

McKool Smith

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Presentation to

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Agenda

- Trends in US cross-border enforcement
- What do we mean when we refer to “sanctions”?
- Recent enforcement actions involving sanctions
- Impact of recent cases on Caribbean banking

The Long (and Longer) Arm of US Law Enforcement

- Application of US criminal law to conduct occurring largely, if not completely, outside the United States
- Use of foreign law in US criminal proceedings and forfeiture proceedings
- More regular exchange of information among governments via mutual legal assistance treaties (MLATs) and letters rogatory
- More cooperation among law enforcement in different countries

What Do We Mean When We Refer to “Sanctions”?

- Ban/limitation on **imports** of goods or services
- Ban/limitation on **exports**, including re-exports or indirect sales
- Ban/limitation on **financial transactions** (loans, transfers, letters of credit, *etc.*)
- Ban/limitation on **travel**

Many Sources of Rules

- **Confusing patchwork** of statutes, US Treasury Department (OFAC) regulations, and executive orders
 - Cuban Assets Control Regulations (CACR)
 - Trading with the Enemy Act
 - Weapons of Mass Destruction Proliferators Sanctions Regulations
 - Sudanese Sanctions Regulations
 - Comprehensive Iran Sanctions, Accountability, and Divestment Act
 - Global Terrorism Sanctions Regulations
 - Burmese Sanctions Regulations
 - Iranian Transactions and Sanctions Regulations
 - International Emergency Economic Powers Act
 - Iran Threat Reduction and Syria Human Rights Act
 - Iran Freedom and Counter-Proliferation Act (IFCA)

Just to name a few . . .

Rules Designed to Further Various US Foreign Policy Goals

➤ **Country-specific**

- **Comprehensive programs:** Burma (Myanmar); Cuba; Iran; Sudan; and Syria
- **Non-comprehensive programs:** Balkans; Belarus; Democratic Republic of the Congo; Iraq; Ivory Coast; Lebanon; Liberia; Libya; North Korea; Somalia; Yemen; and Zimbabwe

➤ Non-proliferation of **weapons of mass destruction**

➤ Transnational **criminal organizations**

➤ **Rough-diamond** trade

➤ Individual-specific policies (*e.g.*, **SDN** – Specially Designated Nationals and Blocked Persons List)

Sergei Magnitsky Rule of Law Accountability Act of 2012

- In 2007, Russian criminal organization -- including government officials -- engaged in **massive tax refund fraud scheme**
- Victim was the **Russian treasury** -- lost US\$230 million
- Magnitsky was private auditor who **exposed the scheme**; was **arrested** on false pretenses; and **died in jail**
- Federal prosecutors in NY sought to **forfeit proceeds of the scheme**, including 4 luxury apartments and 2 commercial locations
- **Sanction**: Congress **bars Russians** suspected of being involved in Magnitsky's death from United States
- **OFAC designates** 18 people alleged to be involved in Magnitsky's death
- **Russia retaliates** against US judges, prosecutors, administration and military officials; **bans adoptions** of Russian children by United States

American Express Travel Related Services

- Leading travel services company
- Dec. 2005 to Nov. 2011: foreign branches and subsidiaries issued nearly **15,000 tickets for travel between Cuba and countries other than US**, without OFAC authorization
- TRS had **previously been investigated** (1995-96) for similar conduct by newly acquired subsidiary
- OFAC concludes that TRS “demonstrated **reckless disregard**” for CACR
- “**lack of oversight** by US management of TRS’ foreign offices”; “**compliance program was inadequate**”
- “**continuing failure to implement effective mechanisms** for detecting Cuba travel bookings . . . after having informed OFAC . . . in 1995 and 1996 that it would do so””
- July 2013: TRS pays **US\$5.2 million** to settle violations

Intesa Sanpaolo S.p.A.

- Leading Italian bank with NY branch
- Intesa maintains long-standing customer relationship with Irasco S.r.l. – **owned/controlled by government of Iran (GOI)**
- Intesa **fails to identify Irasco as associated with Iran**, despite long client relationship, ownership by GOI, line of business, and associations with Iranian state-owned financial institutions
- Nov. 2004 to Oct. 2007: **67 funds transfers (US\$2.9 million)** to/through US that involved **Sudan**
- Oct. 2004 to Mar. 2008: **53 wire transfers (US\$1.6 million)** involving **Cuba**
- Aggravating factors: **failure to maintain adequate compliance program**, bank **knew/should have known** of GOI connection, **sophistication** of bank
- June 2013: Intesa pays **US\$2.9 million** to settle violations

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- June 2012: ING charged with **conspiracy** to violate TWEA and IEEPA
- Enters into **deferred prosecution agreement**; agrees to pay **US \$619 million**
- Illegal conduct involved:
 - Execution of transactions on behalf of Cuban and Iranian entities that were **designed to evade detection** by US financial institutions
 - Provide services to **SDNs to ensure payments were cleared** through US financial institutions
- Illegal conduct occurred in a **variety of countries**: Cuba, Curaçao, Netherlands, Belgium, France, and Romania

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➤ Means by which ING facilitated this conduct:

- Removed, altered, and otherwise **obscured names and references to counterparties** in payment messages
- Created processing methods to **manually alter payment messages**
- Processing payments for the bank's Cuban banking operations **through its branch in Curaçao** on behalf of Cuban customers **without reference to the payments' origin**
- Providing U.S. dollar trade finance services to sanctioned entities through **misleading payment messages, shell companies, and misuse of an internal suspense account**
- **Eliminating payment data** that would have revealed the involvement of sanctioned countries and entities, including Cuba and Iran
- **Advising sanctioned clients on how to conceal** their involvement in U.S. dollar transactions
- **Fabricating endorsement stamps** for two Cuban banks to fraudulently process U.S. dollar travelers' checks
- **Threatening to punish employees** if they failed to take specified steps to remove references to sanctioned entities in payment messages

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dear all . . . Very often we are mentioning Cuba or Havana in payment instructions, related to our U.S.\$ account in [our U.S. correspondent bank]. This create [sic] continuously problems with our correspondent banks in the U.S.A. I strongly request you in payment instructions to our U.S.A correspondents etc NOT!!!! to use the word Cuba or Havana. If you do not know , how to fill in the documents, please approach your department head.

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While I myself was in Curaçao for three years, the problem was solved in the following manner. The specification was coded and anyone who used the word “Cuba,” “Havana” or something similar in specifications was fired summarily. . . . Given the American laws, this discussion is absolutely useless because [the U.S. correspondent bank] has to comply with the OFAC list. Therefore, pay in Euros or code and thus in fact provide incorrect info to [the U.S. correspondent bank]. In the nineties we did not make a fuss about this, but now things are different.

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Dear colleagues,

A couple of days ago an incorrect transaction resulted in a loss of 180,000 Usd for the Bank. Due to the U.S. embargo against Cuba, all transactions through the United States to Cuban beneficiaries are being confiscated.

Although everybody within our processing department is aware of this, we still want to ratify to everyone that all Cuban transactions should be checked thoroughly. It is unacceptable to suffer these kinds of unnecessary losses. If by any means, these kinds of mistakes repeats itself in the future it will have severe consequences for the concerning parties.

23. Another senior executive at the branch responded as follows: “Personally, I’m more concerned that due to such errors the names of NCB and ING Curaçao might be linked to Cuba transactions. This will be more severe compared to interest loss on blocked accounts.”

24. Bank employees complied with management’s demands, and thereby deceived unaffiliated U.S. correspondent banks.

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53. The issue of U.S. economic sanctions was raised again in May 2004, when Wholesale Banking Compliance at ING London circulated an email to employees in several European offices explaining that certain countries, including Cuba and Iran, were subject to U.S. economic sanctions and that ING should not carry out U.S. dollar transactions from or to entities in those countries. A senior member of ING Groep's Legal Department responded by email:

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

When asked, the author of this email said that the Compliance officer's email came at a time when Compliance was "killing the business away."

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OBJECTIVES OF THE PROCEDURE

Reminder: The United States has imposed an embargo over, amongst other things, all movements of funds in favour of Cuban residents and Cuban banks.

We have accounts on our books with Cuban banks, who entrust us with payments transactions from their account in U.S.D. In order to avoid these payment funds from being frozen by the United States, you must follow the following procedure.

Procedure

We have opened a U.S.D account no 06915020001 on the books of [another financial institution] for U.S.D payments concerning Cuban banks, but payments should only be made to this bank where the ultimate Cuban beneficiary of the payments also has an account with [the other financial institution].

For all other payments, a SWIFT MT103 must be sent to the bank (other than in the United States) which holds the beneficiary's account on its books, specifying in field 59 of the message the beneficiary bank or the beneficiary (name or SWIFT code) and indicating in field 54 the SWIFT code of the bank in the United States at which we are covering it.

Under no circumstances should the covering message addressed to our correspondent bank in the United States contain the name and SWIFT code of a Cuban bank, but only the SWIFT code of the bank to which we have addressed the payment.

JPMorgan Chase

- Dec. 2005 to Mar. 2006: JPMC processes more than **1,700 wires**, totaling more than **US \$178 million**, for Cuba-related persons (CACR)
- **Had been alerted** by US financial institution that it might be processing wires for Cuban national and confirmed; **did not take steps to prevent**
- May 2006: JPMC process **32,000 ounce (US\$20+ million) bullion transfer** for GOI
- October 2010: OFAC **issues subpoena** to JPMC for documents relating to a specific wire transfer (“Khartoum”); JPMC **fails to produce** responsive documents; OFAC provides list of documents it **already has**
- OFAC concludes violations were “**egregious** because of reckless acts or omissions by JPMC”; OFAC concludes bank managers and supervisors “acted **with knowledge**” and “**recklessly** failed to exercise” caution/care
- August 2011: JPMC pays **US\$88.3 million** to settle violations

Iran and Correspondent Banking

- Foreign financial institutions can **now be denied correspondent accounts** in the US, effectively cutting off direct access to the US financial system, for violating Iran sanctions (under IFCA)
- Sanctions that could be imposed include prohibitions on:
 - **US bank loans** exceeding \$10 million in any 12-month period
 - **foreign exchange transactions** subject to US jurisdiction
 - **financial transactions** subject to US jurisdiction
 - transactions **with respect to property** subject to US jurisdiction
 - **investment in equity or debt** of the sanctioned person by US persons
 - **entry into the US** of corporate officers of sanctioned entities (visa ban)

Contact/Requests for Source Documents

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