United States or within the possession or control of a U.S. person in which any SDN has an interest must be blocked, imposing an across-the-board prohibition against transfers or dealings of any kind with regard to such property. U.S. persons are prohibited from providing funds, goods or services to or for the benefit of any SDN and from receiving any funds, goods or services from any SDN.

ii. Sectoral Sanctions Measures under E.O. 13662

On July 16, 2014, OFAC first exercised its authority under E.O. 13662 to impose targeted "sectoral sanctions" on certain persons determined to be operating in particular sectors of Russia's economy. At that time, the sectoral sanctions targeted Russia's financial and energy sectors, and only two entities operating within each sector. Subsequently, in July and September 2014, OFAC subjected additional entities operating in Russia's energy and financial sectors to sectoral sanctions. Additionally, in September 2014, OFAC amended the sanctions applicable to certain entities in Russia's financial sector,

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imposed sanctions for the first time on certain entities operating in Russia's defense and materiel sector, and imposed prohibitions on exporting goods or services related to complex oil extraction projects in Russia.

OFAC has implemented the sectoral sanctions in the form of four "directives" that impose targeted sanctions against entities identified by OFAC as operating in the Russian financial, energy and defense and materiel sectors. The [Sectoral Sanctions Identification List](#) ("SSI List")¹¹⁰ identifies the persons targeted by OFAC's sectoral sanctions. The sanctions are also applicable to any entity owned 50 percent or more in the aggregate by one or more SSI List entity. The SSI List also identifies which directives are applicable to the SSI List entities. There are currently 14 entities on the SSI List that are subject to one or more of the directives of the sectoral sanctions.

- ***Financial Sector Debt/Equity Restrictions:*** Directive 1 (applicable to identified financial sector companies) was issued on July 16, 2014 and, at that time, prohibited providing financing for, or otherwise dealing in (including provision of services in support of), "new debt" with a maturity of longer than 90 days or "new equity" by, on behalf of, or for the benefit of, the targeted firms. On September 12, 2014, OFAC amended Directive 1 to shorten the maturity of prohibited "new debt" from 90 to 30 days.
- ***Energy Sector Debt Restrictions:*** Directive 2 (applicable to identified energy sector companies) prohibits providing financing for, or otherwise dealing in (including the provision of services in support of), "new debt" with a maturity of longer than 90 days by, on behalf of, or for the benefit of, the targeted firms.
- ***Defense and Materiel Sector Debt Restrictions:*** Directive 3 (applicable to identified defense and materiel sector companies) prohibits providing financing for, or otherwise dealing in (including the provision of services in support of), "new debt" with a maturity of longer than 30 days by, on behalf of, or for the benefit of, the targeted firms.
- ***Energy Sector Export Restrictions:*** Directive 4 (applicable to the identified Russian energy sector companies) prohibits the provision, exportation or reexportation of goods, services (except for financial services) or technology by U.S. persons or within the United States in support of exploration or production for deepwater, Arctic offshore or shale projects that have the potential to produce oil in the Russian Federation and that involve any of the targeted firms.

Compliance with the sectoral sanctions is generally limited to U.S. persons and transactions that implicate U.S. jurisdiction. For purposes of Directives 1, 2 and 3, "new" debt and equity is measured by reference to the effective date of the sanctions with regard to each SSI List entity. The terms "debt" and "equity" are broadly interpreted by OFAC.

Given the novel compliance issues created by the sectoral sanctions, OFAC issued a number of [frequently asked questions](#) ("FAQs")¹¹¹ throughout 2014 that provide guidance on the applicability of the sectoral sanctions to various situations. OFAC also issued a number of licenses authorizing transactions otherwise prohibited by the sectoral sanctions, including a [general license](#)¹¹² which authorizes certain transactions involving derivative products that would otherwise be prohibited pursuant to Directives 1, 2 or 3.

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c. Export Controls

In measures that complement the actions taken by OFAC, in 2014, the Commerce Department's Bureau of Industry and Security ("BIS") and the State Department's Directorate of Defense Trade Controls ("DDTC") imposed additional restrictive measures on exports to Russia in response to Russia's continued actions in Ukraine.

On April 28, 2014, BIS, which administers the Export Administration Regulations (the "EAR") controlling the transfer of U.S.-origin "dual-use" goods and services (*i.e.*, goods or services that have both civilian purposes and potential military applications), [announced](#) that it will deny pending applications for licenses to export or re-export any "high technology" item subject to the EAR to Russia or occupied Crimea that contribute to Russia's military capabilities and that it is taking actions to revoke any existing export licenses that meet these conditions.¹¹³ Also on April 28, BIS added 13 Russian companies, all of which had been designated by OFAC as SDNs, to its [Entity List](#),¹¹⁴ which imposes licensing requirements for the export, re-export or other foreign transfer of any item subject to the EAR to those companies, with a presumption of denial. In addition, on April 28, DDTC [announced](#) expanded export restrictions on technologies and services regulated under the International Traffic in Arms Regulation's ("ITAR") U.S. Munitions List ("USML").¹¹⁵ DDTC announced that it will deny pending applications for export or re-export of any high-technology defense articles or services regulated under the USML to Russia or occupied Crimea that contribute to Russia's military capabilities, and that it is taking actions to revoke any existing export licenses meeting these conditions. All other pending applications and existing licenses will receive a case-by-case evaluation to determine their contribution to Russia's military capabilities. Both the BIS and DDTC had, in March 2014, placed "holds" on issuing licenses for exports or reexports of items controlled under the EAR or ITAR, respectively, to Russia.

On July 29, 2014, BIS further restricted trade with Russia. In an action that would be reinforced by Directive 4 of OFAC's sectoral sanctions and the provisions of UFGA, BIS [announced](#) a policy of denying the export, reexport or foreign transfer of items for use in Russia's energy sector that may be used for exploration or production from deep water, Arctic offshore or shale projects that have the potential to produce oil.¹¹⁶ In addition, on July 29, BIS added United Shipbuilding Corporation—an entity also added by OFAC to its SDN List—to its Entity List.

d. Ukraine Freedom Support Act of 2014 ("UFGA")

UFGA, enacted on December 18, 2014, is a congressional initiative designed in part to deter the Government of the Russian Federation from further destabilizing the situation in Ukraine. UFGA significantly expanded the potential scope of Ukraine-related sanctions targets by authorizing President Obama to impose sanctions against any foreign person that engages in certain transactions in the energy and defense sectors of the Russian economy or with persons sanctioned under Ukraine-related

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sanctions. The Obama Administration, however, released a [statement](#) that it does not currently intend to impose sanctions under UFSA, noting that the additional authorities of UFSA could be used if circumstances warrant.¹¹⁷

Similar to Iran-related sanctions targeting foreign financial institutions (“FFIs”) dealing with Iran, UFSA authorizes the President to impose sanctions against FFIs that knowingly engage in or facilitate certain “significant” transactions involving foreign persons that have been sanctioned under UFSA or with persons designated as an SDN under UFSA and other U.S. sanctions related to Ukraine. FFIs sanctioned under UFSA may be prohibited from, or subjected to strict conditions regarding, opening or maintaining a correspondent account or a payable-through account in the United States.

Additionally, UFSA requires the President to impose sanctions relating to Russia’s defense sector, including sanctions against Russia’s main weapons exporter, Rosoboronexport. UFSA also requires the President to impose sanctions against foreign entities owned or controlled by the Government of the Russian Federation or nationals of the Russian Federation providing defense articles to Ukraine and certain other countries without the consent of those countries’ internationally recognized governments, and against foreign persons that knowingly assist or support such activities.

Regarding Russia’s energy sector, UFSA authorizes the President to sanction foreign persons that knowingly make significant investments in certain complex crude oil extraction projects in Russia. UFSA also requires the President to impose sanctions on Gazprom if Gazprom withholds “significant” natural gas supplies from Ukraine or other enumerated countries.

The President is authorized to waive the application of sanctions under UFSA based on, among other things, national security concerns. Whether the United States imposes sanctions under UFSA will likely depend on both Russia’s future course of action and whether the European Union chooses to adopt similar measures. Notably, in December 2014, the European Union elected not to impose new sanctions on Russia, citing concerns about Russia’s economy. To date, no sanctions have been imposed under UFSA.

e. Magnitsky Act

On May 20, 2014, OFAC [announced](#) that it had designated 12 individuals as SDNs under the [Sergei Magnitsky Rule of Law Accountability Act of 2012](#) (the “Magnitsky Act”), which was the second group of SDNs designated pursuant to the Magnitsky Act.¹¹⁸ The Magnitsky Act was enacted in response to the death of Russian lawyer Sergei Magnitsky and requires sanctions to be imposed on persons determined to be involved in Magnitsky’s abuse, death or detention or the concealment thereof and on persons determined to be responsible for violations of human rights committed against individuals seeking to expose illegal activity by officials of the Russian Federation Government, among others. The May 20th

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designations included Russian prison, judiciary and law enforcement officials, as well as persons that participated in the criminal conspiracy uncovered by Magnitsky. On December 29, 2014, OFAC [added four individuals](#) to its SDN List pursuant to the Magnitsky Act.¹¹⁹ OFAC had previously designated 18 individuals as SDNs in 2013 pursuant to the Magnitsky Act. Section b.i of this section, above, discusses restrictions on dealings with SDNs.

2. Cuba

On December 17, 2014, the Obama Administration [announced](#) that it intended to normalize diplomatic and economic relations with Cuba.¹²⁰ On January 15, 2014, OFAC and BIS issued revised [regulations](#), effective January 15, 2015, to implement these changes. These measures will facilitate travel to Cuba by U.S. persons, facilitate the provision of authorized travel services and the forwarding of authorized remittances, raise the limits on remittances to Cuba, allow U.S. financial institutions to open correspondent accounts at Cuban financial institutions, authorize certain transactions with Cuban nationals located outside of Cuba, and allow a number of other activities. For more information, see our [memorandum to clients](#) entitled “United States Eases Elements of Cuban Embargo; New Regulations Issued by U.S. Treasury and Commerce Departments Implement Cuban Policy Changes Announced in December.”¹²¹

3. Iran

On November 24, 2013, the United States and its partners in the P5+1 (Russia, China, the United Kingdom, France and Germany) reached an initial understanding with Iran, outlined in a [Joint Plan of Action](#) (the “JPOA”),¹²² designed to halt or reverse progress on Iran’s nuclear program. The JPOA marks the first time in nearly a decade that Iran agreed to specific actions to stop the advance of its nuclear program, which may reflect the effectiveness of broad-based U.S. sanctions imposed on Iran. In return for Iran’s commitment to place meaningful limits on its nuclear program, the P5+1 committed to providing Iran with limited, targeted and reversible sanctions relief for a six-month period beginning on January 20, 2014. OFAC published [guidance](#) regarding the implementation of the JPOA on January 20, 2014, which provides that, for a six-month period, OFAC will refrain from imposing certain sanctions on foreign persons that engage in transactions relating to Iran’s purchase and sale of gold and other precious metals, Iran’s export of petrochemical products and Iran’s automotive industry.¹²³ The relief also applies to “associated services,” including insurance, transportation or financial services, ordinarily incident to the underlying activity covered by the JPOA. OFAC also noted that it will temporarily allow U.S. persons to engage in certain transactions related to Iran’s civil aviation industry.

With the exception of civil aviation and certain humanitarian activities, U.S. persons, and in applicable cases their foreign subsidiaries, may not be involved in any activity for which sanctions are temporarily

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suspended. In addition, the sanctions relief generally applies only to transactions conducted entirely within the JPOA period.

On July 19, 2014, the P5+1 and Iran announced that the JPOA had been renewed until November 24, 2014—which OFAC detailed in a [press release](#) on July 21, 2014¹²⁴—and on November 24, 2014, the JPOA was [extended](#) once again through June 30, 2015 to allow the P5+1 and Iran to continue to negotiate a long-term comprehensive solution.¹²⁵ JPOA sanctions relief notwithstanding, Iran sanctions remain broad in scope, and OFAC’s guidance noted that it intends to “vigorously enforce our sanctions against Iran.” David S. Cohen, Under Secretary for Terrorism and Financial Intelligence, emphasized this point in a statement accompanying the announcement that nine individuals and entities had been designated under the existing Iran-related sanctions authorities on December 30, 2014: “Although we do not support the imposition of any new nuclear-related sanctions while negotiations are ongoing, throughout the JPOA period we have made clear, by word and deed, that we will continue to enforce our existing sanctions.”¹²⁶ The December 30th designations followed other Iran-related additions to the SDN List on August 29, 2014,¹²⁷ to which Iran responded with outrage. President Rouhani, in response to the new designations, tweeted, “The recent measures taken against []Iran by the [United States] are against the spirit of the Joint Plan of Action and confidence building.”¹²⁸

4. Foreign Sanctions Evaders List

On February 6, 2014, OFAC [introduced](#) a new list of persons targeted by U.S. sanctions, called the [Foreign Sanctions Evaders List](#) (the “FSE List”), and added 11 persons to the FSE List.¹²⁹ The FSE List identifies foreign persons sanctioned under [Executive Order 13608](#) for engaging in conduct relating to the evasion of U.S. sanctions on Iran and Syria.¹³⁰ The FSE List was first announced in May 2012, but until February 6, 2014, it consisted of a single entity. On December 17, 2014, OFAC added another six persons to the FSE List.

With the addition of the FSE List in February 2014 and the SSI List in July 2014, OFAC now maintains six lists of sanctions-targeted persons, that, as a general matter, U.S. companies and others should screen when engaging in international business or cross-border transactions. OFAC recently created a [Consolidated Sanctions List](#),¹³¹ which offers all of its lists other than the SDN List in a consolidated data file. Financial institutions’ sanctions-prevention efforts will be further aided by the release of a new format of the SDN List on January 5, 2015.¹³² The new format, developed in consultation with the U.N. and the Wolfsberg Group of International Banks, recognizes additional alphabets and takes into account the unique name and nomenclature rules of various cultures, languages and regions.

U.S. persons generally are prohibited from all transactions or dealings involving persons identified on the FSE List in or related to any goods, services (including financial services), or technology (1) in or intended for the United States, or (2) provided by or to U.S. persons, wherever located. Thus the restrictions

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generally bar U.S. persons from doing almost all types of business with entities on the FSE List. In its February 6, 2014 announcement, OFAC clarified that U.S. persons are *not* required to block the property of FSE List entities, unless such entities are sanctioned under other authority requiring asset blocking. However, financial institutions receiving a wire transfer involving an FSE List party must reject the wire transfer and report the rejection to OFAC.

5. Central African Republic

In May 2014, following a unanimous decision by the U.N. Security Council to sanction individuals fueling violence in the Central African Republic, President Obama introduced new U.S. sanctions to address political unrest and sectarian violence in the Central African Republic. On May 13, 2014, President Obama issued [Executive Order 13667](#) (“E.O. 13667”) which imposes asset-blocking sanctions and travel bans on five Central African Republic political figures for their contributions to sectarian violence and authorizes OFAC to block assets of armed groups and other persons engaging in certain acts of violence and human rights violations or that undermine the peace, security or political agreements and processes of the Central African Republic.¹³³

To date, OFAC has not designated any additional persons under the authority of E.O. 13667.

6. South Sudan

On April 3, 2014, President Obama issued [Executive Order 13664](#) (“E.O. 13664”) to address “widespread violence and atrocities, human rights abuses, recruitment and use of child soldiers, attacks on peacekeepers, and obstruction of humanitarian operations” that began in South Sudan in December 2013.¹³⁴ Prior to its independence from Sudan on July 9, 2011, South Sudan had been subject to broad-based sanctions aimed at Sudan. The issuance of E.O. 13664 in April 2014 re-imposed sanctions relating to South Sudan. However, unlike the previous sanctions, E.O. 13664 does not target the country of South Sudan, but rather, authorizes OFAC to target those responsible for the conflict there. To date, OFAC has designated four individuals as SDNs under the authority of E.O. 13664. A senior Treasury official [indicated](#) that E.O. 13664 is currently being used by OFAC in a limited way, but that the first round of designations should be seen as a “signal” as to the willingness of the United States to sanction other persons who are contributing to the situation in South Sudan.¹³⁵

On June 2, 2014, OFAC published an [FAQ](#) clarifying that humanitarian and other payments, including “taxes” or “access payments,” made to non-designated individuals or entities, including militias and armed groups under the command or control of an individual designated under E.O. 13664, do not, in and of themselves, constitute prohibited activity.¹³⁶ OFAC warned that U.S. persons should employ due diligence, however, to ensure that an SDN is not, for example, profiting from such transactions.

7. Democratic Republic of the Congo (the “DRC”)

In response to continued violence in the DRC, as well as numerous U.N. Security Council resolutions on the topic, President Obama expanded the scope of U.S. sanctions originally imposed against persons in DRC in October 2006. On July 8, 2014, President Obama issued [Executive Order 13671](#), which amended a previously issued executive order to authorize OFAC to designate as SDNs persons determined to be leaders of Congolese or foreign armed groups impeding disarmament in the DRC; to be responsible for or to have engaged in various actions, including actions threatening the peace or stability of DRC; undermining democratic processes in DRC; and to have committed human rights violations or other acts of violence.¹³⁷ OFAC has not added any persons to the SDN List under the DRC-related authority since the issuance of E.O. 13671.

8. Venezuela Sanctions

On December 18, 2014, President Obama also signed the [Venezuela Defense of Human Rights and Civil Society Act of 2014](#) (“VDHRA”) into law. VDHRA was enacted to address “violence and killings perpetrated by [Venezuela’s] public security forces” in response to anti-government protests that began in February 2014. VDHRA requires the President to designate as an SDN and exclude from the United States any foreign person, including any current or former official of the Government of Venezuela or persons acting on their behalf, that the President determines is responsible for significant acts of violence or human rights abuses in Venezuela against persons associated with the anti-government protests, has directed the arrest or prosecution of a person primarily because of the person’s exercise of freedom of expression or assembly or has knowingly materially assisted or supported the commission of these acts. To date, no SDNs have been designated pursuant to the VDHRA. The requirement to impose sanctions terminates on December 31, 2016. Additional discussion concerning the VDHRA may be found in our previous [memorandum to clients](#) entitled “U.S. Economic Sanctions—Recent Developments: President Prohibits Trade with and New Investment in the Crimea Region of Ukraine and Announces Changes to the Cuba Embargo; Congress Passes New Laws Authorizing New Ukraine-Related Sanctions and Targeted Sanctions Against Venezuelan Government Officials.”¹³⁸

9. North Korea

On January 2, 2015, President Obama issued [Executive Order 13687](#) (“E.O. 13687”) in response to the Government of North Korea’s widely publicized “destructive, coercive[,] cyber-related actions during November and December 2014,” imposing additional sanctions regarding North Korea.¹³⁹ E.O. 13687 authorizes OFAC to impose asset blocking and travel bans on persons it determines to be agencies, instrumentalities, or officials of the Government of North Korea or the Workers’ Party of Korea, among others.

B. INTERPRETATIONS

1. New SDN Interpretation (50% or more owned)

On August 13, 2014, OFAC issued [revised guidance](#) addressing entities owned by blocked persons.¹⁴⁰ Under OFAC's previous 2008 guidance, generally referred to as the "50 percent rule," any entity that was owned 50 percent or more by a blocked person was deemed by OFAC to be blocked itself. Business or transactions conducted in the United States or by U.S. persons involving a blocked person, or its interests in property, are generally prohibited. Under the 2008 guidance, if multiple blocked persons owned a property interest in an entity, OFAC did not aggregate the interests of multiple blocked persons in determining whether the 50 percent rule applied. In a significant change, under the revised guidance, OFAC now aggregates the ownership of blocked persons when determining whether the 50 percent rule applies to an entity. Thus, if one or more blocked persons directly or indirectly own, individually or in the aggregate, a 50 percent or more interest in an entity, all property and interests in property of the 50 percent-owned entity are now considered blocked, even if the entity is not specifically listed as blocked in executive orders or on the SDN List.

OFAC's revised guidance may have been meant to address questions received in the context of the new Ukraine-related sanctions. Numerous members of President Putin's inner circle that are designated as SDNs and whose property is blocked appear to have ownership interests in entities that may not individually amount to 50 percent, but when aggregated, may meet or exceed that amount. In addition, OFAC issued [FAQs](#) concurrently with the revised guidance stating¹⁴¹ that OFAC applies the revised 50 percent rule when determining whether the Ukraine-related sectoral sanctions apply to entities owned by one or more persons on the SSI List.

The 50 percent rule applies to both direct and indirect ownership by blocked persons. Regarding indirect ownership, OFAC clarified in its FAQs that, "indirect" ownership refers to one or more blocked persons' ownership of shares of an entity through another entity or entities that are 50 percent or more owned in the aggregate by the blocked person(s). This means that prior to dealing with entities that are subsidiaries, examination must be made into whether blocked persons own shares of the subsidiary through one or more other entities in the corporate structure that are blocked pursuant to the revised 50 percent rule.

The revised guidance places additional burdens on U.S. persons when conducting diligence on accountholders or counterparties. Where previously it may have been sufficient to identify and determine only whether 50 percent owners were blocked, the revised guidance appears to require a review of all owners, both the direct and indirect. U.S. persons should consider whether to conduct remedial diligence on accountholders or counterparties that may have been subject to diligence measures aimed at identifying only 50 percent owners.

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2. New SDN Interpretation (dealing with SDN officers)

On August 23, 2014, OFAC issued [FAQs](#) clarifying¹⁴² that U.S. persons cannot engage in negotiations, enter into contracts, or process transactions involving a blocked individual, even if that blocked individual is acting on behalf of a non-blocked entity that he or she controls by means other than majority ownership. Although the 50 percent rule, discussed above, applies only to ownership, and not control, U.S. persons should be cautious in their dealings with non-blocked entities in which designated persons are involved, to ensure that they are not dealing with a designated person who is representing the non-blocked entity. For instance, a U.S. person would be prohibited from negotiating with a blocked executive that exercises managerial control over a non-blocked entity. OFAC's interpretation appears to require U.S. persons to identify blocked persons that exercise "control" over a non-blocked entity or that are otherwise acting on behalf of the non-blocked entity, and ensure that such persons are not involved in transactions or negotiations with the U.S. persons.

3. Custody/Beneficial Ownership

On January 23, 2014, concurrently with its [announcement](#) of a \$152 million settlement entered into with Clearstream Banking, S.A. ("Clearstream") relating to Clearstream's use of its omnibus account with a U.S. financial institution to hold securities on behalf of the Central Bank of Iran, OFAC issued an [FAQ](#) addressing how firms operating in the securities industry as custodians and securities intermediaries can accurately identify the beneficial owner of assets within an account or transaction to protect themselves from indirectly providing services to or dealing in property of persons subject to sanctions.¹⁴³

According to an [article](#) drafted by OFAC's Sanctions Compliance & Evaluation Division,¹⁴⁴ custody arrangements may mask the interest of a blocked person or a sanctioned country because the true beneficial owners of the securities may not be known across the tiers of custody and may change over time. Similarly, the use of intermediary institutions, such as wealth management companies, to make investments on behalf of customers can also pose an OFAC risk as the true customers' names may not be disclosed to the U.S. parties involved. Regardless of the knowledge of the U.S. person and the difficulty in mitigating the risk, if a sanctioned person retains beneficial ownership of securities in a U.S. custody account or the ultimate customer of a U.S. intermediary is a sanctioned person, the custodian or intermediary could be liable for providing services to, or dealing in property of, a sanctioned person or country in violation of U.S. sanctions.

To mitigate this risk, OFAC [encouraged](#) firms operating in the securities industry, including securities intermediaries and custodians, to implement measures tailored to the firm's business activities.¹⁴⁵ OFAC issued a list of best practices, including: making customers aware of the firm's U.S. sanctions compliance obligations and having customers agree in writing not to use their account(s) with the firm in a manner that could cause a violation of OFAC sanctions; conducting due diligence, including through the use of

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questionnaires and certifications, to identify customers who do business in or with countries or persons subject to U.S. sanctions; imposing restrictions and heightened due diligence requirements on the use of certain products or services by customers who are judged to present a high risk from an OFAC-sanctions perspective; making efforts to understand the nature and purpose of non-proprietary accounts, including requiring information regarding third parties whose assets may be held in the accounts; and monitoring accounts to detect unusual or suspicious activity.

C. ENFORCEMENT

During 2014, OFAC settled 23 enforcement actions and collected over \$1.2 billion in civil money penalties. OFAC's landmark enforcement action was a \$963,619,900 settlement agreement with BNP Paribas to address activities undertaken by BNP Paribas employees to process and conceal thousands of transactions with sanctioned individuals through U.S. financial institutions. The BNPP settlement agreement is discussed below.

Apart from the BNPP settlement agreement, OFAC reached settlement agreements with 22 other institutions for a variety of violations, including violations of the government's country-specific and narcotics-related sanctions regimes, several of which are significant. These enforcement actions are discussed further in parts 2 through 5 of this section.

1. BNP Paribas

On June 30, 2014, BNP Paribas announced a global settlement with OFAC, the U.S. Department of Justice, the New York County District Attorney's Office, the Federal Reserve, and the DFS, relating to U.S.-dollar transactions involving parties subject to U.S. sanctions (the "Global Settlement"). As part of the Global Settlement, BNP Paribas entered into a \$963,619,900 [settlement agreement](#) with OFAC¹⁴⁶ to settle potential civil liability arising from 3,897 apparent violations of the Sudanese Sanctions Regulations, the Iranian Transactions and Sanctions Regulations, the Cuban Assets Control Regulations and the Burmese Sanctions Regulations.

Specifically, BNP Paribas's settlement agreement with OFAC states that for a number of years, up to and including 2012, BNP Paribas processed thousands of transactions to or through U.S. financial institutions that involved countries, entities, and/or individuals subject to the sanctions programs listed above. According to the related OFAC [press release](#),¹⁴⁷ BNP Paribas engaged in a "systemic practice of concealing, removing, omitting, or obscuring references to information about U.S.-sanctioned parties" in U.S. Dollar Society for Worldwide Interbank Financial Telecommunication ("SWIFT") payment messages sent to U.S. financial institutions. According to OFAC, the specific payment practices the bank utilized in order to process certain sanctions-related payments to or through the United States included omitting references to sanctioned parties; replacing the names of sanctioned parties with BNP Paribas's name or

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a code word; and structuring payments in a manner that did not identify the involvement of sanctioned parties in payments sent to U.S. financial institutions.

Notably, as part of the Global Settlement, BNP Paribas also pled guilty in federal court to one count of conspiracy to violate the International Emergency Economic Powers Act and the Trading with the Enemy Act. BNP Paribas also pled guilty in New York state court to one count of Falsifying Business Records and one count of Conspiracy. In addition, the DFS imposed a suspension of certain U.S. Dollar-clearing operations related to specified clients in identified jurisdictions.

2. Provision of Financial Intermediary Services

On January 23, 2014, **Clearstream Banking, S.A.** (“Clearstream”) entered into a \$151,902,000 [settlement agreement](#) with OFAC¹⁴⁸ to settle potential civil liability arising from apparent violations of the Iranian Transactions and Sanctions Regulations. Specifically, the settlement agreement states that the Central Bank of Iran was able to acquire an interest in U.S. corporate bonds by holding a beneficial interest in a Clearstream account that in turn held U.S. corporate and sovereign bonds at a U.S. financial institution. OFAC determined that these activities constituted impermissible “custody and related services” provided by Clearstream to an Iranian entity.

On September 9, 2014, **Zulutrade, Inc.**, a CFTC-registered introducing broker and commodity trading advisor (“Zulutrade”), entered into a \$200,000 [settlement agreement](#) with OFAC¹⁴⁹ to settle potential civil liability arising from apparent violations of the Iranian Transactions and Sanctions Regulations, the Sudanese Sanctions Regulations and the Syrian Sanctions Regulations. Specifically, the settlement agreement states that beginning in 2009, Zulutrade “maintained accounts for over 400 persons in Iran, Sudan and Syria and exported services to these customers by placing FX trades via its platform.” Zulutrade also originated eight funds transfers totaling \$10,264.36 destined for two individuals in Iran.

3. Failure of Screening Systems in Banking Transactions

On January 27, 2014, **Bank of Moscow**, a Russian Joint-Stock Commercial Bank, entered into a \$9,492,525 [settlement agreement](#) with OFAC¹⁵⁰ to settle potential civil liability for alleged violations of Executive Order 13382 of June 28, 2005 (“E.O. 13382”) and the WMD Proliferators Sanctions Regulations. Specifically, the settlement agreement states that from January 9, 2008 to July 13, 2009, Bank of Moscow sent 69 funds transfers totaling \$41,306,113 for or on behalf of Bank Melli Iran ZAO, Moscow Russia (“BMI Russia”), an entity designated by OFAC under E.O. 13382, that were processed to or through the United States. None of the SWIFT payment messages sent by Bank of Moscow in connection with these funds transfers included specific references to “Melli,” “Iran,” or BMI Russia’s SWIFT Business Identifier Code. U.S. financial institutions processed all 69 of the funds transfers straight through without manual intervention. Bank of Moscow has since been added to OFAC’s Sectoral Sanctions Identifications List pursuant to OFAC’s Directive 2, discussed above in Section III.A.1.¹⁵¹

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On July 24, 2014, **Bank of America, N.A.** (“Bank of America”) entered into a \$16,562,700 [settlement agreement](#) with OFAC¹⁵² to settle potential liability stemming from apparent violations of the Foreign Narcotics Kingpin Sanctions Regulations; the Narcotics Trafficking Sanctions Regulations; and the Reporting, Procedures and Penalties Regulations. Specifically, the settlement agreement states that between September 2005 and March 2009, Bank of America processed 208 transactions on behalf of, and failed to file timely blocked property reports with respect to five accounts owned by, 10 individuals on OFAC’s list of specially designated narcotics traffickers.

On September 3, 2014, **Citigroup Inc.** (“Citigroup”) entered into a \$217,841 [settlement agreement](#) with OFAC¹⁵³ to settle potential civil liability for eight apparent violations of the Iranian Transactions and Sanctions Regulations, the Weapons of Mass Destruction Proliferators Sanctions Regulations, the Foreign Narcotics Kingpin Sanctions Regulations, and the Global Terrorism Sanctions Regulations. Specifically, the Citigroup Settlement Agreement states that between April 2, 2009 and November 16, 2009, Citigroup Trade Services Malaysia processed four export bill collection applications totaling \$638,074 on behalf of Citibank, N.A. (“Citibank”), Hong Kong that involved the shipment of goods to Iran. In two instances, the shipments made were to the Islamic Republic of Iran Shipping Lines, which was designated by OFAC in September 2008 as a Weapons of Mass Destruction Proliferator. Separately, on four occasions between February 2010 and October 2012, Citibank processed four funds transfers totaling \$133,787 involving entities appearing on OFAC’s SDN List because its interdiction software did not recognize references to entities on the SDN List with minor variations in their names (e.g., the “Higher Institute *for* Applied Science and Technology” versus the “Higher Institute *of* Applied Science and Technology”).

On August 27, 2014, **Branch Banking & Trust Co.** (“BB&T”) entered into a \$19,125 [settlement agreement](#) with OFAC¹⁵⁴ to settle potential civil liability for one apparent violation of the Sudanese Sanctions Regulations. Specifically, the settlement agreement states that on June 1, 2011, BB&T received instructions to process a \$20,000 funds transfer on behalf of its customer, destined for a third-party’s account at a foreign financial institution. BB&T’s interdiction software stopped the payment for review due to a name in the payment details that appeared to match an entry on the SDN List. During the course of BB&T’s investigation of the potential name match, the bank determined that the individual was a Sudanese national but failed to request additional information, such as a physical address. After determining that the name was not an SDN List match, a BB&T compliance specialist added a reference in the payment details that included, *inter alia*, “NATIONALITY: SUDANESE” and then approved the wire. When BB&T’s interdiction software rescreened the transaction, it failed to generate an alert because the software did not contain the word “Sudanese” (or other similar terms relating to OFAC-sanctioned countries such as “Burmese,” “Cuban,” or “Iranian”).

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4. Cuban Assets Control Regulations

On April 18, 2014, **CWT B.V.** (“CWT”) entered into a \$5,990,490 [settlement agreement](#) with OFAC¹⁵⁵ to settle potential civil liability for apparent violations of the Cuban Assets Control Regulations. Specifically, the settlement agreement states that from on or about August 8, 2006 through on or about November 28, 2012, CWT dealt in property in which Cuba or its nationals had an interest when its business units mostly outside the United States provided services related to travel to or from Cuba, assisting 44,430 persons. In 2006, CWT, a travel services provider incorporated in the Netherlands, became majority-owned by U.S. persons and thus subject to U.S. jurisdiction pursuant to the Trading With the Enemy Act and the Cuban Assets Control Regulations.

On May 6, 2014, **Decolar.com, Inc.** (“Decolar”) entered into a \$2,809,800 [settlement agreement](#) with OFAC¹⁵⁶ to settle potential civil liability for apparent violations of the Cuban Assets Control Regulations. Specifically, the settlement agreement states that from March 2, 2009 through March 31, 2012, Decolar appears to have dealt in property in which Cuba or Cuban nationals had an interest when its foreign subsidiaries assisted 17,836 persons with flight reservations for travel between Cuba and countries other than the United States and/or hotel reservations for stays in Cuba, without authorization from OFAC.

On May 8, 2014, **American International Group, Inc.** (“AIG”) entered into a \$279,038 [settlement agreement](#) with OFAC¹⁵⁷ to settle potential civil liability for 3,560 apparent violations of the Cuban Assets Control Regulations. Specifically, the AIG Settlement Agreement states that between January 2006 and March 2009, two AIG subsidiaries in Canada issued or renewed three types of property and casualty insurance policies that insured Cuban risks of a Canadian corporate entity for an estimated aggregate premium of \$486,137. The policies involved Comprehensive General Liability, Director and Officer’s (“D&O”) Excess Liability, and Pollution Legal Liability coverages. One of the AIG subsidiaries in Canada also maintained a D&O Liability insurance policy that insured certain directors and officers of three Cuban joint venture partners of a Canadian corporation between January 1, 2006, and October 4, 2006. Separately, from March 17, 2006 through September 30, 2008, Travel Guard Canada—an AIG subsidiary in Canada—sold, renewed, or maintained in force 3,446 individual or annual multi-trip travel insurance policies in which the insured individual identified Cuba as the travel destination.

On June 27, 2014, **Red Bull North America, Inc.** (“Red Bull”) entered into a \$89,775 [settlement agreement](#) with OFAC¹⁵⁸ to settle potential civil liability for seven alleged violations of the Cuban Assets Control Regulations. Specifically, the settlement agreement states that between June 8 and June 18, 2009, seven representatives of Red Bull traveled to Cuba in order to film a documentary, without authorization from OFAC. The production of the film, as well as the associated travel, was approved by Red Bull management.

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On October 29, 2014, *Bupa Insurance Company, Bupa Worldwide Corporation* and *USA Medical Services Corporation* (together “Bupa”) entered into a \$128,704 [settlement agreement](#) with OFAC¹⁵⁹ to settle potential civil liability for 39 apparent violations of the Narcotics Trafficking Sanctions Regulations, the Foreign Narcotics Kingpin Sanctions Regulations and the Cuban Assets Control Regulations. Specifically, the settlement agreement states that Bupa provided insurance support services for healthcare policies covering persons on the SDN List and processed and paid reimbursement claims made by Cuban policyholders who were beneficiaries of persons designated on the SDN List.

On November 13, 2014, *ESCO Corporation* (“Esco”) entered into a \$2,057,540 [settlement agreement](#) with OFAC¹⁶⁰ to settle potential civil liability for apparent violations of the Cuban Assets Control Regulations. Specifically, the settlement agreement states that a subsidiary of Esco purchased nickel briquettes made or derived from Cuban-origin nickel between, on or about November 7, 2007, and on or about June 11, 2011.

5. Other Commercial Transactions

On March 6, 2014, *Ubiquiti Networks, Inc.* (“Ubiquiti”) entered into a \$504,225 [settlement agreement](#) with OFAC¹⁶¹ to settle potential civil liability for apparent violations of the Iranian Transactions and Sanctions Regulations. Specifically, the settlement agreement states that from on or about March 24, 2008, to in or around February 2010, Ubiquiti appears to have violated the Iranian Transactions and Sanctions Regulations by engaging in transactions related to the exportation, reexportation, sale or supply, directly or indirectly, of goods for broadband wireless connectivity to Iran, and facilitating the reexportation, sale or supply of such goods to Iran. Ubiquiti had entered into an agreement granting a distributor in the United Arab Emirates (the “U.A.E.”) exclusive rights to distribute Ubiquiti’s goods in Iran, then subsequently sold to the U.A.E. distributor and exported or shipped to the U.A.E. goods that were reexported to Iran. Additionally, from on or about December 1, 2009, to on or about February 25, 2011, Ubiquiti appears to have violated the Iranian Transactions and Sanctions Regulations by engaging in 13 exports of goods for broadband wireless connectivity to a distributor located in Greece, with knowledge or reason to know that the goods were intended specifically for supply, transshipment, or reexportation, directly or indirectly, to Iran.

On March 31, 2014, *GAC Bunker Fuels (USA) LLC* (“GAC”) entered into a \$157,500 [settlement agreement](#) with OFAC¹⁶² to settle potential civil liability for alleged violations of the Iranian Transactions and Sanctions Regulations. Specifically, the settlement agreement states that GAC supplied bunker fuel worth \$513,141 in Paranagua, Brazil for an Iranian vessel.

On April 2, 2014, *Sea Tel Inc.* (“Sea Tel”) entered into a \$85,113 [settlement agreement](#) with OFAC¹⁶³ to settle potential civil liability for apparent violations of the Iranian Transactions and Sanctions Regulations. Specifically, the settlement agreement states that between November 20, 2007, and February 26, 2009,

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Sea Tel invoiced a South Korean distributor for 16 orders of marine antenna systems and exported the antenna systems to its distributor, with knowledge or reason to know that they were intended specifically for reexportation, directly or indirectly, to Iran.

On June 5, 2014, *Fokker Services B.V.* (“Fokker”) entered into a [settlement agreement](#) with OFAC¹⁶⁴ to settle potential civil liability for apparent violations of the Sudanese Sanctions Regulations and the Iranian Transactions and Sanctions Regulations. The release accompanying the Fokker Settlement Agreement indicates that on 1,112 occasions, Fokker indirectly exported or reexported to Iranian customers spare aircraft parts that were procured or repaired in the United States or that were U.S.-origin and subject to export license requirements under U.S. law. On 41 occasions, Fokker engaged in similar conduct with respect to Sudanese customers or end users. As part of a global settlement with federal regulators, Fokker was to pay a joint civil money penalty of \$10,500,000 to OFAC and the Department of Commerce’s Bureau of Industry and Security and a separate penalty of \$10,500,000 agreed to pursuant to a deferred prosecution agreement reached with the Department of Justice’s U.S. Attorney’s Office for the District of Columbia.

Notably, at a July 2014 hearing, U.S. District Judge Richard Leon, who must approve the deferred-prosecution agreement before it can take effect, expressed concerns about whether Fokker had, in fact, voluntarily disclosed the alleged wrongdoing or whether the government had learned of the behavior prior to the voluntary disclosure.¹⁶⁵ Judge Leon’s concerns arose from a series of articles by Bloomberg News indicating that OFAC may have learned of the alleged activities two or three years before Fokker’s self-reporting.¹⁶⁶ At a hearing on October 29, 2014, Judge Leon encouraged the parties to engage in additional discussions to consider an alternative settlement that reflects the recent revelations regarding the facts.¹⁶⁷

On June 25, 2014, *Network Hardware Resale LLC* (“NHR”) entered into a \$64,758 [settlement agreement](#) with OFAC¹⁶⁸ to settle potential liability for apparent violations of the Sudanese Sanctions Regulations and the Iranian Transactions and Sanctions Regulations. Specifically, the settlement agreement states that between approximately April 14, 2008, and January 6, 2011, NHR exported 16 shipments of networking equipment and related accessories from the United States to Sudan, and two shipments of networking equipment and related accessories from the United States destined for Iran.

On July 17, 2014, *Tofasco of America, Inc.*, (“Tofasco”) entered into a \$21,375 [settlement agreement](#) with OFAC¹⁶⁹ to settle potential civil liability for an alleged violation of the Weapons of Mass Destruction Proliferators Sanctions Regulations. Specifically, the settlement agreement states that on or about April 16, 2009, Tofasco appears to have violated the WMDPSR by engaging a bank to process a letter of credit transaction constituting payment for a shipment of recreational chairs with a bill of lading that omitted

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reference to the Islamic Republic of Iran Shipping Lines, an entity whose property and interests in property are blocked pursuant to the Weapons of Mass Destruction Proliferators Sanctions Regulations.

On July 24, 2014, *Procesadora Campofresco, Inc.* (“Campofresco”) entered into a \$27,000 [settlement agreement](#) with OFAC¹⁷⁰ to settle potential civil liability for apparent violations of the Narcotics Trafficking Sanctions Regulations. Specifically, the settlement agreement states that from on or about October 9, 2009, to on or about July 21, 2010, Campofresco made six purchases worth a total of \$344,016 of frozen passion fruit juice and pulp from a narcotics trafficker on the SDN List.

On July 25, 2014, *Epsilon Electronics Inc.* (“Epsilon”) entered into a \$4,073,000 [settlement agreement](#) with OFAC¹⁷¹ to settle potential civil liability for apparent violations of the Iranian Transactions and Sanctions Regulations. Specifically, the settlement agreement states that from on or about August 26, 2008 to on or about May 22, 2012, Epsilon violated the Iranian Transactions and Sanctions Regulations when it issued 39 invoices for car audio and video equipment which was shipped to a company that reexports most, if not all, of its products to Iran and has offices in Tehran and Dubai. Epsilon knew or had reason to know that such goods were intended specifically for supply, transshipment, or reexportation, directly or indirectly to Iran. In addition, Epsilon issued five of these invoices after it received a cautionary letter from OFAC in January 2012. The cautionary letter explained that the Iranian Transactions and Sanctions Regulations generally prohibited the unauthorized exportation, reexportation, sale or supply of goods, technology, or services to Iran.

On October 31, 2014, *Indam International, Inc.* (“Indam”) entered into a \$44,850 [settlement agreement](#) with OFAC¹⁷² to settle potential civil liability for apparent violations of the Iranian Transactions and Sanctions Regulations. Specifically, the settlement agreement states that between July 4, 2006 and October 23, 2008, Indam attempted to export or exported nine shipments of goods, collectively valued at \$27,846, from the United States to the U.A.E., with reason to know that the shipments were intended specifically for supply, transshipment or reexportation to two oil drilling rigs destined for or located in Iranian waters. OFAC determined that Indam demonstrated “reckless disregard” for U.S. sanctions requirements by failing to conduct due diligence to determine the end users of its products.

* * *

ENDNOTES

- ¹ This memorandum is not intended to encompass all developments and potential trends in the BSA/AML and sanctions areas; rather, its purpose is to highlight the importance of these developments and trends for financial institutions and their officers and directors.
- ² Remarks of Thomas J. Curry, Comptroller of the Currency, Before the Association of Certified Anti-Money Laundering Specialists, Hollywood, Florida (March 17, 2014), *available at* <http://www.occ.gov/news-issuances/news-releases/2014/nr-occ-2014-39.html>.
- ³ Remarks of Thomas J. Curry, Comptroller of the Currency, Before RMA's Governance, Compliance, and Operational Risk Conference (May 8, 2014), *available at* <http://www.occ.gov/news-issuances/speeches/2014/index-2014-speeches.html>.
- ⁴ OCC's Semiannual Risk Perspective (Dec. 17, 2014), *available at* <http://www.occ.gov/news-issuances/news-releases/2014/nr-occ-2014-170.html>.
- ⁵ See, e.g., Remarks of Thomas J. Curry, Comptroller of the Currency, Before the Association of Certified Anti-Money Laundering Specialists, Hollywood, Florida (March 17, 2014), *available at* <http://www.occ.gov/news-issuances/news-releases/2014/nr-occ-2014-39.html>.
- ⁶ *Id.*
- ⁷ FIL-5-2015, "Statement on Providing Banking Services" (Jan. 28, 2015), *available at* <https://www.fdic.gov/news/news/financial/2015/fil15005.html>. This FDIC letter will be the subject of a separate memo to clients.
- ⁸ FIL-41-2014, "FDIC Clarifying Supervisory Approach to Institutions Establishing Account Relationships with Third-Party Payment Processors" (July 28, 2014), *available at* <https://www.fdic.gov/news/news/financial/2014/fil14041.html>.
- ⁹ Memorandum to Members of the Committee on Financial Services from FSC Majority Staff, dated July 10, 2014, *available at* <http://financialservices.house.gov/calendar/eventsingle.aspx?EventID=387064>.
- ¹⁰ See, e.g., Testimony of Daniel P. Stipano, Deputy Chief Counsel, Office of the Comptroller of the Currency, Before the Subcommittee on Oversight and Investigations, U.S. House of Representatives (July 15, 2014), *available at* <http://financialservices.house.gov/calendar/eventsingle.aspx?EventID=387064>.
- ¹¹ OCC Bulletin 2014-58, "Statement on Risk Management Associated with Money Services Businesses" (Nov. 19, 2014), *available at* <http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-58.html>. FATF also issued guidance to the banking sector on the risk-based approach. See FATF, Guidance for a Risk-Based Approach, the Banking Sector (dated Oct. 2014), *available at* <http://www.fatf-gafi.org/documents/news/risk-based-approach-banking-sector.html>.
- ¹² Testimony of Scott G. Alvarez, General Counsel, Federal Reserve Board, Before the Subcommittee on Oversight and Investigations, U.S. House of Representatives, *available at* <http://financialservices.house.gov/calendar/eventsingle.aspx?EventID=387064>; Testimony of Richard J. Osterman, Acting General Counsel, Federal Deposit Insurance Corporation, Before the Subcommittee on Oversight and Investigations, U.S. House of Representatives, *available at* <http://financialservices.house.gov/calendar/eventsingle.aspx?EventID=387064>.
- ¹³ "FinCEN Statement on Providing Banking Services to Money Services Businesses" (Nov. 10, 2014), *available at* http://www.fincen.gov/news_room/nr/html/20141110.html (*citing* testimony of regulators cited therein).
- ¹⁴ Remarks of Jennifer Shasky Calvery, Director, FinCEN, 2014 Mid-Atlantic AML Conference (Aug. 12, 2014), *available at* http://www.fincen.gov/news_room/testimony/.

ENDNOTES (CONTINUED)

- 15 Remarks of Under Secretary Cohen at the ABA/ABA Money Laundering Enforcement Conference (Nov. 10, 2014), available at <http://www.treasury.gov/press-center/press-releases/Pages/jl2692.aspx>.
- 16 “FATF Clarifies Risk-Based Approach: Case-by-case, Not Wholesale De-Risking,” (Oct. 23, 2014), available at <http://www.fatf-gafi.org/documents/news/rba-and-de-risking.html>.
- 17 *Id.*
- 18 *Id.*
- 19 *Id.*
- 20 Remarks of Jennifer Shasky Calvery, Director, FinCEN, 2014 Mid-Atlantic AML Conference (Aug. 12, 2014), available at http://www.fincen.gov/news_room/testimony/.
- 21 Remarks of Thomas J. Curry, Comptroller of the Currency, Before the Annual Conference of The Clearing House Association (Nov. 21, 2014), available at <http://www.occ.gov/news-issuances/speeches/2014/pub-speech-2014-160.pdf>.
- 22 Governor Daniel K. Tarullo, at the Federal Reserve Bank of New York Conference, “Reforming Culture and Behavior in the Financial Services Industry,” (Oct. 20, 2014), available at <http://www.federalreserve.gov/newsevents/speech/tarullo20141020a.htm>.
- 23 “Enhanced Prudential Standards for Bank Holding Companies and Foreign Banking Organizations,” 79 Fed. Reg. 17240 (Mar. 27, 2014), available at <http://www.federalreserve.gov/newsevents/press/bcreg/20140218a.htm>.
- 24 Available at <http://sullcrom.com/enhanced-prudential-standards-for-large-us-bank-holding-companies-and-foreign-banking-organizations>.
- 25 “OCC Guidelines Establishing Heightened Standards for Certain Large Insured National Banks, Insured Federal Savings Associations, and Insured Federal Branches; Integration of 12 C.F.R. Parts 30 and 170,” RIN 1557-AD78 (Sept. 3, 2014), available at <http://www.occ.gov/news-issuances/news-releases/2014/nr-occ-2014-4a.pdf>.
- 26 *Id.* at 54533.
- 27 *Id.*
- 28 “FinCEN Advisory to U.S. Financial Institutions on Promoting a Culture of Compliance” (Aug. 11, 2014), available at http://www.fincen.gov/statutes_regs/guidance/html/FIN-2014-A007.html.
- 29 FinCEN states that “[a]ppropriate involvement of a financial institution’s leadership should be, at a minimum, commensurate with the institution’s level of BSA/AML risk exposure.”
- 30 FinCEN observes that several recent enforcement actions referenced an institution’s failure to make relevant information available to BSA/AML compliance staff.
- 31 “FinCEN Advisory to U.S. Financial Institutions on Promoting a Culture of Compliance” (Aug. 11, 2014), available at http://www.fincen.gov/statutes_regs/guidance/html/FIN-2014-A007.html.
- 32 Remarks of Thomas J. Curry, Comptroller of the Currency, Before the Association of Certified Anti-Money Laundering Specialists, Hollywood, Florida (March 17, 2014), available at <http://www.occ.gov/news-issuances/news-releases/2014/nr-occ-2014-39.html>.
- 33 Remarks of Thomas J. Curry, Comptroller of the Currency, Before the Association of Certified Anti-Money Laundering Specialists, Hollywood, Florida (March 17, 2014), available at <http://www.occ.gov/news-issuances/news-releases/2014/nr-occ-2014-39.html>.
- 34 Remarks of Superintendent Lawsky on Financial Regulatory Enforcement at the Exchequer Club (March 19, 2014), available at http://www.dfs.ny.gov/about/speeches_testimony/sp140319.pdf.

ENDNOTES (CONTINUED)

- 35 *Id.*
- 36 Governor Daniel K. Tarullo at the Federal Reserve Bank of New York Conference, “Reforming Culture and Behavior in the Financial Services Industry” (Oct. 20, 2014), *available at* <http://www.federalreserve.gov/newsevents/speech/tarullo20141020a.htm>. See also Transcript of Hearing, Wall Street Reform: Assessing and Enhancing the Financial Regulatory System (Sept. 9, 2014).
- 37 Attorney General Holder, Remarks on Financial Fraud Prosecutions at NYU School of Law (Sept. 17, 2014), *available at* <http://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law>.
- 38 Remarks of Principal Deputy Assistant Attorney General for the Criminal Division, Marshall L. Miller, at the Global Investigation Review Program (Sept. 17, 2014), *available at* <http://www.justice.gov/criminal/pr/speeches/2014/crm-speech-1409171.html>.
- 39 *Id.*
- 40 Transcript of Hearing, “Wall Street Reform: Assessing and Enhancing the Financial Regulatory System” (Sept. 9, 2014). In January 2014, Senator Warren introduced S. 1898, the “Truth in Settlements Act of 2014,” which would set forth new requirements for the public disclosure of any covered settlement agreement entered into by a federal executive agency. See S. 1898, *available at* <https://www.congress.gov/bill/113th-congress/senate-bill/1898>. Senator Warren has stated that she will reintroduce the bill in the next Congress.
- 41 *Id.*
- 42 *Id.*
- 43 Financial Industry Regulatory Authority Letter of Acceptance, Waiver and Consent No. 2013035821401 re: Brown Brothers Harriman & Co., CRD No. 104487, at 2, *available at* <http://www.finra.org/web/groups/industry/@ip/@enf/@ad/documents/industry/p443448.pdf>.
- 44 *Id.* at 3.
- 45 The matter is pending in the U.S. District Court for the Southern District of New York.
- 46 Complaint, para. 4.
- 47 *Id.*
- 48 See FinCEN Press Release (Dec. 18, 2014), *available at* http://www.fincen.gov/news_room/nr/html/20141218.html.
- 49 Attorney General Holder, Remarks on Financial Fraud Prosecutions at NYU School of Law (Sept. 17, 2014), *available at* <http://www.justice.gov/opa/speech/attorney-general-holder-remarks-financial-fraud-prosecutions-nyu-school-law>.
- 50 U.S. Attorney’s Office for the Southern District of New York, Press Release (July 9, 2014), *available at* <http://www.justice.gov/usao/nys/pressreleases/July14/BNPPpleaPR.php>.
- 51 Compliance and Legal Society Annual Seminar, Prepared Remarks of U.S. Attorney Preet Bharara (March 31, 2014), *available at* <http://www.justice.gov/usao/nys/pressspeeches/2014/SIFMARemarks2014.php>.
- 52 Financial Industry Regulatory Authority Letter of Acceptance, Waiver and Consent No. 2013035821401 re: Brown Brothers Harriman & Co., CRD No. 104487, at 2.
- 53 *Id.*
- 54 <http://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial>. Although not a BSA/AML/OFAC action, on May 19, 2014, Credit Suisse AG pleaded

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- guilty to conspiracy to aid and assist U.S. taxpayers in filing false income tax returns and other documents with the IRS. *Id.*
- 55 In the Matter of BNP Paribas S.A., Docket Nos. 14-022-B-FB & 14-022-CMP-FB (June 30, 2014),
available at <http://www.federalreserve.gov/newsevents/press/enforcement/20140630a.htm>.
- 56 *Id.*
- 57 See DFS Press Release (June 30, 2014), available at
<http://www.dfs.ny.gov/about/press2014/pr1406301.htm>.
- 58 Although not a BSA/AML/OFAC action, on May 19, 2014, Credit Suisse AG pleaded guilty to
conspiracy to aid and assist U.S. taxpayers in filing false income tax returns and other documents
with the IRS. As part of the Federal Reserve's related order, Credit Suisse agreed to terminate
its relationship with, and not re-employ or otherwise engage, nine individuals who were involved
in the actions that resulted in the violations of U.S. laws. The DFS similarly required Credit
Suisse to terminate three individuals, and to not hire, retain, or enter into any contract,
agreement, or business relationship with those three individuals and six others. In the Matter of
Credit Suisse AG, Docket Nos. 14-009-B-FB & 14-009-CMP-FB, available at
<http://www.federalreserve.gov/newsevents/press/enforcement/20140519a.htm>; DFS Press
Release (May 19, 2014), available at <http://www.dfs.ny.gov/about/press2014/pr1405191.htm>.
- 59 *In the Matter of Standard Chartered Bank, New York Branch* (Sept. 21, 2012).
- 60 See DFS Press Release (Aug. 19, 2014), available at
<http://www.dfs.ny.gov/about/press2014/pr1408191.htm>.
- 61 *Id.*
- 62 Bank Secrecy Act Interagency Guidance on Transparency for U.S. Banking Organizations
Conducting, (Dec. 17, 2009) available at
<https://www.fdic.gov/news/news/financial/2009/fil09072.html>.
- 63 See DFS Press Release (June 18, 2013), available at
<http://www.dfs.ny.gov/about/press2013/pr1306181.htm>.
- 64 See DFS Press Release (Nov. 18, 2014), available at
<http://www.dfs.ny.gov/about/press2014/pr1411181.htm>.
- 65 FFIEC BSA/AML Exam Manual at p. 60 (Nov. 17, 2014).
- 66 *Id.* at p. 61.
- 67 *Id.* at p. 68.
- 68 *Id.*
- 69 *Id.*
- 70 Remarks of Jennifer Shasky Calvery, Director, FinCen, at SDNY Press Conference (Jan. 7,
2014), available at http://www.fincen.gov/news_room/speech/pdf/20140107.pdf.
- 71 *Id.*
- 72 Remarks of Under Secretary Cohen at the ABA/ABA Money Laundering Enforcement
Conference, dated November 10, 2014, available at <http://www.treasury.gov/press-center/press-releases/Pages/jl2692.aspx>.
- 73 Supervisory Letter No. SR 14-2/CA (Feb. 24, 2014), available at
<http://www.federalreserve.gov/bankinfo/reg/srletters/sr1402.htm>.

ENDNOTES (CONTINUED)

- 74 BancorpSouth, Inc. Quarterly Report (Form 10-Q) (June 30, 2014), *available at* <http://www.sec.gov/Archives/edgar/data/701853/000070185314000007/c853-20140630x10q.htm>.
- 75 M&T Bank Press Release (Dec. 9, 2014), *available at* <http://newsroom.mtb.com/press-releases/udson-city-bancorp-inc-and-mt-bank-corporation-announce-further-extension-of-time-to-complete-proposed-merger-to-april-30-2015.htm>.
- 76 *Available at* <http://www.sullcrom.com/banking-applications>.
- 77 FinCEN, "Customer Due Diligence Requirements for Financial Institutions," 77 Fed. Reg. 13046 (Mar. 5, 2012), *available at* <http://www.gpo.gov/fdsys/pkg/FR-2012-03-05/pdf/2012-5187.pdf>.
- 78 79 Fed. Reg. 45151 (Aug. 4, 2014), *available at* http://www.fincen.gov/statutes_regs/files/CDD-NPRM-Final.pdf.
- 79 James M. Cole, Deputy Attorney General, U.S. Department of Justice, *Memorandum for All United States Attorneys: Guidance Regarding Marijuana Enforcement* (August 29, 2013), *available at* <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>.
- 80 21 U.S.C. § 801 *et seq.*
- 81 FinCEN Guidance to Financial Institutions on Marijuana Businesses, *available at* http://www.fincen.gov/news_room/nr/html/20140214.html.
- 82 See, e.g., Prepared Remarks of Jennifer Shasky Calvery, Director, FinCEN, Association of Certified Anti-Money Laundering Specialists (March 18, 2014).
- 83 Testimony of Jennifer Shasky Calvery, Director of the Financial Crimes Enforcement Network, Before the 2014 Mid-Atlantic AML Conference, at 4-5, Aug. 12, 2013, *available at* http://www.fincen.gov/news_room/speech/html/20140812.html.
- 84 "Application of FinCEN's Regulations to Persons Administering, Exchanging, or Using Virtual Currencies," (Mar. 18, 2013), *available at* http://www.fincen.gov/statutes_regs/guidance/html/FIN-2013-G001.html.
- 85 See "FinCEN Publishes Two Rulings on Virtual Currency Miners and Investors," (Jan. 20, 2014), *available at* http://www.fincen.gov/news_room/nr/html/20140130.html.
- 86 "Application of FinCEN's Regulations to Virtual Currency Mining Operations," (Jan. 30, 2014), *available at* http://www.fincen.gov/news_room/rp/rulings/html/FIN-2014-R001.html.
- 87 "Application of FinCEN's Regulations to Virtual Currency Software Development and Certain Investment Activity," (Jan. 30, 2014), *available at* http://www.fincen.gov/news_room/rp/rulings/html/FIN-2014-R002.html.
- 88 "Request for Administrative Ruling on the Application of FinCEN's Regulations to a Virtual Currency Payment System," (Oct. 27, 2014), *available at* http://www.fincen.gov/news_room/rp/rulings/html/FIN-2014-R012.html.
- 89 *Id.*
- 90 See "NY DFS Releases Proposed BitLicense Regulatory Framework for Virtual Currency Firms," (July 17, 2014), *available at* <http://www.dfs.ny.gov/about/press2014/pr1407171.html>.
- 91 See CSBS Policy on State Virtual Currency Regulation (Dec. 16, 2014); "State Regulators Propose Model Regulatory Framework for Virtual Currency Activities," (Dec. 16, 2014), *available at* <http://www.csbs.org/news/press-releases/pr2014/Pages/pr-121614.aspx>.
- 92 See Virtual Currencies — Key Definitions and Potential AML/CFT Risks (June 2014), *available at* <http://www.fatf-gafi.org/media/fatf/documents/reports/virtual-currency-key-definitions-and-potential-aml-cft-risks.pdf>.

ENDNOTES (CONTINUED)

- 93 Testimony of Jennifer Shasky Calvery, Director of the Financial Crimes Enforcement Network, Before the Mexican Bankers Association AML/CFT Seminar, at 2-3, Oct. 3, 2014, *available at* http://www.fincen.gov/news_room/speech/html/20141003.html.
- 94 See FinCEN Advisory, "Update on U.S. Currency Restrictions in Mexico: Funnel Accounts and TBML," FIN-2014-A005 (May 28, 2014), *available at* http://www.fincen.gov/statutes_regs/guidance/html/FIN-2014-A005.html.
- 95 FinCEN Guidance on Recognizing Activity that May be Associated with Human Smuggling and Human Trafficking (Sept. 11, 2014), FIN-2014-A008, *available at* http://www.fincen.gov/statutes_regs/guidance/pdf/FIN-2014-A008.pdf.
- 96 Interagency Statement, The 2014 Version of the Bank Secrecy Act/Anti-Money Laundering Examination Manual (Dec. 2, 2014), FIN-2014-A007, *available at* <http://www.occ.gov/news-issuances/bulletins/2014/bulletin-2014-60a.pdf>.
- 97 *See id.*
- 98 "Iran Sanctions Contained in the Iran Threat Reduction and Syria Human Rights Act (ITRSHRA)," (Sept. 28, 2012), *available at* <http://www.state.gov/e/eb/rls/fs/2012/198393.htm>.
- 99 *Available at* <http://www.sullcrom.com/BExchange-Act-Requires-Issuers-to-Disclose-Iran-Related-Activities-BDisclosures-Required-in-Reports-Due-to-Be-Filed-On-or-After-February-6-2013-12-16-2012>.
- 100 For information regarding Ukraine-related U.S. sanctions that are currently in force, see our previous memoranda to clients entitled (1) "[U.S. Economic Sanctions – Recent Developments: President Prohibits Trade with and New Investment in the Crimea Region of Ukraine and Announces Changes to the Cuba Embargo; Congress Passes New Laws Authorizing New Ukraine-Related Sanctions and Targeted Sanctions Against Venezuelan Government Officials](#)," (2) "[Ukraine-Related Sanctions: U.S. and EU Take Coordinated Action to Restrict Access of Russian State-Owned Banks to U.S. and EU Capital Markets, Restrict Trade with Russia, Including for Certain Deep Water, Arctic Offshore and Shale Exploration and Production Projects, and Sanction Additional Persons and Entities; U.S. Supplements Sectoral Sanctions Guidance](#)," (3) "[Ukraine-Related Sanctions: Latest Developments Include U.S. Introduction of Sectoral Sanctions Imposing Targeted Sanctions on Certain Entities in Russia's Financial Services and Energy Sectors; U.S. Designating Additional Persons and Entities as Blocked Persons; and New EU Designations Targeting Additional Individuals and Entities](#)," (4) "[Ukraine-Related Sanctions: U.S. and EU Expand the List of Parties Targeted by Economic Sanctions in Response to Evolving Ukraine Crisis and Russia's Failure to Meet Geneva Commitments; New Measures Target Certain Russian Officials and Persons Close to President Putin, Including Several Russian Entities; Package of Sanctions Now Includes Expanded List of Blocked Persons, Travel and Visa Bans and Export Denials](#)," and (5) "[Ukraine-Related Economic Sanctions: U.S. and EU Adopt Economic Sanctions in Response to the Current Situation in Ukraine; Additional Measures Likely if Current Situation Persists or Escalates](#)."
- 101 "Blocking Property of Certain Persons Contributing to the Situation in Ukraine," (March 6, 2014), *available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20140306.aspx>.
- 102 OFAC's actions to address misappropriation follow related action taken by FinCEN. On March 6, 2014, FinCEN updated its [Ukraine-related advisory](#), originally issued on February 25, 2014, which stresses that U.S. financial institutions must, among other things, take reasonable, risk-based steps regarding the suspicious movement of assets by the Former President of Ukraine, Viktor Yanukovych, and his administration.

ENDNOTES (CONTINUED)

- ¹⁰³ “Blocking Property of Additional Persons Contributing to the Situation in Ukraine,” (March 17, 2014), available at <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20140317.aspx>.
- ¹⁰⁴ “Blocking Property of Additional Persons Contributing to the Situation in Ukraine,” (March 20, 2014), available at http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20140320_44.aspx.
- ¹⁰⁵ “Blocking Property of Certain Persons and Prohibiting Certain Transactions With Respect to the Crimea Region of Ukraine,” (Dec. 19, 2014), available at <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20141219.aspx>.
- ¹⁰⁶ “U.S. person” means “any United States citizen, permanent resident alien, entity organized under the laws of the United States or any jurisdiction within the United States (including foreign branches), or any person in the United States.” See E.O. 13661 § 8(c). Unless otherwise noted, this definition of “U.S. person” will apply throughout this memorandum.
- ¹⁰⁷ OFAC, “General License No. 4, Authorizing the Exportation or Reexportation of Agricultural Commodities, Medicine, Medical Supplies and Replacement Parts,” available at http://www.treasury.gov/resource-center/sanctions/Programs/Documents/ukraine_gl4.pdf.
- ¹⁰⁸ OFAC, “General License No. 5, Authorizing Certain Activities Prohibited by Executive Order 13685 of December 19, 2014 Necessary to Wind Down Operations Involving the Crimea Region of Ukraine,” (Dec. 30, 2014), available at http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20141230_33.aspx.
- ¹⁰⁹ “Specially Designated Nationals List (SDN),” (Jan. 16, 2015), available at <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>.
- ¹¹⁰ “Secoral Sanctions Identifications (SSI List),” (Sept. 12, 2014), available at http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/ssi_list.aspx.
- ¹¹¹ “OFAC FAQs: Question Index,” (Jan. 15, 2015), available “Ukraine-related Sanctions” (Sept. 12, 2014), available at http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/ques_index.aspx.
- ¹¹² “Ukraine-related Sanctions,” (Sept. 12, 2014), available at <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140912.aspx>.
- ¹¹³ BIS, “Commerce Department Announces Expansion of Export Restrictions on Russia,” April 28, 2014, available at <http://www.bis.doc.gov/index.php/about-bis/newsroom/%20press-releases/107-about-bis/newsroom/press-releases/press-release-2014/665-commerce-dept-announces-expansion-of-export-restrictions-on-russia>.
- ¹¹⁴ “Entity List” available at <http://www.bis.doc.gov/index.php/policy-guidance/lists-of-parties-of-concern/entity-list>.
- ¹¹⁵ “United States Expands Export Restrictions on Russia,” (April 28, 2014), available at <http://www.bis.doc.gov/index.php/about-bis/newsroom/%20press-releases/107-about-bis/newsroom/press-releases/press-release-2014/665-commerce-dept-announces-expansion-of-export-restrictions-on-russia>.
- ¹¹⁶ “U.S. Commerce Department Expands Export Restrictions on Russia,” (July 29, 2014), available at <http://www.bis.doc.gov/index.php/about-bis/newsroom/press-releases/107-about-bis/newsroom/press-releases/press-release-2014/710-u-s-commerce-department-expands-export-restrictions-on-russia>.

ENDNOTES (CONTINUED)

- 117 “Statement by the President on the Ukraine Freedom Support Act,” (Dec. 18, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/12/18/statement-president-ukraine-freedom-support-act>.
- 118 “Announcement of Sanctions Under the Sergei Magnitsky Rule of Law Accountability Act,” (May 20, 2014), *available at* <http://www.treasury.gov/press-center/press-releases/Pages/jl2408.aspx>.
- 119 “Magnitsky [sic]-related Designations,” (Dec. 29, 2014), *available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20141229.aspx>.
- 120 “Fact Sheet: Charting a New Course on Cuba,” (Dec. 17, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/12/17/fact-sheet-charting-new-course-cuba>.
- 121 *Available at* <http://www.sullcrom.com/us-economic-sanctions-united-states-eases-elements-of-cuban-embargo-new-regulations-issued-by-us-treasury>.
- 122 Joint Plan of Action (Nov. 24, 2013), *available at* <http://www.state.gov/p/nea/rls/220042.htm>.
- 123 “Implementation of a Joint Plan of Action Reached on November 24, 2013 Between the P5+1 and the Islamic Republic of Iran,” (Jan. 20, 2014) *available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140120.aspx>.
- 124 “Extension of the Implementation of the Joint Plan of Action Reached on November 24, 2013 Between the P5+1 and the Islamic Republic of Iran,” (July 21, 2014), *available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140721.aspx>.
- 125 “Extension of the Implementation of the Joint Plan of Action Reached On November 24, 2013 Between The P5+1 and The Islamic Republic of Iran,” (Nov. 25, 2014), *available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20141125.aspx>.
- 126 “Treasury Designates Additional Individuals and Entities Under Iran-Related Authorities” (Dec. 30, 2014), *available at* <http://www.treasury.gov/press-center/press-releases/Pages/jl9731.aspx>.
- 127 “Iran Sanctions Designations; Non-proliferation Designations; Counter Terrorism Designations,” (Aug. 29, 2014), *available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140829.aspx>.
- 128 See <https://twitter.com/hassanrouhani>.
- 129 “Identification of Foreign Sanctions Evaders and the Publication of a New Foreign Sanctions Evaders List,” (Feb 6, 2014), *available at* http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/fse_list_intro.aspx.
- 130 “Foreign Sanctions Evaders (FSE) List,” (Dec. 17, 2014), *available at* http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/fse_list.aspx.
- 131 “Release of Consolidated Non-SDN Data Files and Upgrade to Sanctions List Search,” (Oct. 10, 2014), *available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/consolidated.aspx>.
- 132 “Treasury Releases New Format for OFAC’s Specially Designated Nationals List,” (Jan. 5, 2015), *available at* <http://www.treasury.gov/press-center/press-releases/Pages/jl9734.aspx>.
- 133 “Issuance of an Executive Order Related to the Central African Republic,” (May 13, 2014), *available at* http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/car_eo.aspx.
- 134 “Issuance of South Sudan-related Executive Order,” (April 3, 2014), *available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20140403.aspx>.

ENDNOTES (CONTINUED)

- 135 “Background Briefing on South Sudan,” (May 6, 2014), *available at* <http://www.state.gov/r/pa/prs/ps/2014/05/225701.htm>.
- 136 “Publication of Frequently Asked Question on South Sudan-related Executive Order,” (June 2, 2014), *available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140602.aspx>.
- 137 “Issuance of an Executive Order Related to the Democratic Republic of the Congo,” (July 8, 2014), *available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140708.aspx>.
- 138 *Available at* <http://www.sullcrom.com/us-economic-sanctions-recent-developments>.
- 139 *Available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20150102.aspx>.
- 140 “Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property Are Blocked,” (August 13, 2014), *available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140813.aspx>.
- 141 *Available at* http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/ques_index.aspx.
- 142 “OFAC FAQs: Question Index,” *available at* http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/ques_index.aspx.
- 143 “Settlement Agreement between the U.S. Department of the Treasury’s Office of Foreign Assets Control and Clearstream Banking, S.A.,” (June 23, 2014), *available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140123.aspx>.
- 144 “OFAC Compliance in the Securities and Investment Sector,” (2012), *available at* <http://dx.doi.org/10.1108/15285811211266074>.
- 145 See FAQ 335 *at* <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx>.
- 146 “Settlement Agreement between the U.S. Department of the Treasury’s Office of Foreign Assets Control and BNP Paribas SA” (June 30, 2014), *available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140630.aspx>. BNPP’s obligation to pay that amount to OFAC was deemed satisfied by its larger payments to the other regulators and prosecutors taking part in the Global Settlement.
- 147 “Treasury Reaches Largest Ever Sanctions-Related Settlement with BNP Paribas SA for \$963 Million,” (June 30, 2014), *available at* <http://www.treasury.gov/press-center/press-releases/Pages/jl2447.aspx>.
- 148 “Settlement Agreement between the U.S. Department of the Treasury’s Office of Foreign Assets Control and Clearstream Banking, S.A.,” (Jan. 23, 2014), *available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140123.aspx>.
- 149 “Release of OFAC Enforcement Information,” (Sept. 9, 2014), *available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140909.aspx>.
- 150 “Release of OFAC Enforcement Information” (Jan. 27, 2014), *available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140127.aspx>.
- 151 See OFAC, “Ukraine-Related Sanctions: Sectoral Sanctions Identifications List Updates,” (Sept. 12, 2014), *available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140912.aspx>.
- 152 “Release of OFAC Enforcement Information” (July 24, 2014), *available at* <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140724.aspx>.

ENDNOTES (CONTINUED)

- 153 “Release of OFAC Enforcement Information” (Sept. 27, 2014), available at <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140903.aspx>.
- 154 “Release of OFAC Enforcement Information” (Aug. 27, 2014), available at http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140827_33.aspx.
- 155 “Release of OFAC Enforcement Information” (May 18, 2014), available at http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140418_33.aspx.
- 156 “Release of OFAC Enforcement Information” (May 6, 2014), available at http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140506_33.aspx.
- 157 “Release of OFAC Enforcement Information” (May 8, 2014), available at http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140508_33.aspx.
- 158 “Release of OFAC Enforcement Information” (June 27, 2014), available at http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140627_33.aspx.
- 159 “Release of OFAC Enforcement Information” (Oct. 29, 2014), available at <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20141029.aspx>.
- 160 “Release of OFAC Enforcement Information” (Nov. 13, 2014), available at <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20141113.aspx>.
- 161 “Release of OFAC Enforcement Information” (March 6, 2014), available at http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20140306_33.aspx.
- 162 “Release of OFAC Enforcement Information” (March 31, 2014), available at <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20140331.aspx>.
- 163 “Release of OFAC Enforcement Information” (April 2, 2014), available at <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/pages/20140402.aspx>.
- 164 “Release of OFAC Enforcement Information” (June 5, 2014), available at <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140605.aspx>.
- 165 “Fokker Judge Says He May Reject Accord on Iran Sanctions,” Bloomberg (October 29, 2014), available at <http://www.bloomberg.com/news/2014-10-29/fokker-judge-says-he-may-reject-accord-on-iran-sanctions.html>. Fokker and the government maintained that any information that the government had of the alleged activities prior to Fokker’s disclosures were insufficient to support a formal investigation.
- 166 *Id.*
- 167 *Id.*
- 168 “Release of OFAC Enforcement Information,” (June 25, 2014) available at http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140625_33.aspx.
- 169 “Release of OFAC Enforcement Information,” (July 17, 2014) available at <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140717.aspx>.
- 170 “Release of OFAC Enforcement Action” (July 24, 2014) available at http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140724_33.aspx.
- 171 “Release of OFAC Enforcement Information,” (July 25, 2014) available at <http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20140725.aspx>.
- 172 “Release of OFAC Enforcement Information,” (Oct. 31, 2014) available at http://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Pages/20141031_33.aspx.

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