CAUSING A SANCTIONS VIOLATION WITH U.S. DOLLARS: DIFFERENCES IN REGULATORY LANGUAGE ACROSS OFAC SANCTIONS PROGRAMS

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TABLE OF CONTENTS

I. INTRODUCTION ... 31

II. BACKGROUND AND APPLICABLE LEGAL PROVISIONS ... 32
- *A. Prohibitions Against "Causing a Violation"* ... 33
  - *i. Statutory Language* ... 33
  - *ii. Regulatory Language* ... 34
  - *iii. Analysis of Regulatory Language* ... 41

III. OFAC ENFORCEMENT: CAUSATION PROVISIONS AND OTHER MECHANISMS ... 44
- *A. Enforcement Actions* ... 45
  - *i. TransTel* ... 45
  - *ii. Lloyds* ... 46
  - *iii. Credit Suisse* ... 47
  - *iv. BNP Paribas* ... 48
  - *v. Barclays* ... 50
  - *vi. UniCredit* ... 51
  - *vii. Standard Chartered* ... 52
- *B. Analysis* ... 53
  - *i. Causation vs. Export of Financial Services as a Basis for Liability* ... 53
  - *ii. Prohibitions on the Direct or Indirect Export of Financial Services and Practical Effect on Differences in Causation Provisions* ... 55

IV. U.S. DOLLAR CLEARING AND SETTLEMENT ... 56
- *A. Methods of U.S. Dollar Clearing* ... 57
  - *i. Fedwire* ... 57

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ii. CHIPS 59
iii. Offshore Clearing Systems 60
B. Does Using U.S. Dollars Necessarily "Cause a Violation" of the Sanctions Regulations Through Dollar Clearing? 63
i. U.S. Dollar Clearing Systems 63
ii. Offshore Dollar Clearing Systems 63

V. CURRENT ISSUES RELATED TO DIFFERING CAUSATION PROVISIONS 66
A. Notice 66
i. OFAC Publications 66
ii. Notice Issues Concerning Definition of "U.S. Person" 69
iii. The 50% Rule 70
iv. Notice and Effect on Compliance Efforts 72
v. Criminal Charges Based on Causation and Export of Financial Services 74
B. Considerations of Extraterritorial Application 75
C. Potential Effects on the Use of the U.S. Dollar 76
D. Cash 78

VI. RECOMMENDATIONS AND POTENTIAL ALTERNATIVES 79
A. Policy Goals Related to Restricting the Use of U.S. Dollars in Transactions with Sanctioned Parties 79
B. Making All "Causing a Violation" Provisions Expansive 80
C. Making All "Causing a Violation" Provisions Limited 81

VII. CONCLUSION 82

I. INTRODUCTION

Since 2007, the International Emergency Economic Powers Act (IEEPA), one of the principal statutes enabling U.S. economic sanctions, has prohibited any party from causing a violation of any license, order, regulation, or prohibition issued under its authority.[1] When this statutory requirement appears in regulatory text, however, it does so in two different forms. More commonly, this prohibition is framed in general terms applicable to "[a]ny transaction," but sometimes this same restriction is phrased as applicable only to "[a]ny transaction by a U.S. person or within the United States."[2] This difference in phrasing may appear minor and indeed, the U.S. Department of the Treasury does not seem to have intended to create two versions of the causation language having distinct meanings. The broader form of this language, however, has been used on at least one occasion as the basis for government enforcement against non-U.S. parties based solely on the use of U.S. dollars in transactions with a sanctioned party that would be prohibited if performed by a U.S. party.[3] Where the broad causation provision has been used in this way, the Office of Foreign Assets Control (OFAC) within the U.S. Department of the Treasury based its theory of liability on the foreign party having caused a U.S. entity to violate the sanctions regulations by way of the U.S. entity participating in the dollar clearing process.[4]

Part I of this Article discusses the different versions of the causation provisions found within the sanctions regulations and examines their relationship to relevant statutes and Executive Orders. Part II reviews how a broad causation provision was used as the basis for the government enforcement action brought by OFAC against CSE Global Limited and its subsidiary CSE TransTel Pte Ltd. (TransTel). It also examines how OFAC has also brought enforcement actions in the past based on similar facts but based instead on a theory of export of financial services from the United States, either directly or indirectly. This Article argues that the government's use of the causation provisions therefore does not constitute an entirely new area of enforcement, even though different regulatory provisions are used as the stated basis. Part III explores the nature of U.S. dollar clearing and settlement, both in U.S. and

[1] International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1705(a) (1977).

[2] 31 C.F.R. § 544.205 (2018). U.S. persons are generally defined in the OFAC regulations to include both individuals and entities. *See, e.g.*, 31 C.F.R. § 535.308 (1980).

[3] Settlement Agreement Between U.S. Dep't of the Treasury's Office of Foreign Assets Control and CSE Global Limited and CSE TransTel Pte. Ltd. (July 15, 2017), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/transtel_settlement.pdf [hereinafter TransTel Settlement Agreement].

[4] *Id.*

offshore payment systems, and concludes that U.S. dollar-denominated transactions generally do require the involvement of a U.S. party and thus necessarily cause a sanctions violation where the broad version of the causation language is present or where a theory of indirect export of financial services is used. Part IV analyzes how OFAC has publicized prohibitions concerning the use of U.S. dollars in transactions with sanctioned entities and discusses how those legal requirements might be made clearer and more broadly understandable in the future. Finally, Part V recommends that the causation provisions be made consistent and standardized into the more expansive form in order to create transparency around the applicability of U.S. sanctions to transactions involving U.S. dollars.

II. BACKGROUND AND APPLICABLE LEGAL PROVISIONS

The Office of Foreign Assets Control (OFAC) within the U.S. Department of the Treasury was created in 1950 and administers U.S. economic and trade sanctions.[5] Previously, asset controls were administered by the Office of Foreign Funds Control, created in 1940.[6] OFAC's authority to control assets is based on several statutes, including among others the International Emergency Economic Powers Act (IEEPA); the Trading With the Enemy Act (TWEA); the Foreign Narcotics Kingpin Designation Act (FNKDA); and the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).[7]

IEEPA was enacted in 1977.[8] The statute "grants the President extensive power to regulate a variety of economic transactions during a state of emergency."[9] Pursuant to IEEPA, the President may declare a national emergency to exercise powers under IEEPA "to deal with any unusual or extraordinary threat, which has its source in whole or in substantial part outside of the United States, to the national security, foreign policy, or economy of the United States."[10] A list of Executive Orders (mainly issued under the authority of IEEPA) relevant to the scope of this Article is detailed in the table found in Part I.A.ii.

[5] *About, Terrorism and Financial Intelligence*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/about/organizational-structure/offices/pages/office-of-foreign-assets-control.aspx (last updated Apr. 5, 2019, 5:53 PM).

[6] *Id.*

[7] 31 C.F.R. pt. 501, app. A (2018).

[8] CHRISTOPHER A. CASEY ET AL., CONG. RESEARCH SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 2 (2019), https://fas.org/sgp/crs/natsec/R45618.pdf.

[9] *Id.*

[10] 50 U.S.C. § 1701(a) (1977).

A. Prohibitions Against "Causing a Violation"

The laws, regulations, and orders governing U.S. sanctions may prohibit not only certain types of conduct, but also, as described below, actions which cause a violation of any of the terms of particular U.S. sanctions programs. Such language is the subject of this Article and is referred to herein as "causation provisions" or "causation language." Causation language appears within the IEEPA statute itself (within the section describing penalties), as well as in two different forms of regulatory prohibitions and in the penalties sections of certain sanctions regulations.[11] The different forms of the causation language are described in Section I.A.ii. of this Article.

i. Statutory Language

Currently, 50 U.S.C. § 1705 ("Penalties") states under paragraph (a) that "[i]t shall be unlawful for a person to violate, attempt to violate, conspire to violate, or cause a violation of any license order, regulation, or prohibition issued under" Chapter 35 of Title 50 of the U.S. Code, namely IEEPA. This specific language was added to the statute through the IEEPA Enhancement Act, enacted in 2007.[12] Paragraph (c) allows for a fine or imprisonment for any person "who willfully commits, willfully attempts to commit, or willfully conspires to commit, or aids and abets in the commission of, an unlawful act described in subsection (a)." The IEEPA Enhancement Act also increased the maximum civil penalty for violations of IEEPA, from $50,000 to $250,000 per violation, and also raised the maximum criminal penalty from $50,000 to $1,000,000 per violation.[13] The 2007 amendments also added conspiracy to violate any IEEPA license, order, regulation, or prohibition as an act prohibited under the statute.[14]

The Penalties section of the original 1977 statute provided for the imposition of a civil penalty "on any person who violates any license, order, or regulation issued under this title," or a criminal fine or term of imprisonment upon "[w]hoever willfully violates any license, order, or regulation issued

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[11] 50 U.S.C. § 1705(a).

[12] Brad S. Karp et al., *OFAC Breaks New Ground by Penalizing Non-U.S. Companies for Making U.S. Dollar Payments Involving a Sanctioned Country*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Aug. 16, 2017), https://corpgov.law.harvard.edu/2017/08/16/ofac-breaks-new-ground-by-penalizing-non-u-s-companies-for-making-u-s-dollar-payments-involving-a-sanctioned-country/.

[13] *New Legislation Increases Penalties Under the International Emergency Economic Powers Act*, GIBSON DUNN (Oct. 16, 2007), https://www.gibsondunn.com/new-legislation-increases-penalties-under-the-international-emergency-economic-powers-act/.

[14] CASEY, *supra* note 8, at 12.

under this title."[15] Causation and conspiracy were not in themselves included as prohibited acts.[16] While language was added to the Penalties section in other amendments made to IEEPA between the enactment of the statute in 1977 and the passage of the IEEPA Enhancement Act in 2007 (for example, allowing a civil penalty to be assessed for attempts to violate the statute), the imposition of liability for causing a violation did not appear until the 2007 revisions.[17]

The causation language in the 2007 IEEPA Enhancement Act was in the version of the bill passed by the Senate and subsequently the House of Representatives.[18] The Senate Committee Report does not specifically address why the causation language was being added to IEEPA, but instead commented generally on the intent of the IEEPA Enhancement Act to strengthen the penalties available for violations of IEEPA, as "current penalties [were] neither adequate nor proportionate in many cases, for deterring companies from investing in bad actors."[19]

ii. Regulatory Language

The regulations implementing the various OFAC sanctions programs are set forth in Title 31. Many of these sanctions programs contain some type of provision prohibiting individuals and other entities from causing a violation of that particular sanctions program (or in some cases, of any license, order, or prohibition issued under IEEPA). This causation language appears in principally two different forms across different sanctions programs. One version of this language is as follows: "Any transaction by a U.S. person or within the United States that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth in this part is prohibited."[20] In the table below, this language is denoted as "limited," since it applies only to the conduct of U.S. persons or to actions taken within the United States. As described in the table below, this limited causation language appears in the Syrian and Zimbabwean sanctions regulations.

A different version of the causation language appears in a larger number of sanctions programs: "Any transaction . . . that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate

[15] International Emergency Economic Powers Act (IEEPA), Pub. L. No. 95-223, § 206, 91 Stat. 1626 (1977) (codified as amended at 50 U.S.C. § 1705).

[16] *Id.*

[17] 50 U.S.C. § 1705.

[18] 50 U.S.C. §§ 1701-1708 (2007).

[19] S. Rep. No. 110-82 (2007).

[20] 31 C.F.R. § 542.205(a) (2014).

any of the prohibitions set forth in this part is prohibited."[21] In the table below, this type of language is described as "expansive" because its reach is not limited to actions taken by U.S. persons or within the U.S. This Article also refers to this version as "broad" causation language.

Some sanctions programs contain neither type of language, but instead allow for the imposition of penalties for causing a violation of IEEPA.[22] This language is similar to the expansive causation language and is as follows: "A civil penalty not to exceed the amount set forth in Section 206 of the Act may be imposed on any person who violates, attempts to violate, conspires to violate, or causes a violation of any license, order, regulation, or prohibition issued under the Act."[23] In the table below, this form of language is also described as "expansive," but the fact that the language appears in the penalties section of the sanctions program, rather than as a separate prohibition, is noted next to the regulatory citation.

The following table summarizes the type of causation language appearing in each U.S. sanctions program, along with the corresponding executive order and the year of that order:

Sanctions Program	**Type of "causing a violation" language in E.O.**	**E.O. and year**	**Type of "causing a violation" language in regulation**	**Regulation cite (within Title 31 of the Code of Federal Regulations)**
North Korea	Expansive (13810, 13687 & 13722); limited (13570 & 13551); none within 13466	E.O.s 13466 (2008); 13551 (2010); 13570 (2011); 13687 (2015); 13722 (2016); 13810 (2017)	Expansive	§ 510.212 (Implemented in current form March 5, 2018; 83 Fed. Reg. 9182)
Cuba	None	E.O 12854 (1993)	None	n/a
Iranian Assets	None	E.O.s 12170 (1979), 12205 (1980), 12211	Expansive	§ 535.701 (penalties) (June 10,

[21] 31 C.F.R. § 560.203(a) (2012).
[22] *See, e.g.*, 31 C.F.R. § 535.701 (2008).
[23] *See*, *e.g.*, 31 C.F.R. §561.07(a)(3) (2012).

		(1980), 12276 (1981), 12279 (1981), 12280 (1981), 12281 (1981), 12282 (1981), 12283 (1981), 12294 (1981)		2008; 73 Fed. Reg. 32652)
Narcotics	None	E.O. 12978 (1995)[24]	Expan-sive	§ 536.701 (penal-ties) (June 10, 2008; 73 Fed. Reg. 32652)
Weapons of Mass Destruc-tion Trade Control	None	E.O.s 12938 (1994); 13094 (1998);	Expan-sive	§ 539.701 (penal-ties) (June 10, 2008; 73 Fed. Reg. 32652)
Zimba-bwe	None	E.O.s 13469 (2008); 13391 (2005); 13288 (2003)	Limited in 541.204 and ex-pansive penalties	§ 541.204 (July 29, 2004; 69 Fed. Reg. 45246) & § 541.207 (June 10, 2008; 73 Fed. Reg. 32652)
Syria	Limited	E.O. 13582 (2011)	Limited in 542.205 and ex-pansive penalties	§ 542.205 (2005) & § 542.701 (pen-alties) (June 10, 2008; 73 Fed. Reg. 32652)
Darfur	None	E.O. 13400 (2006)	Expan-sive	§ 546.701 (penal-ties) (May 28, 2009; 74 Fed. Reg. 25430)

[24] *Counter Narcotics Trafficking Sanctions*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/resource-center/sanctions/programs/pages/narco.aspx (last updated Aug. 21, 2019, 10:20 AM).

Democratic Republic of the Congo	Expansive (13671); none in original E.O.	E.O.s 13413 (2006); 13671 (2014)[25]	Expansive	§ 547.205[26] (Nov. 15, 2018; 83 Fed. Reg. 57308)
Belarus	None	E.O. 13405 (2006)	Expansive	§ 548.701 (penalties) (February 3, 2010; 75 Fed. Reg. 5502)
Lebanon	None	E.O. 13441 (2007)	Expansive	§ 549.701 (penalties) (July 30, 2010; 75 Fed. Reg. 44907)
Somalia	Limited	E.O. 13536 (2010)	None	n/a
Yemen	Expansive	E.O. 13611 (2012)	None	n/a
Central African Republic	Expansive	E.O. 13667 (2014)	None	n/a
Burundi	Expansive	E.O. 13712 (2015)	None	n/a
South Sudan	Expansive	E.O. 13664 (2014)	None	n/a
Iranian Transactions	None (12613, 12957,	E.O.s 12613 (1987); 12957 (1995); 12959	Expansive	§ 560.203 & § 560.701 (penalties)[27] (June 10,

[25] *Democratic Republic of the Congo Sanctions*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/resource-center/sanctions/Programs/pages/drc.aspx (last updated Nov. 15, 2018, 4:58 PM).

[26] 31 C.F.R. § 547.205 (2018).

[27] 31 C.F.R. § 560.701(a)(3) (as amended in 2019) states:

> As set forth in section 218 of the Iran Threat Reduction and Syria Human Rights Act of 2012 (Pub. L. 112-158), a civil penalty not to exceed the amount set forth in section 206 of IEEPA may be imposed on a United States person if an entity owned or controlled by the United States person and established or maintained outside the United States violates, attempts to violate, conspires to violate, or causes a violation of the prohibition set forth in § 560.215 or of any order, regulation or license set forth in or issued pursuant to this part concerning such prohibition. The penalties set forth in this paragraph shall not apply with respect to a transaction described in § 560.215 by an entity owned or controlled by the United States person and established or maintained outside the United States if the United States person divests or terminates its business with the entity

	12959, 13059); Limited (13599); Expansive (13268)	(1995); 13059 (1997); 13599 (2012); 13268 (2012)		2008; 73 Fed. Reg. 32652)
Iranian Financial	None (12957); Limited (13599); Expansive (13622, 13628)	E.O.s 12957 (1995), 13599 (2012), 13622 (2012), 13628 (2102)	Expansive	§ 561.205 & § 561.701(a)(1) & (3) (penalties) (Aug. 16, 2010) (75 Fed. Reg. 49836) (additional, limited penalties in (a)(2))
Iranian Human Rights	Limited	E.O. 13553 (2010)	None	n/a
Hizbollah Financial	None	E.O.s 12947 (1995); 13099 (1998); 13224 (2001); 13268 (2001); 13372 (2005)[28]	Expansive	§ 566.202 & § 566.701 (penalties) (Apr. 15, 2016; 81 Fed. Reg. 22185)
Libya	Limited	E.O. 13566 (2011)	None	n/a
Iraq stabilization and insurgency	None	E.O.s 13303 (2003), 13315 (2003), 13350 (2004), 13438 (2007), 13668 (2014)	Expansive	§ 576.701 (penalties) (Sept. 13, 2010) (75 Fed. Reg. 55463)
Cyber-related	Expansive	E.O. 13694 (2015)	None	n/a
Foreign Interference in	Expansive	E.O. 13848 (2018)	None	n/a

not later than February 6, 2013, such that the U.S. person no longer owns or controls the entity, as defined in § 560.215(b)(1).

[28] *Counter Terrorism Sanctions*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/resource-center/sanctions/programs/pages/terror.aspx (last updated Sept. 12, 2019, 1:06 PM).

U.S. Elections				
Nicaragua	Expansive	E.O. 13851 (2018)	None	n/a
Global Magnitsky	Expansive	E.O. 13818 (2017)	Reference within E.O.s only	n/a
Magnitsky Act	n/a	n/a	Expansive	§ 584.205 & § 584.701 (penalties) (both Dec. 21, 2017; 82 Fed. Reg. 60507)
Western Balkan Stabilization	None	E.O.s 13304 (2001); 13219 (2001)[29]	Expansive	§ 588.701 (penalties) (June 10, 2008; 73 Fed. Reg. 32652)
Ukraine	Expansive	E.O.s 13660, 13661, 13662 (2014)	Reference within E.O.s only	Apps. A, B, C to Part 589
Transnational Criminal Organizations	Limited	E.O. 13581 (2011)	Reference within E.O. only	App. A to Part 590
Venezuela	Expansive	E.O. 13692 (2015)	Reference within E.O. only	App. A to Part 591
Rough diamonds	None	E.O. 13312 (2003)[30]	None	n/a

[29] *Balkans-Related Sanctions*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/resource-center/sanctions/programs/pages/balkans.aspx (last updated July 26, 2019, 2:49 PM).

[30] *Rough Diamond Trade Controls*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/resource-center/sanctions/Programs/pages/diamond.aspx (last updated Mar. 28, 2019, 12:21 PM).

Global Terror-ism	None	E.O.s 12947 (1995); 13099 (1998); 13224 (2001); 13268 (2001); 13372 (2005)[31]	Expan-sive	§ 594.701 (penal-ties) (June 10, 2008; 73 Fed. Reg. 32652)
Terror-ism	None	E.O.s 12947 (1995); 13099 (1998); 13224 (2001); 13268 (2001); 13372 (2005)[32]	Expan-sive	§ 595.701 (penal-ties) (June 10, 2008; 73 Fed. Reg. 32652)
Terror-ism List Govern-ments	n/a	n/a	None	n/a
Foreign Terrorist Organi-zations	None	E.O.s 12947 (1995); 13099 (1998); 13224 (2001); 13268 (2001); 13372 (2005)[33]	None	n/a
Foreign Narcotics Kingpin	None	N/A (regula-tions imple-mented King-pin Act, 21 U.S.C. §§ 1901-1908 and 8 U.S.C. § 1182)[34]	None	n/a

In addition, the Sudanese sanctions regulations have now been revoked, but contained an expansive version of the causation language in the penalties section only, added in 2008. Similar language appeared in the relevant penalties sections of the Burmese, Taliban (Afghanistan), Yugoslavia/Bosnia, former Liberian regime of Charles Taylor and highly enriched uranium sanctions

[31] U.S. DEP'T OF THE TREASURY, *supra* note 28.
[32] *Id.*
[33] *Id.*
[34] OFFICE OF FOREIGN ASSETS CONTROL, NARCOTICS SANCTIONS PROGRAM (2014), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/drugs.pdf.

regulations, among others.[35] Executive Order 13882, announcing Mali-related sanctions on July 26, 2019, contained a broad causation provision.[36]

iii. Analysis of Regulatory Language

As a preliminary point, the broad version of the causation language, whether in place as a separate prohibition or in a penalties section, appears much more frequently across OFAC sanctions programs than does the more limited causation language. Only the Syria and Zimbabwe sanctions programs contain the limited version of the causation language, although the limited causation language also appears in certain Executive Orders related to additional sanctions programs (such as Somalia, Libya, and transnational criminal organizations, among others).[37] There does not appear to be a relationship between the overall restrictiveness of a sanctions program and the specific type of causation language used within that program. The Syrian sanctions program, for example, "is one of the most comprehensive sanctions programs currently implemented by OFAC," and contains blanket restrictions on the "exportation, reexportation, sale or supply of" services into Syria.[38] Despite this, the Syrian sanctions regulations contain the limited type of causation language. Other sanctions programs only target certain named individuals but nonetheless use the expansive causation language (such as, for example, the Western Balkan stabilization program).[39]

It is not entirely clear why these differences in causation language appear across sanctions programs, across Executive Orders, and between authorizing Executive Orders and regulatory language related to the same sanctions program. More recent regulations and Executive Orders seem to more frequently contain expansive causation language as a separate prohibition.[40] One event explains the timing of the expansive penalties language: the 2007 enhancements to the IEEPA Act changed the penalties sections, described above, to include penalties for causation actions where no such liability had explicitly

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[35] 31 C.F.R. § 537 (2016) (Burmese); 31 C.F.R. §545 (2009) (Taliban); 31 C.F.R. § 586 (2000) (Yugoslavia/Bosnia); 31 C.F.R. § 593 (2016) (Former Liberian Regime of Charles Taylor).

[36] Exec. Order. No. 13882, 3 C.F.R. § 5(a) (2019).

[37] 31 C.F.R. § 542.205 (2014) (Syria); 31 C.F.R. § 541.204 (2006) (Zimbabwe); Exec. Order No. 13,536, 75 Fed. Reg. 19,869 (Apr. 12, 2010) (Somalia); Exec. Order No. 13,566, 76 Fed. Reg. 11,315 (Feb. 25, 2011) (Libya); Exec. Order No. 13,581, 76 Fed. Reg. 44,757 (July 24, 2011) (transnational criminal organizations).

[38] OFFICE OF FOREIGN ASSETS CONTROL, SYRIA SANCTIONS PROGRAM (2013), https://www.treasury.gov/resource-center/sanctions/Programs/Documents/syria.pdf (citing Exec. Order No. 13582, 76 Fed. Reg. 52,209 (Aug. 22, 2011)).

[39] *See generally* U.S. DEP'T OF THE TREASURY, *supra* note 29.

[40] *See generally* sanction chart, *supra* pp. 35-41.

existed in those penalties sections before.[41] Namely, before the IEEPA Enhancement Act was passed, the relevant penalty section (e.g., 31 C.F.R. § 538.701) provided that "[a] civil penalty not to exceed $50,000 per violation may be imposed on any person who violates any license, order, or regulation issued under the Act." The language was amended by the IEEPA Enhancement Act[42] to state that "[a] civil penalty not to exceed the amount set forth in Section 206 of the Act may be imposed on any person who … causes a violation of any license, order, regulation, or prohibition issued under" IEEPA. All the instances of expansive causation language that appear in the penalties sections of sanctions programs were added after the time of the IEEPA Enhancement Act. These sections appear to have been added with the intent of penalizing actions causing violations of any of the prohibitions of IEEPA, and there is no evidence to suggest an intent to implement these penalties provisions in order to widen the jurisdictional reach of the sanctions regulations beyond what the limited version of the causation language was intended to address (as discussed in greater detail below).

There does not appear to be any relationship between the type of causation language that appears in an Executive Order and that appearing in the corresponding regulatory language. For example, the Zimbabwe sanctions regulations contain a limited causation provision, but no reference to causation was made in the corresponding Executive Orders.[43] The causation language that appears in the authorizing Executive Order[44] related to the Iranian Transactions and Sanctions Regulations (ITSR)[45] is limited; the causation language within the ITSR themselves, however, is expansive. The fact that the ITSR Executive Order with its limited causation language was translated into the more general provision in the ITSR might indicate that the two versions were intended to have the same effect–namely, to be limited to U.S. persons and U.S. transactions–and that the omission of the limiting language in the ITSR was not intended to have a practical difference as to the reach of that section.

The theory that the two forms of causation provisions were intended to have the same jurisdictional reach (namely, to actions taken by U.S. persons or within the United States) is further supported by the Federal Register Notice in which the causation provision in the North Korean sanctions regulations, which appears in the broader form, is nevertheless discussed as being

[41] *See, e.g.*, 73 Fed. Reg. 32,652 (June 10, 2008) ("OFAC is amending the current IEEPA-based sanctions programs regulations to reflect the revised description of unlawful acts and the revised penalties prescribed by the Act").

[42] IEEPA Civil and Criminal Penalties, 31 C.F.R. §537.701(a)(1) (2008).

[43] *See* Exec. Order No. 13,288, 68 Fed. Reg. 11,457 (Mar. 6, 2003); Exec. Order No. 13,391, 70 Fed. Reg. 71,201 (Nov. 22, 2005); Exec. Order No. 13,469, 73 Fed. Reg. 43,841 (July 25, 2008); *cf.* 31 C.F.R. § 541.204.

[44] Exec. Order No. 13,599, 77 Fed. Reg. 6659 (2012).

[45] 31 C.F.R. § 560.

limited to transactions by U.S. persons or within the United States.[46] Specifically, 31 C.F.R. § 510.212 (within the North Korean sanctions regulations) itself includes the expansive causation language.[47] However, the Federal Register Notice amending the North Korean sanctions regulations comments that "[s]ection 510.212 further contains the additional prohibition, included in all but the first order but available for all IEEPA-based prohibitions, on any transaction *by a U.S. person or within the United States* that causes a violation of any of the prohibitions in any of the orders."[48] This perhaps indicates that at the time of the amendment of the North Korean sanctions regulations, OFAC considered the expansive prohibition language to be a prohibition relating only to transactions by a U.S. person or occurring within the United States.[49]

Moreover, the fact that the Zimbabwean and Syrian sanctions regulations contain a limited causation provision as a separate prohibition but expansive causation language within their respective penalties section seems to indicate that the presence of expansive language in the penalties section is not necessarily intended to extend potential liability to actions taken outside of the United States or by persons outside of the United States. The expansive language of the penalties section might not necessarily extend the jurisdictional reach of a limited causation provision which appears as a separate prohibition.

The broad and limited causation provisions appear to constitute a different set of legal requirements despite having been intended to have the same effect, namely, to be limited to actions taken within the United States or by U.S. parties. The broad causation provisions appear to have been drafted as a sort of shorthand version of the more limited causation language. Despite the clues noted above as to the intent of the drafters, it seems (as described within this Article) that OFAC currently interprets the sanctions causation provisions according to their plain text. This next Part of this Article explores the principles that appear to govern OFAC's use of the causation principles as the basis for government enforcement of the sanctions regulations. Part II also discusses an alternative theory of liability used by OFAC with respect to the use of U.S. dollars overseas in transactions with sanctioned parties.

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[46] 83 Fed. Reg. 9182 (Mar. 5, 2018); *cf.* 31 C.F.R. §510.212 (2018).

[47] 31 C.F.R. §510.212 (2018).

[48] North Korean Sanctions Regulations, 83 Fed. Reg. 9182, 9182-83 (Mar. 5, 2018) (amending the North Korean sanctions regulations contained at 31 C.F.R. § 510 and reissuing them in their entirety) (emphasis added).

[49] It should be noted, however, that the *TransTel* settlement (discussed in greater detail in Part II.A), in which a broad causation provision was used to support a theory of liability based on actions taken outside the United States. and by non-U.S. entities, had occurred nearly eight months earlier, in July 2017. It is possible that the division of OFAC responsible for the *TransTel* settlement was not fully aligned with the division of the office responsible for the amendment of the North Korean sanctions regulations. It is also possible that, for some reason, OFAC saw a difference in jurisdictional reach between the North Korean sanctions regulations and the ITSR (although that difference is not reflected in any textual difference in the causation provisions of these programs).

III. OFAC ENFORCEMENT: CAUSATION PROVISIONS AND OTHER MECHANISMS

Regardless of the type of conduct the broad causation language was originally meant to encompass, the expansive causation language has since been used by OFAC as the basis for enforcement against conduct taken outside the United States and by non-U.S. parties, based on the nexus of U.S. financial institutions being involved during the course of U.S. dollar transactions.[50] This Part describes the background of the *TransTel* settlement and the legal theory of causation upon which OFAC described TransTel's liability. This Part also discusses other OFAC enforcement actions that were brought under similar, but slightly different, legal theories and facts, including cases brought under the theory of indirect export of financial services from the United States and that of causing a violation by U.S. financial institutions through more active concealment of the involvement of a sanctioned entity. As such, this Article proposes that OFAC's use of the broad causation provisions did not penalize a type of conduct that it had not already exercised jurisdiction over by other means. The other actions discussed in this Part besides *TransTel* were all brought against financial institutions, however, and the use of the causation provisions might therefore constitute a new tool for OFAC to penalize different types of actors for their use of the U.S. dollar in connection with transactions with sanctioned parties. Finally, this Part examines how the nature of OFAC enforcement through an alternative theory of liability may render transactions with sanctioned parties violations of the OFAC regulations even

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[50] TransTel Settlement Agreement, *supra* note 3; Settlement Agreement Between U.S. Dep't of the Treasury's Office of Foreign Assets Control and Lloyds TS Bank, PLC (Dec. 22, 2009), https://www.treasury.gov/resource-center/sanctions/OFAC-Enforcement/Docuuments/lloyds_agreement.pdf [hereinafter Lloyds Settlement Agreement]; Settlement Agreement Between U.S. Dep't of the Treasury's Office of Foreign Assets Control and Credit Suisse AG (Dec. 16, 2000), https://www.treasury.gov/resource-center/santions/OFAC-Enforcement/Documents/12162009.pdf [hereinafter Credit Suisse AG Settlement Agreement]; Settlement Agreement Between U.S. Dep't of the Treasury's Office of Foreign Assets Control and BNP Paribas SA 8 (Jun. 30, 2014), https://www.treasury.gov/resource-center/sanctions/OFACEnforcement/Pages/20140630.aspx [hereinafter BNP Paribas SA 8 Settlement Agreement]; Settlement Agreement Between U.S. Dep't of the Treasury's Office of Foreign Assets Control and Barclays Bank PLC (Feb. 8, 2016), https://www.treasury.gov/resource-center/sanctions/OFACEnforcement/Pages/20160208.aspx [hereinafter Barclays Settlement Agreement]; Settlement Agreement Between U.S. Dep't of the Treasury's Office of Foreign Assets Control and UniCredit Bank AG at ¶5 (Apr. 15, 2019), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20190415_unicredit_bank_ag.pdf [hereinafter UniCredit Bank AG Settlement Agreement]; Settlement Agreement Between U.S. Dep't of the Treasury's Office of Foreign Assets Control and Standard Chartered Bank (Apr. 9, 2019), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/scb_settlement.pdf [hereinafter Standard Chartered Bank Settlement Agreement].

in the context of sanctions programs with the limited version of the causation language.

A. *Enforcement Actions*

i. *TransTel*

The *TransTel* settlement stemmed from an enforcement action brought by OFAC against CSE Global Limited ("CSE") and its wholly-owned subsidiary, CSE TransTel Pte. Ltd. ("TransTel").[51] TransTel was based in Singapore and supplied telecommunications to the oil and gas sector.[52] TransTel allegedly "entered into contracts with, and received purchase orders from, multiple Iranian companies" (at least two of which were contained on OFAC's Specially Designated Nationals and Blocked Persons (SDN) List).[53] TransTel also hired Iranian companies to provide goods and services in connection with these contracts and purchase orders.[54] According to OFAC, between June 2012 and March 2013, TransTel originated 104 funds transfers relating to Iran or Iranian persons in some way, totaling $11,111,812 from its account denominated in U.S. dollars at a non-U.S. financial institution based in Singapore.[55] All of these funds transfers "were processed through the United States and caused multiple financial institutions–including several U.S. financial institutions–to engage in the prohibited exportation or re-exportation of financial services from the United States to Iran."[56] OFAC alleged that on this basis, and because TransTel appeared to have "explicit knowledge and reason to know" of the Iranian connection with respect to these transactions, TransTel appeared to have violated § 1705(a) of IEEPA (making it unlawful for a person to violate or cause a violation of any IEEPA prohibition or regulation) and/or § 560.203 of the ITSR (the ITSR causation provision).[57] Pursuant to the July 2017 settlement agreement, CSE and TransTel agreed to pay a total penalty of approximately $12 million to OFAC.[58]

The *TransTel* settlement was widely regarded as being based on a new type of jurisdictional theory–namely, the use of the causation provisions to hold a non-U.S. party responsible for violations of U.S. sanctions based solely on its

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[51] TransTel Settlement Agreement, *supra* note 3.
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*

use of the U.S. dollar.[59] However, as described below, the *TransTel* settlement was perhaps a logical extension of, and conceptually very similar to, prior and subsequent OFAC cases in which foreign parties were penalized for directly or indirectly exporting financial services from the United States to sanctioned parties or countries.

ii. Lloyds

In December 2009, OFAC entered into a settlement agreement with Lloyds TSB Bank, plc ("Lloyds"), a financial institution organized under the laws of England and Wales.[60] Lloyds participated in conduct including "intentionally manipulating and deleting information in wire transfer instructions executed" on behalf of Iranian customers and those in Sudan and Libya; this "policy of manipulating information in wire transfer instructions was memorialized in writing and approved by senior managers within Lloyds."[61] Thus, according to the settlement, at least 4,200 electronic transfers were routed by Lloyds "to or through third-party banks located in the United States, in apparent violation of IEEPA and OFAC regulations related to Iran, Sudan, and Libya."[62] These violations did not involve either of Lloyds' two U.S. branches.

The settlement agreement described that the apparent violations involved the following:

> (1) the exportation of services by Lloyds from the United States to Iran or the Government of Iran; (2) the exportation of services by Lloyds from the United States to Sudan or the Government of Sudan; (3) the transfer, payment, exportation, withdrawal, or other dealings by Lloyds in property or interests in property of the Government of Sudan that were in or came within the United States; and (4) the transfer, payment, exportation, withdrawal, or other dealings by Lloyds in property or interests in property of the Government of Libya that were or came within the United States during the pendency of U.S. sanctions against Libya.[63]

[59] *See, e.g.*, *OFAC Pushes New Limits on Jurisdiction of U.S. Sanctions by Penalizing Non-U.S. Companies for "Causing" Violations by U.S. Dollars Payments*, AKIN GUMP (Aug. 10, 2017) https://www.akingump.com/en/news-insights/ofac-pushes-new-limits-on-jurisdiction-of-u-s-sanctions-by.html; *see also* Karp et al., *supra* note 12.

[60] Lloyds Settlement Agreement, *supra* note 50.

[61] *Id.*

[62] *Id.*

[63] *Id.*

This matter therefore involved a sanctions program in which no causation provision was present (Libya); one in which the causation provision appeared in broad form but only in the penalties section (Iran); and one in which there was a separate causation prohibition (Iran). Causation was nowhere mentioned in the Lloyds settlement agreement as a basis of liability, but the concept of causing U.S. financial institutions to commit U.S. sanctions violations appeared to form the basis for this enforcement action. Indeed, a 2009 article noted that the Lloyds case "appear[ed] to mark the first time the DOJ . . . asserted jurisdiction over a non-U.S. person whose conduct occurred entirely outside the United States, but which caused OFAC violations by a non-affiliated U.S. person."[64] Moreover, "the stripping of transactions by Lloyds appears to have occurred without any participation by its U.S. affiliates or employees," and as such "the only link between Lloyds and the United States appears to have been the transmittal of payment instructions to U.S. financial institutions, which in turn violated OFAC sanctions, albeit unknowingly, by processing those requests."[65]

Thus, while TransTel was not a financial institution as was Lloyds, the essential theory of liability–causing U.S. financial institutions to process transactions involving U.S.-sanctioned parties–was essentially the same. The *TransTel* case, therefore, did not necessarily introduce an entirely novel theory of liability in the form of causation. As described in the cases below, OFAC continued to use the theory of export of financial services as the basis for enforcement actions both before and after the *TransTel* settlement was entered into.

iii. Credit Suisse

Also in 2009, OFAC, the U.S. Department of Justice, and the New York County District Attorney's Office entered into a settlement agreement with Credit Suisse AG for a total of $536 million.[66] The Credit Suisse matter involved allegations that Credit Suisse had "engaged in payment processes that prevented U.S. financial institutions from identifying the involvement of U.S. sanctions targets in funds transfers processed to and through the United States."[67] Among other allegations, these payment processes included the following types of conduct:

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[64] *New Enforcement Action Highlights Potential OFAC Risks for Non-U.S. Financial Institutions*, CLEARY GOTTLIEB STEEN & HAMILTON LLP (Jan. 14, 2009), https://www.clearygottlieb.com/news-and-insights/publication-listing/new-enforcement-action-highlights-potential-ofac-risks-for-non-us-financial-institutions22?search=.

[65] *Id.*

[66] *U.S. Treasury Dep't Announces Joint $536 Million Settlement with Credit Suisse AG*, U.S. DEP'T OF THE TREASURY (Dec. 16, 2009), https://www.treasury.gov/press-center/press-releases/Pages/tg452.aspx.

[67] Credit Suisse AG Settlement Agreement, *supra* note 50.

> [O]mitting or removing information referencing sanctioned locations, entities or individuals; forwarding payment messages to U.S. financial institutions that referenced Credit Suisse as the ordering institution and that omitted the identity of the actual originating bank; filling the field on Society for Worldwide Interbank Financial Telecommunication ("SWIFT") payment messages that indicated the originator or replacing the names of ordering customers on such payment messages with references to Credit Suisse or with phrases such as "Order of a Customer'; and using cover payments to avoid referencing parties subject to U.S. sanctions.[68]

Credit Suisse's conduct was alleged to have violated the OFAC prohibitions against the "exportation, . . . directly or indirectly, from the United States, . . . of any services to Iran or the Government of Iran"[69] through processing electronic funds transfers through financial institutions located in the United States. Credit Suisse was also alleged to have violated similar prohibitions with respect to Burma, Sudan, Cuba, Libya, and Liberia, based on the same type of conduct.[70] This enforcement action was not based on the causation provisions themselves, but as was the case in the *Lloyds* settlement, was based instead on the OFAC regulations prohibiting the export of financial services to sanctioned parties, directly or indirectly, from the United States.[71] However, as was also the case for the *Lloyd* and *TransTel* settlements, the type of action penalized in this settlement was that of causing U.S. financial institutions to violate the sanctions regulations by providing financial services to sanctioned parties.[72]

iv. BNP Paribas

BNP Paribas, BA (BNPP) entered into a combined $8.9 billion state and federal settlement in June 2014, $963 million of which was with OFAC.[73] As part of the settlement, BNPP was "restricted from performing certain dollar-clearing functions through its New York office for a period of a year starting

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[68] *Id.*

[69] *Id.* (citing 31 C.F.R. § 560.204 (2011)).

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *BNP Paribas Agrees to Plead Guilty and to Pay $8.9 Billion for Illegally Processing Financial Transactions for Countries Subject to U.S. Economic Sanctions*, U.S. DEP'T OF JUSTICE (June 30, 2014), https://www.justice.gov/opa/pr/bnp-paribas-agrees-plead-guilty-and-pay-89-billion-illegally-processing-financial.

in January 2015."[74] BNPP was alleged to have violated the Sudanese Sanctions Regulations, the ITSR, the Cuban Assets Control Regulations, and the Burmese Sanctions Regulations.[75]

According to the settlement agreement with OFAC, "BNPP processed thousands of transactions to or through U.S. financial institutions that involved countries, entities, and/or individuals subject to the sanctions programs administered by OFAC."[76] In the course of those transactions, BNPP was alleged to have "engaged in a systematic practice, spanning many years and involving multiple BNPP branches and business lines, that concealed, removed, omitted, or obscured references to, or the interest or involvement of, sanctioned parties in U.S. Dollar (USD) Society for Worldwide Interbank Financial Telecommunication (SWIFT) payment messages sent to U.S. financial institutions."[77] These actions included "omitting references to sanctioned parties; replacing the names of sanctioned parties with BNPP's name or 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."[78] Therefore, OFAC alleged that BNPP appeared to have conveyed the services of U.S. banks to recipients in sanctioned parties, and directly or indirectly exported financial services to those parties.[79]

Moreover, legal advice provided to BNPP indicated that non-U.S. branches of foreign banks were prohibited from processing sanctions-related transactions through the U.S. The opinion noted: "if the use of the unaffiliated [U.S.] bank were perceived to result from an effort by the foreign bank to avoid the involvement of its U.S. branch in handling prohibited transactions, there is a substantial risk either that regulators or prosecutors" would argue that the foreign bank was a covered person under the CACR or the ITSR, or that such a transaction would be considered a prohibited evasion under those sanctions programs.[80] This legal opinion therefore indicates that even prior to the time of the BNPP settlement in 2014, BNPP's legal counsel understood that causing U.S. financial institutions to handle transactions that involved sanctioned parties would be prohibited by OFAC. The *TransTel* settlement of 2017, then, did not introduce an entirely new prohibition against involving

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[74] Andrew R. Johnson, *5 Things on Dollar Clearing and BNP Paribas*, WALL ST. J. (June 30, 2014), https://blogs.wsj.com/briefly/2014/06/30/5-things-on-dollar-clearing-and-bnp-paribas/.

[75] *Enforcement Information for June 30, 2014*, U.S. DEP'T OF TREASURY, https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20140630_bnp.pdf (last visited Nov. 11, 2019).

[76] BNP Paribas SA 8 Settlement Agreement, *supra* note 50.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.*

U.S. financial institutions in transactions with U.S.-sanctioned parties by way of dollar clearing and settlement.

v. Barclays

In 2016, OFAC entered into a $2.4 million settlement with Barclays Bank PLC for processing dollar-denominated transactions for Barclays Bank of Zimbabwe Limited (BBZ) involving entities owned over 50% by SDNs.[81] OFAC's 50% Rule treats an entity as a blocked person when it is owned in the aggregate, directly or indirectly, 50% or more by one or more blocked persons.[82] BBZ's sanctions screening system had shortcomings that did not allow it to "effectively capture or otherwise identify all of its customers' beneficial owners in the bank's electronic system."[83] As a result of this deficiency, BBZ maintained U.S. dollar accounts for three corporate customers that were blocked by way of the 50% Rule, although not themselves specifically named to the SDN List, and BBZ "continued to process USD transactions for or on their behalf to or through the United States in apparent violation of the ZSR."[84] Approximately $3.375 million in transactions were processed to or through financial institutions located in the United States, including Barclay's New York Branch, on behalf of BBZ.[85] OFAC found that these 159 funds transfers "conferred economic benefit to, and provided indirect access to the U.S. financial system for, blocked persons, causing harm to the Zimbabwe sanctions program and its associated policy objectives."[86] Given that Zimbabwe is one of the two sanctions programs containing the limited version of the causation language, OFAC's theory of liability would most likely have to have been based on the export of financial services to Zimbabwe rather than on the causation language. Such transactions could only be sanctionable by OFAC under a causation theory if they had been effected in the United States or by a U.S. person.

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[81] Jessica Piquet Megaw, *OFAC Penalizes Barclays for Zimbabwe Sanctions Violations*, STEPTOE INT'L COMPLIANCE BLOG (Feb. 23, 2016), https://www.steptoeinternationalcomplianceblog.com/2016/02/ofac-penalizes-barclays-for-zimbabwe-sanctions-violations/.

[82] *Id.*

[83] *Enforcement Information for February 8, 2016*, U.S. DEP'T OF TREASURY, https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20160208_barclays.pdf (last visited Nov 11, 2019).

[84] *Id.*

[85] *Id.*

[86] *Id.*

vi. UniCredit

In April 2019, OFAC entered into a settlement totaling $611 million with three UniCredit Group banks located in Germany, Austria, and Italy.[87] A related cease and desist order in an action before the Board of Governors of the Federal Reserve System noted that these overseas offices "processed certain U.S. dollar-denominated funds transfers" through their own U.S. branch as well as other unaffiliated U.S. financial institutions.[88] The UniCredit overseas offices, moreover, omitted relevant information from payment messages that prevented their U.S. branch and the other U.S. financial institutions from determining that their carrying out these transactions would result in violations of the OFAC regulations.[89]

Specifically, UniCredit Bank AG operated U.S. dollar accounts on behalf of Islamic Republic of Iran Shipping Lines (IRISL) (Iran's national maritime carrier, blocked pursuant to Executive Order 13599, among other provisions[90]) and other companies owned or affiliated with IRISL.[91] Moreover, separately from these actions, UniCredit Bank AG's head office, several branches, and a subsidiary "appear to have employed a practice of processing USD payments through financial institutions in the United States on behalf of persons subject to other U.S. sanctions programs in a manner that did not disclose the interest of the sanctioned parties from U.S. financial institutions."[92]

Public statements made by U.S. government officials in connection with this settlement reiterated that the UniCredit Group banks had used the U.S. financial system in connection with transactions with sanctioned parties. Sigal P. Mandelker, then-Under Secretary for Terrorism and Financial Intelligence in the U.S. Department of the Treasury, noted that "UniCredit Group banks routed transactions through the United States in a non-transparent manner, when those payments would have been blocked or rejected if their true nature had been clear, in violation of multiple sanctions programs."[93] OFAC Director Andrea M. Gacki noted that OFAC would "continue to investigate institutions that utilize the U.S. financial system in a manner that undermines U.S

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[87] *U.S. Treasury Announces Settlement with UniCredit Group Banks*, U.S. DEP'T OF THE TREASURY (Apr. 15, 2019), https://home.treasury.gov/news/press-releases/sm658.

[88] Order to Cease and Desist and Order of Assessment of a Civil Money Penalty Issued Upon Consent Pursuant to the Federal Deposit Insurance Act, as Amended, Docket Nos. 19-017-B-FB, 19-017-CMP-FB, (Fed. Res. Bd. of Governors) (Apr. 15, 2019), *available at* https://www.federalreserve.gov/newsevents/pressreleases/files/enf20190415a1.pdf.

[89] *Id.*

[90] *Islamic Republic of Iran Shipping Lines (IRISL)*, IRAN WATCH (Dec. 10, 2018), https://www.iranwatch.org/iranian-entities/islamic-republic-iran-shipping-lines-irisl.

[91] UniCredit Bank AG Settlement Agreement, *supra* note 50.

[92] *Id.* at ¶ 26.

[93] U.S. DEP'T OF THE TREASURY, *supra* note 87.

sanctions programs."[94] As these statements indicate, the allegations that the UniCredit banks had caused U.S. financial institutions to violate the OFAC sanctions regulations were an important part of the facts of this matter, even if OFAC did not pursue this action based on the causation provision itself.

The facts of this case are different from those of the *TransTel* matter, beyond the identity of the UniCredit banks as financial institutions while TransTel was not, in that the UniCredit banks acted willfully and fraudulently in conducting some of the activities described in the settlement agreement, as they intentionally hid the presence of sanctioned parties in USD transactions. For example, the charged conduct included UniCredit Bank AG's processing of "USD payments in a non-transparent manner – for example, by confirming that payment instructions did not include references to U.S.-sanctioned persons and countries – through financial institutions in the United States on behalf of persons subject to the WMDPSR and other U.S. sanctions programs."[95]

Causation was not specifically referenced by OFAC as a basis of the UniCredit enforcement action. Instead, the settlement agreement referenced the various prohibitions against the export of services and transaction with blocked persons.[96] The language within the settlement agreement describing UniCredit activities, however, does indicate UniCredit's role in causing U.S. parties to violate OFAC sanctions regulations.[97] Thus, the type of conduct penalized was essentially the same as that which could have been penalized under a broad version of the causation provision instead.

vii. Standard Chartered

Also in April 2019, OFAC entered into a settlement agreement with Standard Chartered Bank (Standard Chartered), a financial institution organized under the laws of England and Wales with a branch office in New York.[98] OFAC had previously entered into a 2012 settlement with Standard Chartered Bank for violations of the ITSR, the Syrian Sanctions Regulations, the Libyan Sanctions regulations, the Burmese Sanctions Regulations, and the Foreign Narcotics Kingpin Sanctions Regulations, as the bank "engaged in payment practices that impaired compliance with U.S. economic sanctions by financial

[94] *Id.*

[95] *Enforcement Information for April 15, 2019*, U.S. DEP'T OF TREASURY, https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20190415_uni_webpost.pdf (last visited Nov 11, 2019).

[96] *Id.* at 95 at ¶¶ 35-45.

[97] "It appears that UWC [unit of UniCredit responsible for financial sanctions compliance] employees understood their U.S. correspondents had obligations pursuant to U.S. sanctions laws not to process certain transactions involving sanctioned entities or interests." *Id.* at ¶ 30.

[98] Standard Chartered Bank Settlement Agreement, *supra* note 50.

institutions in the United States," including by Standard Chartered's U.S. branch in New York.[99] The April 2019 settlement agreement stated that "OFAC determined that the transactions [Standard Chartered] processed to or though the United States" involving certain corporate entities initiating payment instructions from Iran "constitute[d] apparent violations of § 560.204 of the ITSR," namely, the prohibitions on the exportation, reexportation, sale, or supply of goods, technology, or services to Iran.[100] Again, as in the matters described above besides *TransTel*, OFAC based the 2019 *Standard Chartered* enforcement action against a financial institution on the prohibitions against the export of services to Iran, but the conduct penalized was conceptually the same as actions prohibited under the broad version of the causation provision.

B. Analysis

i. Causation vs. Export of Financial Services as a Basis for Liability

The *TransTel* settlement was seen as a new area of enforcement due to OFAC's use of a causation provision as a basis for liability, but the novelty of the *TransTel* enforcement action was perhaps due more to OFAC's specific citation of that language as the theory of liability rather than OFAC's use of an entirely new area of enforcement conceptually. Indeed, a 2016 Southern District of New York opinion cited the following contention that the U.S. government made in one of its filings for that case: "[i]t has been clear for a long time that foreign nationals are not permitted to use the U.S. financial system to conduct transactions that are for the benefit of Iran or for the government of Iran."[101] The court did not specify exactly how long this rule had been clear, but the 2016 opinion did predate the 2017 *TransTel* settlement agreement. Thus, the enforcement stance in *TransTel* could not have by itself created a novel blanket prohibition against the use of the U.S. financial system with respect to Iran or other comprehensively sanctioned countries.

Further, the other enforcement actions described above were also brought by OFAC based on prohibited uses of the U.S. dollar in transactions with sanctioned parties, even if the prohibited conduct was characterized as directly or indirectly exporting financial services instead of causing others to violate the sanctions regulations. The *TransTel* settlement thus perhaps constituted a novel case because of the specific provision used by OFAC as the basis for that enforcement action, but not due to any novel prohibition in the type of conduct prohibited by the sanctions regulations. Causation, even where not specifically referenced by OFAC in enforcement actions other than the

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[99] *Id.* at ¶ 4.
[100] *Id.* at ¶ 43.
[101] United States v. Zarrab, No. 1:15-cr-000867, 2016 WL 6820737, at *10 (S.D.N.Y. Oct. 17, 2016).

TransTel case, nevertheless played an important role in those fact patterns; many of the financial institutions in the settlements described above were penalized for their role in causing the funds transfers made by unrelated U.S. financial institutions and omitting or deleting information that would have prevented those U.S. financial institutions from committing sanctions violations. Whether OFAC's theory of liability was based on the causation provisions as in *TransTel*, or on the indirect export of financial services to blocked parties, the end result was the same: a non-U.S. party was held responsible for causing U.S. financial institutions to process U.S. dollar-denominated transactions involving blocked parties.

There are, however, certain factors that distinguish *TransTel* and its causation theory of liability from the other (both earlier and later) OFAC enforcement actions discussed within this Part and the concept of export of financial services from the United States. Most notably, neither CSE Global nor its subsidiary TransTel were financial institutions, as were the alleged wrongdoers in the other OFAC enforcement actions discussed. Thus the *TransTel* case represented a new type of action not because the causation theory was inherently different from the theory of export of financial services to a sanctioned party, but because the party against whom the enforcement action was brought played a different role in the transaction and was not directly involved in the dollar clearing and settlement process, other than entering into the relevant U.S. dollar-denominated transactions.

A theory of causation was perhaps necessary for OFAC to bring the *TransTel* enforcement action, or was at least better-suited to that particular matter, because a theory of export of financial services would be even more attenuated where the respondent was not itself a financial institution or involved in the dollar-clearing process. While TransTel and the financial institutions discussed above both actively omitted identifying details that would have allowed U.S. financial institutions to recognize that the transactions involved a sanctioned party, the omissions made by TransTel were less directly tied to the dollar clearing and settlement process, since TransTel itself did not directly take part in the payment process. Likewise, other differences between TransTel and the other alleged sanctions violators that might explain why OFAC used a causation theory instead that of export of financial services included the financial sophistication of the parties, size of their operations, closer ties with U.S. financial institutions, knowledge of the dollar clearing process, and potential level of control over the dollar clearing process. While on a practical level, the nature of the conduct penalized was the same, OFAC might have chosen to base its enforcement action in *TransTel* on the causation language, rather than on the export of services prohibitions, based on these factors.

ii. Prohibitions on the Direct or Indirect Export of Financial Services and Practical Effect on Differences in Causation Provisions

The fact that OFAC has brought enforcement actions based on a theory of export of financial services on multiple occasions raises the question of whether the availability of this enforcement mechanism subsumes any differences between the broad and limited causation language. The Syria and Zimbabwe sanctions programs, which are the only sanctions programs with limited causation provisions appearing as separate prohibitions, do contain prohibitions against the export of services from the United States or by a U.S. person to sanctioned parties (and with respect to Syria, against the export of services to anywhere in Syria).[102] Although these two sanctions programs expressly limit the reach of their causation provisions to actions taken within the United States or to conduct by U.S. parties, OFAC could theoretically bring an enforcement action where facts exist similar to the *TransTel* matter, but based on a theory of export of financial services to parties sanctioned under the Syrian or Zimbabwean sanctions programs. The practical effect of the difference in causation language, then, would be minimized; the same type of conduct (the use of U.S. dollars by foreign parties in transactions with OFAC-sanctioned individuals and entities) could be reached regardless of the absence of a broad causation provision in the Syrian or Zimbabwean sanctions programs.

A key question, then, is whether OFAC would consider the type of conduct in *TransTel* to be equally reachable by way of a theory of export of financial services. Was the choice of the causation provision as the basis for liability made because OFAC did not consider a theory of export of financial services as applicable where the foreign party was not a financial institution? The answer to that question will depend on the nature of future enforcement actions brought by OFAC and on which theories of liability OFAC chooses to base those cases. In addition, in the enforcement actions described above that were brought after the *TransTel* settlement, OFAC continued to rely on a theory of export of services to sanctioned entities or countries, rather than basing such enforcement actions principally on the causation provisions as it had done in *TransTel*.[103] Therefore, it remains to be seen whether OFAC's use of the causation provision in *TransTel* as a basis for enforcement constitutes a new trend in sanctions enforcement, or whether *TransTel* will remain an outlier with respect to OFAC's use of a broad causation provision to reach transactions outside of the United States entered into by non-U.S. parties who are not financial institutions.

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[102] Prohibitions to Syria, 31 C.F.R. § 542.207 (2014); Prohibited Transactions to Syria, 31 C.F.R. § 542.201 (2014); Prohibited Transactions to Zimbabwe, 31 C.F.R. § 541.201 (2014).

[103] TransTel Settlement Agreement, *supra* note 3.

IV. U.S. DOLLAR CLEARING AND SETTLEMENT

This Part examines the nature of dollar clearing and settlement as related to dollar-denominated transactions made both within the United States and overseas. In doing so, this Article seeks to identify potential U.S. nexuses that could support OFAC's use of the causation provisions to reach as far as prohibiting the use of U.S. dollars in the transactions of foreign entities with U.S.-sanctioned parties, whether those U.S. dollars are held at U.S. or non-U.S. financial institutions. Both the limited and the expansive causation provisions require the involvement of a U.S. party or some action having been taken within the United States or by a U.S. party, however tangentially, in order for a foreign party to incur a violation based on causation (although this factor is necessary, but not sufficient, for a theory of liability using the limited causation provisions).[104] Therefore, the identification of those parties who can be involved in U.S. dollar clearing transactions is helpful to determine under which circumstances foreign parties may or may not use U.S. dollars for transactions involving blocked or sanctioned parties. This Article concludes in this Part that U.S. parties do appear to be in fact involved, however tangentially, in U.S. dollar clearing and settlement processes even when offshore clearing systems are used in a particular transaction, and thus a broad causation provision or a theory of export of financial services could be used as the basis for OFAC enforcement with respect to any U.S. dollar-denominated transaction with a U.S.-sanctioned party.[105]

As discussed in the previous Part, a theory of export of financial services might be a tenable theory of liability based on the export of financial services even if a particular sanctions program at issue contains a limited, rather than expansive, causation provision. The availability of this alternative theory of liability therefore narrows the practical effect of the disparity in causation provisions in most U.S. dollar transactions. Identifying which parties may cause a sanctions violation, however, is important to understanding the extent to which OFAC may employ broad causation provisions as an enforcement tool in the future and also to the ways in which the theory of export of financial services may be used in connection with U.S. dollar-denominated transactions.

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[104] *See, e.g.*, 31 C.F.R. § 542.205 (2014) (Syria, limited); 31 C.F.R. § 547.205 (Democratic Republic of the Congo, broad).

[105] *See generally* TransTel Settlement Agreement, *supra* note 3; Lloyds Settlement Agreement, *supra* note 50; Credit Suisse AG Settlement Agreement, *supra* note 50; BNP Paribas SA 8 Settlement Agreement, *supra* note 50; Barclays Settlement Agreement, *supra* note 50; UniCredit Bank AG Settlement Agreement, *supra* note 50; Standard Chartered Bank Settlement Agreement, *supra* note 50.

A. Methods of U.S. Dollar Clearing

The process of "[d]ollar clearing involves the conversion of payments on behalf of clients into U.S. dollars from a foreign currency."[106] "Clearing" is "the process of transmitting, reconciling, and in some cases confirming payment orders or security transfer instructions prior to settlement, possibly including the netting of instructions and the establishment of final positions for settlement."[107] There are three main steps in clearing: "processing payment instruments, delivering them to paying banks, and calculating interbank payment obligations."[108] Settlement is the act that discharges the payment obligations in respect of funds or securities.[109]

CHIPS (owned by commercial banks and supervised by the U.S. Federal Reserve) and FedWire (operated by the U.S. Federal Reserve) are the two major U.S. payment systems, and are described in greater detail below.[110] To dollar clear in the United States, foreign banks do not need have banking operations in the United States, "but whichever bank they use to do so must be a customer of either the private sector-owned Clearing House Interbank Payment System [CHIPS] or the Federal Reserve's Fedwire Funds Service [Fedwire]."[111]

i. Fedwire

The Fedwire Funds Service (Fedwire) operates as a real-time gross settlement system and "is generally used to make large-value, time-critical payments."[112] Fedwire is used "to make cash concentration payments, to settle commercial payments, to settle positions with other financial institutions or clearing arrangements, to submit federal tax payments or to buy and sell

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106 Johnson, *supra* note 74.

107 Morten L. Bech et al., *Settlement Liquidity and Monetary Policy Implementation—Lessons From the Financial Crisis*, FRBNY ECON. POL'Y REV., Mar. 2012, at 1, 2.

108 Bruce J. Summers & R. Alton Gilbert, *Clearing and Settlement of U.S. Dollar Payments: Back to the Future?*, FED. RES. BANK OF ST. LOUIS REV. Sept./Oct. 1996, at 3, 6.

109 *Id.*

110 Karen Freifeld et al., *Exclusive: BNP Asks Other Banks for Help as Dollar Clearing Ban Nears*, REUTERS (Oct. 6, 2014, 7:20 PM), https://www.reuters.com/article/us-bnp-paribas-clearing/exclusive-bnp-asks-other-banks-for-help-as-dollar-clearing-ban-nears-idUSKCN0HV28C20141006.

111 Duncan Kerr, *Clearing: European Banks Weigh up US Dollar Clearing Options*, EUROMONEY, (Jan. 5, 2015), https://www.euromoney.com/article/b12kjyygbzp9v4/clearing-european-banks-weigh-up-us-dollar-clearing-options.

112 *Fedwire Funds Services*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., https://www.federalreserve.gov/paymentsystems/fedfunds_about.htm (last updated Feb. 19, 2014).

federal funds."[113] Fedwire is operated by the U.S. Federal Reserve Banks[114] and operates in the following manner:

> When sending a payment order to the Fedwire Funds Service, a Fedwire participant authorizes its Federal Reserve Bank to debit its master account for the amount of the transfer. If the payment order is accepted, the Federal Reserve Bank holding the master account of the Fedwire participant that is to receive the transfer will credit the same amount to that master account.[115]

Foreign banks that are Fedwire participants "can send and receive payments directly via Fedwire using the SWIFT international messaging[116] service."[117] Foreign banks that are not Fedwire participants "can send payments via a US bank or another foreign bank that is a Fedwire participant," using correspondent banking.[118] Correspondent banking, generally, is defined as "an arrangement under which one bank (correspondent) holds deposits owned by other banks (respondents) and provides payment and other services to those respondent banks."[119] Correspondent banking "requires the opening of accounts by respondent banks in the correspondent banks' books and the exchange of messages to settle transactions by crediting and debiting those accounts."[120]

In 2018, Fedwire originated approximately 158.4 million transactions valued at approximately $716.2 trillion. [121]

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[113] *Fedwire Funds Service*, THE FEDERAL RESERVE, https://www.frbservices.org/assets/financial-services/wires/funds.pdf (last visited Nov. 11, 2019).

[114] BD. OF GOVERNORS OF THE FED. RESERVE SYS., *supra* note 112.

[115] *Fedwire Funds Service*, *supra* note 113.

[116] SWIFT is "the global provider of secure financial messaging services," connecting 11,000 institutions over more than 200 countries and territories. *About Us*, SWIFT, https://www.swift.com/about-us (last visited Oct. 24, 2019). In 1977, the SWIFT messaging system replaced the Telex technology used by banks to communicate instructions for cross-border transactions. *Discover SWIFT: Messaging and Standards*, SWIFT, https://www.swift.com/about-us/discover-swift/messaging-standards (last visited Oct. 24, 2019).

[117] Frances Coppola, *Fedwire: The US Dollar in International Payments*, AMERICAN EXPRESS, https://www.americanexpress.com/us/foreign-exchange/articles/fedwire-us-dollar-in-international-payments/ (last visited Oct. 20, 2019).

[118] *Id.*

[119] BANK FOR INT'L SETTLEMENTS, COMM. ON PAYMENTS & MKT. INFRASTRUCTURES, CORRESPONDENT BANKING (2016), https://www.bis.org/cpmi/publ/d147.pdf.

[120] *Id.*

[121] *Fedwire Funds Service—Annual*, BD. OF GOVERNORS OF THE FED. RESERVE SYS., https://www.federalreserve.gov/paymentsystems/fedfunds_ann.htm (last updated Feb. 7, 2019).

ii. CHIPS

The Clearing House Interbank Payments System (CHIPS) system transmits and settles U.S. dollar payments among participating banks.[122] CHIPS was organized in 1970 with eight members and gradually expanded thereafter.[123] CHIPS is operated by The Clearing House Payments Company L.L.C., which is based in New York.[124] CHIPS processed an average of approximately 361,000 payments per day during 2010, and the total value of transfers originated during that year was about $365 trillion.[125] Unlike the real-time gross settlement system of Fedwire, CHIPS allows for payments to be netted, allowing for the consolidation of pending payments into a fewer number of transactions.[126] CHIPS transfers daily amount to approximately 80% of non-securities transfers by Fedwire.[127] "CHIPS clears and settles approximately $1.5 trillion in domestic and international payments per day."[128] The CHIPS system is governed by the law of the state of New York and operates in the following manner:

> A CHIPS participant sends a payment message to CHIPS in a structured format . . . . The payment message is sent to CHIPS through one of two communications-networks . . . . Upon receipt of a payment message, CHIPS will perform systems syntax checks rejecting any payment message that does not pass the checks. Once these syntax checks have been completed, CHIPS will move the payment message to a queue where a computer algorithm determines whether to release the message. The payment message will be released if the algorithm

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[122] BANK OF INT'L SETTLEMENTS, PAYMENT, CLEARING AND SETTLEMENT SYSTEMS IN THE UNITED STATES 471, 488 (2013), https://www.bis.org/cpmi/publ/d105_us.pdf.

[123] *CHIPS*, FED. RESERVE BANK OF N.Y. (Apr. 2002), https://www.newyorkfed.org/aboutthefed/fedpoint/fed36.html.

[124] CLEARING HOUSE, CLEARING HOUSE INTERBANK PAYMENTS SYSTEM ("CHIPS") PUBLIC DISCLOSURE OF LEGAL, GOVERNANCE, RISK MANAGEMENT, AND OPERATING FRAMEWORK 1, 6 (2018), https://www.theclearinghouse.org/-/media/new/tch/documents/payment-systems/chips-public-disclosure-2018.pdf.

[125] BANK OF INT'L SETTLEMENTS, *supra* note 122, at 3.2.2.3.

[126] *About CHIPS*, CLEARING HOUSE, https://www.theclearinghouse.org/~/link.aspx?_id=8AD2931B0ED0468DB096332DA183241B&_z=z (last visited Nov. 12, 2019).

[127] *CHIPS*, *supra* note 123.

[128] *About CHIPS*, *supra* note 126; *see also* Phillip Silitschanu, *B2B Payments Lending: What Are Fedwire Transfers?*, https://www.americanexpress.com/us/foreign-exchange/articles/fedwire-transfers/#:~:targetText=The%20Fedwire%20transfer%20system%20is,twelve%20U.S.%20Federal%20Reserve%20Banks.&targetText=Because%20Fed-wire%transfers%20do%20not,Bank%20actually%20transfers%20US%245%2C000 (last visited Nov. 22, 2019).

> determines that it can be released and settled within the parameters sent by the CHIPS Rules.[129]

Each CHIPS participant must deposit a predetermined amount into a pre-funded balance account and may also transfer additional funds into the account.[130]

Relevant to this Article's examination of the role of U.S. persons in dollar clearing, CHIPS participants "must be a U.S. depository institution or a U.S. branch or agency of a foreign bank, and if a participant uses a leased telecommunications line as its connection to CHIPS, the line must terminate at an office of the participant located in the United States."[131] Therefore, "for each CHIPS payment message, both the sender and the receiving bank is a U.S. bank."[132]

iii. Offshore Clearing Systems

U.S. dollar accounts may also be cleared through offshore dollar clearing transactions, including through systems based in Singapore, Hong Kong, the Philippines, and Japan.[133] Within Singapore, the U.S. Dollar Cheque Clearing system "clear[s] and settle[s] U.S. dollar-denominated cheques drawn on banks in Singapore."[134] CHATS allows for real-time gross settlement of U.S. dollar payments and payments vs. payment of U.S. vs. Hong Kong dollars.[135]

For the Singaporean USDCCS, "BCS and Citibank are the appointed clearing operator and settlement bank, respectively . . . ." BSC is the Banking Computer Services Pte Ltd.[136] The USDCCS operates as follows:

> (1) USD cheques are delivered to the [Singapore Automated Clearing House] ACH by presenting banks. (2) At the end of

[129] THE CLEARING HOUSE, CLEARING HOUSE INTERBANK PAYMENTS SYSTEM ("CHIPS") SELF-ASSESSMENT OF COMPLIANCE WITH STANDARDS FOR SYSTEMICALLY IMPORTANT PAYMENT SYSTEMS 6 (2016), https://www.theclearinghouse.org/-/media/files/payco%20files/standards%20self%20assessment%202016.pdf?la=en.

[130] *Id.*

[131] *Id.* at 12.

[132] *Id.*

[133] Clif Burns, *Touch a U.S. Dollar Anywhere, Go Directly to U.S. Jail*, EXPORT L. BLOG (Aug. 2, 2017), https://www.exportlawblog.com/archives/8621; *see also* Kerr, *supra* note 111 ("Tokyo, Hong Kong, Singapore and Manila are the only official offshore US dollar clearing centres").

[134] *Payment Systems in Singapore*, BANK OF INT'L SETTLEMENTS 1, 10 (2003), https://www.bis.org/cpmi/paysys/singaporecomp.pdf.

[135] Bech, *supra* note 107.

[136] *Payment Systems in Singapore*, *supra* note 134, at 3, 10.

> the first day, the ACH will generate a settlement statement to the settlement bank setting out the total credits and the total debits of each of the participating banks. (3) The settlement bank then advises participating banks if there will be insufficient funds in their accounts with the settlement bank, based on a comparison of the total debit position against available funds in each participating bank's account. Participating banks are required to meet any projected shortfall. (4) The ACH processes and sorts the USD cheques and these are available for collection by the relevant paying banks on the second business day. Settlement occurs on the second business day across participating banks' accounts with Citibank, but the funds are not considered "cleared funds" until the end of day three. (5) All returned unpaid USD cheques are delivered to the ACH at the latest by the morning of the third business day. (6) The ACH processes the returned cheques and the relevant presenting banks collect them by noon on the third business day. (7) The customers can then withdraw the proceeds after 14:00 on the third business day. [137]

Hong Kong's USD CHATS began operating on August 21, 2000.[138] The settlement institution of the USD CHATS is The Hongkong and Shanghai Banking Corporation[139], which is a wholly owned subsidiary of HSBC and is headquartered in Hong Kong.[140] HSBC itself is headquartered in the United Kingdom.[141] Settlement in the USD CHATS system takes place on the books of HSBC in New York City.[142] The settlement institution has appointed as system operator Hong Kong Interbank Clearing Limited (HKICL), which is jointly owned by the Hong Kong Monetary Authority and the Hong Kong Association of Banks (HKAB), which is the association of the licensed banks

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[137] *Id.* at 10-11.

[138] H.K. MONETARY AUTH., ASSESSMENT OF US DOLLAR CHATS AGAINST THE PRINCIPLES FOR FINANCIAL MARKET INFRASTRUCTURES 1, 4 (2016), https://www.hkma.gov.hk/media/eng/doc/key-functions/banking-stability/oversight/US_Dollar_CHATS_2016.pdf.

[139] BANK OF INT'L SETTLEMENTS, PAYMENT, CLEARING AND SETTLEMENT SYSTEMS IN HONG KONG SAR 1, 10 (2012), https://www.bis.org/cpmi/publ/d105_hk.pdf.

[140] HSBC, HSBC BANK (CHINA) COMPANY LIMITED FACT SHEET (2009), https://www.hsbc.com.cn/1/PA_ES_Content_Mgmt/content/china/about/docs/factsheetenJan09.pdf.

[141] *Id.*

[142] Morten L. Bech et al., *Global Trends in Large-Value Payments*, FRBNY ECON. POL'Y REV. 59, 66 (Sept. 2008), https://www.newyorkfed.org/medialibrary/media/research/epr/08v14n2/0809prei.pdf. "Direct participants can enjoy an interest-free overdraft facility and interest-free intraday repos if they can repay HSBC's New York correspondent before the close of the New York CHIPS on that value day." BANK OF INT'L SETTLEMENTS, PAYMENT SYSTEMS IN HONG KONG 1, 197 (2003), https://www.bis.org/cpmi/publ/d53p07 hk.pdf.

in Hong Kong.[143] "Participants must connect to the SWIFT network in order to access USD CHATS to initiate or receive payment instructions."[144] USD CHATS is governed by the laws of Hong Kong.[145] In 2015, USD CHATS settled transactions daily averaging $25 billion. [146]

As part of the USD CHATS validation process, "[a]ll validated transactions will be sent to a sanction screening system for scanning" before settlement occurs.[147] A 2016 update from Hong Kong Interbank Clearing Limited states that "USD CHATS has been enhanced to interface with the HSBC Sanction screening system, replacing the Centralised Payment Filter, with effect from 1 August 2016 to provide corresponding payment sanction screening capabilities."[148]

The Philippine Domestic Dollar Transfer System (PDDTS) is used for the transfer of U.S. dollars across banks in the Philippines.[149] Citi Philippines is the settlement bank for PDDTS, which position it has held since 1994.[150] Citi Philippines is a branch of Citibank, and thus would be considered a U.S. person under the sanctions regulations.[151] Within Japan, JP Morgan Chase & Co. (a U.S. entity) has operated Japan's Tokyo Dollar Clearing system since its establishment in 1986.[152]

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[143] H.K. MONETARY AUTH., *supra* note 138, at 4-5.

[144] *Id.* at 6.

[145] *Principles for Financial Market Infrastructures: Disclosure for USD CHATS*, HSBC GRP. MGMT. SERV. LTD., https://www.hsbcnet.com/-/media/hsbcnet/attachments/products-services/transaction-banking/payments-cash-management/principles-for-financial-market-infrastructures.pdf (last visited Oct. 20, 2019).

[146] *See* H.K. MONETARY AUTH., *supra* note 138, at 3.11.

[147] *Principles for Financial Market Infrastructures*, *supra* note 145, at 7.

[148] *What's New,* H.K. INTERBANK CLEARING LIMITED (June 10, 2019), http://www.hkicl.com.hk/clientbrowse.do?docID=2&lang=en.

[149] PAYMENTS & SETTLEMENT OFFICE, THE PHILIPPINE PAYMENT AND SETTLEMENT SYSTEM (2019), http://www.bsp.gov.ph/payments/payments/PhilPaSS.pdf.

[150] *Citi PH Celebrates Reappointment as Domestic Settlement Bank for US Dollars*, MANILA BULL. (Oct. 18, 2017), https://business.mb.com.ph/2017/10/18/citi-ph-celebrates-reappointment-as-domestic-settlement-bank-for-us-dollars/; CITI TRANSACTION SERV., PHILIPPINES: COUNTRY PROFILE (2012), https://www.citibank.com/tts/insights/eSource_academy/docs/country_profiles/asia_pacific/1442004516-Citi-TTS-Philippines-Country-Profile-Sep2015.pdf.

[151] *See, e.g.*, 31 C.F.R. § 560.314 (2012).

[152] Steve Bills*, JPM Broadens Dollar Clearing in Japan*, AM. BANKER (Aug. 26, 2009), https://www.americanbanker.com/news/jpm-broadens-dollar-clearing-in-japan.

B. Does Using U.S. Dollars Necessarily "Cause a Violation" of the Sanctions Regulations Through Dollar Clearing?

Apart from the issue of differences in language and the extraterritorial application of the statute, there is the question of whether, where there is broad regulatory causation language in place, the use of U.S. dollars in transactions by foreign parties with U.S.-sanctioned parties would necessarily cause a sanctions violation. Additionally, there is a question of what conduct OFAC could regulate based on the theory of direct or indirect export of financial services to a sanctioned party. The answer to this question will have implications for general compliance: should parties, U.S. and non-U.S., consider there to be a blanket restriction on the use of U.S. dollars in such transactions? The answer will also affect OFAC enforcement actions: will OFAC necessarily need to show a U.S. nexus in each enforcement action? Or will the presence of U.S. dollars be sufficient to assume the causation of a sanctions violation? This analysis therefore involves identifying the involvement of parties subject to the U.S. sanctions regulations when U.S. dollars are used in a transaction, and how their involvement in a U.S. dollar-denominated transaction might violate OFAC regulations.

i. U.S. Dollar Clearing Systems

As described above, the CHIPS and Fedwire systems will necessarily involve a U.S. party at some point in a dollar clearing transaction. During the course of a payment completed using the Fedwire system, the Federal Reserve Bank involved completes the necessary debit and credit of the relevant Fedwire participant. The CHIPS system itself, owned and operated by a U.S. company, would also be a "U.S. person" under the OFAC regulations. Moreover, within the CHIPS system, both the sender and the receiving bank are U.S banks, which necessarily involves a U.S. person in the course of a CHIPS transaction.

Therefore, the use of the CHIPS or Fedwire systems could be considered to cause a sanctions violation if a U.S. dollar-denominated transaction was processed involving a U.S.-sanctioned party, due to the necessary involvement of U.S. entities in the dollar clearing process. The extremely large volume of transactions processed by the CHIPS and Fedwire systems together will therefore give great effect and wide reach to the broad causation provisions when applied to U.S. dollar-denominated transactions.

ii. Offshore Dollar Clearing Systems

U.S. dollar-denominated transactions made between foreign parties and effected through offshore clearing centers have, on their face, a less clear

jurisdictional nexus to the OFAC regulations than do the U.S. dollar-denominated transactions transacted through U.S. payment systems. However, as described above, since the settlement banks used in offshore dollar clearing systems, such as in the Singaporean dollar clearing system or the Hong Kong USD CHATS system, are U.S. entities, it seems that the involvement of a U.S. settlement bank could be considered a U.S. party necessarily involved in a transaction where dollar clearing and settlement occurs. Thus, a U.S. dollar-denominated transaction involving a U.S. settlement bank would be considered to cause the U.S. settlement bank to violate the sanctions regulations and thus form the basis for liability under a broad causation provision. Indeed, it seems that such might have been the jurisdictional nexus for OFAC to bring the *TransTel* action, as that matter involved a non-U.S. party acting outside of the U.S. with dollar transactions effected in Singapore.[153]

Based on this logic, it appears that the involvement of a U.S. settlement bank would form a sufficient basis for the application of U.S. dollar sanctions in the context of transactions effected by means of offshore dollar clearing systems when the broad causation provisions or a theory of export of financial services are used. By the plain language of the regulations, OFAC in most cases would be authorized to take action against parties using U.S. dollars in transactions with sanctioned entities.[154] This is, however, separate from the question of whether the sanctions programs were intended to wield such wide-

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[153] It has been argued that the presence of a settlement bank is not in itself sufficient to constitute the export of a financial service from the United States in the context of an offshore dollar clearing system.

> Say a bank in Singapore pays $10,000 for a customer's Iran transaction but during the day pays out $200,000 and receives $100,000 where none of these other dollar transactions have anything to do with Iran. It will need to transfer $100,000 to the Singapore clearing house, which will be effectuated through a U.S. Dollar correspondent account in the United States. In that case the bank in the United States has not transferred any financial services to Iran because the payment relates to an aggregate of transactions valued at $300,000, almost all of which have nothing to do with Iran. The only scenario in the Singapore clearing situation where the U.S. bank would transfer a financial service to Iran would be where the Iran payment by the Singapore bank is the ***only*** U.S. dollar transaction by the Singapore bank during the clearing day. Burns, *supra* note 133.

However, based on the existence of the *TransTel* settlement, it seems that OFAC considers the general presence of a U.S. settlement bank in a dollar clearing system to be sufficient to support U.S. jurisdiction. The broad language of the OFAC prohibitions in general might form the basis for a potential argument by OFAC that the nature of causing a violation would depend not on the direct transfer of financial services to a sanctioned party or country by virtue of a direct dollar transfer in connection with a particular transaction, but perhaps indirectly where the sanctioned party is able to take advantage of a U.S. dollar payment system that would not be able to function without the general involvement of the U.S. financial institution as the settlement bank.

[154] *See, e.g.*, 31 C.F.R. § 542.201 (Syrian sanctions regulation prohibiting dealings in property and interests in property in the possession or control of U.S. persons of blocked parties and the Government of Syria).

ranging authority, or whether the extraterritorial reach of these sanctions should be limited by other principles.

Consistent with the conclusion that the use of the U.S. dollar is enough to involve the actions of U.S. entities, even where those dollars are not held at U.S. financial institutions, the case of *U.S. v. Zarrab* upheld the authority of OFAC to reach transactions based on the use of U.S. dollars alone (though that case examined a theory of liability based on an export of financial services, rather than based on a broad causation provision).[155] In *Zarrab*, the defendant was charged in part with conspiracy to violate the IEEPA and the ITSR, among other counts, by allegedly "conducting international financial transactions using Turkish and Emirati companies on behalf of and for the benefit of Iranian individuals and entities in order to conceal from U.S. banks and others that services were being provided" to sanctioned parties and to Iran.[156] In his motion to dismiss the indictment, the defendant argued that 31 C.F.R. § 560.204, which prohibits exports, directly or indirectly, from the United States or by a U.S. person, did not apply to his conduct because "[t]he funds [the defendant] and his alleged co-conspirators sent to third countries, purportedly for the benefit of Iran, all came 'from' accounts held outside of the U.S. by foreign persons at foreign banks."[157] He argued that a U.S. nexus had not been created by "the mere fact that a U.S. bank cleared a payment originating and terminating at foreign banks . . . ."[158] The court, however, disagreed with the defendant's interpretation of the ITSR. It noted that the Second Circuit "has made clear that 'the execution of money transfers on behalf of others from the United States to Iran' may constitute the exportation or supply of a prohibited 'service,' in violation of the IEEPA and the ITSR."[159] The court found that the indictment alleged a U.S. nexus: namely, the exportation of services from the U.S. in the form of financial services.[160]

Based on the previous analysis of the offshore dollar clearing systems, the use of the U.S. dollar is enough to trigger a U.S. nexus sufficient to support the application of U.S. sanctions regulations, whether the transaction is effected through a U.S. or offshore dollar clearing system. Consistently, the *Zarrab* case found that the use of U.S. dollars constituted the rendering of a financial service, even when those dollars were held abroad.[161] Based on these facts and on the OFAC enforcement history detailed earlier in this Article, OFAC will likely seek to continue to apply U.S. sanctions provisions to

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[155] Zarrab, 2016 WL 6820737, at *11.

[156] *Id.* at *7 n.11.

[157] *Id.* at *5 (citing Memorandum of Law in Support of Defendant Reza Zarrab's Motion to Dismiss, United States v. Zarrab, No. S1 15 Cr. 867 (RMB), 2016 WL 10998479, at *11 (S.D.N.Y. July 19, 2016) [hereinafter Zarrab Motion to Dismiss]).

[158] *Id.* at *5 (citing Zarrab Motion to Dismiss, 2016 WL 10998479, at *12).

[159] *Id.* at *7 (quoting United States v. Banki, 685 F.3d 99, 106 (2d Cir. 2012)).

[160] *Id.* at *8.

[161] *Id.* at *35.

transactions involving the U.S. dollar and undertaken with U.S.-sanctioned parties, whether by employing the broad causation provisions or a theory of liability based on the export of financial services from the United States.

V. CURRENT ISSUES RELATED TO DIFFERING CAUSATION PROVISIONS

This Part will discuss some of the issues that arise in the context of certain sanctions programs with different causation language. It will also examine the general manner in which OFAC makes known and clarifies the sanctions compliance obligations connected with the use of the U.S. dollar arising as a result of the broad causation provisions and the general prohibitions on the export of services. This Article recommends that the prohibitions around the use of the U.S. dollar, especially by foreign parties and through offshore dollar clearing systems, be highlighted more clearly and consistently within OFAC publications, web notices, and responses to frequently asked questions, in order to ensure that the requirements around the use of the U.S. dollar are more broadly and accurately understood and to promote compliance with those requirements.

A. Notice

i. OFAC Publications

Whether a blanket prohibition applied to block U.S. dollar transactions with a sanctioned party (even when such a transaction is carried out by a non-U.S. person) is not always readily apparent upon either a reading of the plain text of the sanctions laws and regulations or a review of informational material put forth by OFAC. More recently, however, OFAC has provided additional guidance regarding the obligations of non-U.S. parties under the OFAC regulations with respect to their use of U.S. dollars,[162] which suggests that the use of U.S. dollars can often trigger a sanctions violation, even for non-U.S. entities conducting transactions outside of the United States. Even so, OFAC has not yet publicly addressed the issue of whether differing causation language across U.S. sanctions programs might affect any prohibitions against U.S. dollar use with sanctioned parties, or whether any such dealings would be considered an indirect export of financial services and thus the differing causation language would have no practical effect on the obligations of foreign parties with respect to U.S. dollars.

In May 2019, OFAC issued a Framework for OFAC Compliance Commitments providing information on how entities could use a risk-based approach

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[162] See discussion *infra* p. 67-68.

to sanctions compliance, based on at least management commitment, risk assessment, internal controls, testing and auditing, and training.[163] Within that document, OFAC provided a list of root causes of OFAC sanctions compliance program breakdowns or deficiencies, based on its assessment of prior OFAC administrative actions.[164] One such deficiency listed was "Utilizing the U.S. Financial System, or Processing Payments to or through U.S. Financial Institutions, for Commercial Transactions Involving OFAC-Sanctioned Persons or Countries."[165] That root cause was explained by OFAC as follows:

> Many non-U.S. persons have engaged in violations of OFAC's regulations by processing financial transactions (almost all of which have been denominated in U.S. Dollars) to or through U.S. financial institutions that pertain to commercial activity involving an OFAC-sanctioned country, region, or person. Although no organizations subject to U.S. jurisdiction may be involved in the underlying transaction–such as the shipment of goods from a third-country to an OFAC-sanctioned country–the inclusion of a U.S. financial institution in any payments associated with these transactions often results in a prohibited activity (e.g., the exportation or re-exportation of services from the United States to a comprehensively sanctioned country, or dealing in blocked property in the United States).[166]

The Compliance Framework therefore explained that the use of U.S. dollars may "often" result in a prohibited activity such as the export of services to a sanctioned country, but the Framework did not reach the issue of whether a blanket prohibition is in place against the use of U.S. dollars in transactions with sanctioned entities, both for U.S. and foreign parties. This language is helpful for alerting entities to review their use of U.S. dollars in regard to U.S. sanctions compliance, including the examples of comprehensively sanctioned countries or dealing in blocked property, but does not entirely clarify when the use of U.S. dollars does or does not implicate the U.S. sanctions regulations.

Before the Framework was issued, other OFAC documents referenced the nexus between U.S. dollars and U.S. sanctions more obliquely. For example, on January 16, 2016, OFAC issued responses to FAQs relating to the lifting

[163] *OFAC Issues a Framework for Compliance Commitments*, U.S. DEP'T OF THE TREASURY (May 2, 2019), https://home.treasury.gov/news/press-releases/sm680; *A Framework for OFAC Compliance Commitments*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/resource-center/sanctions/Documents/framework_ofac_cc.pdf (last visited Nov. 12, 2019).

[164] *See Framework for OFAC Compliance Commitments*, *supra* note 163.

[165] *Id.*

[166] *Id.*

of certain U.S. sanctions under the JCPOA on Implementation Day.[167] The response to question C. 7. indicated that foreign financial institutions, "including foreign-incorporated subsidiaries of U.S. financial institutions," could process U.S. dollar-denominated transactions or maintain U.S. dollar-denominated accounts involving Iran or persons ordinarily resident in Iran, or of persons blocked solely pursuant to E.O. 13599 and section 560.211 of the ITSR, so long as such transactions did not involve any SDN and if such activities "d[id] not involve, directly or indirectly, the United States financial system or any United States person."[168] The response further noted that foreign financial institutions needed to ensure that such transactions were not processed through the U.S. financial system or otherwise involved U.S. financial institutions (including foreign branches), in order to comply with the continued prohibition on U.S. persons exporting financial services directly or indirectly to Iran (including in currencies other than the U.S. dollar).[169] Similarly, the response to question C. 8. indicated that non-U.S. persons were now permitted to provide U.S. bank notes to the Government of Iran, so long as the activity did not involve an SDN or prohibited conduct.[170] Such transactions were prohibited from transiting the U.S. financial system.[171] This language, by referencing currencies other than the U.S. dollar, and the need to avoid the U.S. financial system, hinted that the U.S. dollar cannot be used in any transaction prohibited by the Iranian sanctions regulation, but that prohibition was not stated outright.

Beyond the Compliance Framework, the OFAC FAQs in place on the OFAC website also do not directly address the issue when the use of the U.S. dollar may involve the application of U.S. sanctions. Currently, OFAC FAQ 11 responds to the question: "Who must comply with OFAC regulations?"

U.S. persons must comply with OFAC regulations, including all U.S. citizens and permanent resident aliens regardless of where they are located, all persons and entities within the United States, all U.S. incorporated entities and their foreign branches. In the case of certain programs, foreign subsidiaries owned or controlled by U.S. companies must comply. Certain programs also require foreign persons in possession of U.S.-origin goods to comply.[172]

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[167] *JCPOA Implementation*, U.S. DEP'T OF THE TREASURY (Jan. 16, 2016), https://www.treasury.gov/resource-center/sanctions/OFACEnforcement/Pages/jcpoa_implementation.aspx.

[168] *Frequently Asked Questions Relating to the Lifting of Certain U.S. Sanctions Under the Joint Comprehensive Plan of Action (JCPOA) on Implementation Day,* U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/resource-center/sanctions/Programs/Documents/jcpoa_faqs.pdf (last updated Dec. 15, 2016).

[169] *Id.*

[170] *Id.*

[171] *Id.*

[172] *OFAC FAQs: General Questions*, U.S. DEP'T OF THE TREASURY, https://www.treasury

While the response mentions the responsibilities of non-U.S. persons in possession of U.S. goods to comply, there is nothing in the FAQ response to indicate a similar responsibility of a foreign person in possession of U.S. dollars. This FAQ could be amended to indicate the presence of obligations with respect to U.S. dollars. Likewise, it was unclear in previous FAQs relating to the ITSR whether all U.S. dollar transactions were prohibited.[173]

Before the *TransTel* settlement and the issuance of the Compliance Framework, it was unclear whether OFAC would consider the use of the U.S. dollar, even in offshore clearing systems, to be prohibited in connection with transactions with sanctioned parties, based on the expansive causation provisions. For example, S.2752 proposed prohibiting the President from issuing any license under IEEPA that would permit anyone "to conduct an offshore United States dollar clearing system for transactions involving the Government of Iran or an Iranian person," or "to provide United States dollars for any offshore United States dollar clearing system conducted or overseen by a foreign government or a foreign financial institution for transactions involving the Government of Iran or an Iranian person." [174] This bill assumed that a license was necessary for these actions to be undertaken, which is consistent with the position taken by OFAC in the *TransTel* settlement (namely, that the use of U.S. dollars with a blocked party in Singapore, with its offshore dollar clearing system, was prohibited). It was unclear, however, that such actions would in fact require a license; the role of the U.S. dollar in connection with U.S. sanctions was itself not entirely clear.[175]

OFAC, then, has an opportunity to use its informational materials to provide general guidance on how the use of the U.S. dollar might trigger U.S. sanctions, such that U.S. and non-U.S. parties might have clearer expectations around their U.S. sanctions compliance obligations.

ii. Notice Issues Concerning Definition of "U.S. Person"

The limited causation provisions may seem to have the advantage of clarity in penalizing only actions taken within the U.S. or by a U.S. person that cause a violation of the U.S. sanctions. Certain notice issues, however, do also exist

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.gov/resource-center/faqs/sanctions/pages/faq_general.aspx (last visited Oct. 19, 2019).

[173] Tyler Cullis, *Unresolved Questions on Offshore Dollar-Clearing*, SANCTIONLAW BLOG (Apr. 15, 2016), https://sanctionlaw.com/unresolved-questions-on-offshore-dollar-clearing/.

[174] Preventing Iran's Access to United States Dollars Act of 2016, S. 2752, 114th Cong. (2016).

[175] *See, e.g.*, Tyler Cullis, *Memo: Senators Kirk and Rubio Bill on Dollar Clearing Would Violate Iran Deal*, NIAC ACTION (Apr. 14, 2016), https://www.niacaction.org/memo-senators-kirk-and-rubio-bill-on-dollar-clearing-would-violate-iran-deal/ (stating that "foreign banks are likely not barred from clearing U.S. dollar-denominated transactions involving Iran if such dollar clearing does not touch the United States.").

in the context of the limited causation provision. Namely, parties seeking to comply with the limited causation provision must contend with the issue of how well-defined a "U.S. person" is or what actions "within the U.S." constitute in connection with the limited causation language.

For example, the issue of the definition of a "U.S. person" under the meaning of the sanctions regulations arose in 2017, when OFAC issued a finding of violation to B Whale Corporation (BWC).[176] BWC was based in Taipei, Taiwan and had entered into a bankruptcy proceeding in a U.S. bankruptcy court. OFAC "determined that BWC was a U.S. person within the scope of the ITSR because it was present in the United States for the bankruptcy proceedings when the transaction occurred."[177] Moreover, the vessel was found to be subject to U.S. sanctions regulations "because it was property under the jurisdiction of a U.S. bankruptcy court."[178]

BWC itself filed the bankruptcy petition at issue, thereby voluntarily making itself subject to the U.S. judicial system.[179] What if BWC had appeared as a defendant or otherwise involuntarily in a U.S. court case? The BWC case, therefore, raises questions regarding the expansiveness of the definition of a "U.S. person" as defined by the U.S. sanctions regulations,[180] and thus the effectiveness of limited causation principles in helping a foreign party to understand and comply with its U.S. sanctions obligations. Where the meaning of a "U.S. person" is interpreted broadly, parties located outside of the United States might not be aware or might have difficulty in determining whether they would be considered U.S. persons under the meaning of the OFAC regulations, especially where the theory of export of financial services is also in place.

iii. The 50% Rule

Restrictions on the use of the U.S. dollar by non-U.S. parties might be particularly difficult for the compliance efforts of those parties in light of the existence of OFAC's 50% Rule, whereby parties may be subject to U.S.

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[176] *OFAC Issues a Finding of Violation to B Whale Corporation, a Member of the TMT Group of Shipping Companies, for a Violation of the Iranian Transactions and Sanctions Regulations*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20170203_bwc.pdf (last visited Nov. 12, 2019).

[177] *Id.*

[178] *Id.*

[179] Debtor's Emergency Motion for an Order (I) Authorizing the Debtors to Use Cash Collateral of Existing Secured Lenders, (II) Granting Adequate Protection for Use Thereof, (III) Scheduling Final Hearing at 1, 3, *In re* TMT USA Shipmanagement LLC, No. 13-33740 (Bankr. S.D. Tex. June 20, 2013).

[180] Clif Burns, *OFAC Radically Expands Its Extraterritorial Jurisdiction with B Whale Ruling*, EXPORT LAW BLOG (Feb. 9, 2017), https://www.exportlawblog.com/archives/8298.

sanctions even if they are not explicitly designated, by reason of their corporate ownership. Foreign entities seeking to use the U.S. dollar must therefore inquire into the corporate ownership of potential transaction parties, in addition to screening such parties to determine if they have been specifically named to U.S. government lists.

OFAC originally issued its 50% Rule on February 14, 2008 and issued revised guidance on August 13, 2014 concerning this policy.[181] As referenced earlier in this Article, pursuant to the 50% Rule, entities are blocked when they are owned in a 50% or greater interest by blocked persons, individually or in the aggregate, directly or indirectly.[182] As such, "a U.S. person generally may not engage in any transactions with such an entity, unless authorized by OFAC."[183] Moreover, "[a] property interest subject to blocking includes interest of any nature whatsoever, direct or indirect."[184] The revised guidance advised U.S. persons "to act with caution when considering a transaction with a non-blocked entity in which one or more persons has a significant ownership interest that is less than 50 percent or which one or more persons may control by means other than a majority ownership interest,"[185] since such entities could be the subject of future OFAC designations or enforcement actions.

The 50% Rule thereby raises certain issues for foreign entities seeking to ensure corporate compliance. Identifying those parties with whom U.S. dollars cannot be used becomes more challenging when going beyond specifically named parties or governments and considering issues of corporate ownership, especially where such ownership information may not be publicly available. Non-U.S. parties have the obligation, then, to inquire into the ownership of parties to any U.S. dollar transaction. This was demonstrated by the OFAC settlement in connection with Barclays Zimbabwe in which, as described above, Barclays settled for apparent violations involving corporate customers of Barclays Bank of Zimbabwe Limited that were owned 50 percent or more by an entity on OFAC's SDN List and which held U.S. dollar-denominated accounts.[186]

Further, as a settlement between OFAC and Cobham Holdings, Inc. demonstrates, effective screening of transaction parties may be impeded due to screening software failures, making it more difficult for companies to

[181] *OFAC FAQs: Sanctions Compliance*, U.S. DEP'T OF THE TREASURY, https://www.treasury.gov/resource-center/faqs/sanctions/pages/faq_compliance.aspx (last visited Oct. 19, 2019).

[182] *Revised Guidance on Entities Owned by Persons Whose Property and Interests in Property Are Blocked*, U.S. DEP'T OF THE TREASURY (Aug. 13, 2014), https://www.treasury.gov/resource-center/sanctions/Documents/licensing_guidance.pdf.

[183] *Id.* Additionally, for the Cuban sanctions program (and the former Sudanese sanctions program), other criteria of ownership or control can result in an entity being blocked. *Id.*

[184] *Id.*

[185] *Id.*

[186] Megaw, *supra* note 81.

effectively ascertain their compliance responsibilities and identify potentially problematic transaction partners when using U.S. dollars.[187] In the *Cobham* settlement, Metelics (a subsidiary of Cobham at the time) apparently violated the Ukraine Related Sanctions Regulations by selling items to a blocked person through distributors in Canada and Russia.[188] The purchaser, although not specifically identified on OFAC's List of Specially Designated Nationals and Blocked Persons (the SDN List), was 51% owned by an SDN, and as such was blocked by way of the 50% Rule.[189] Metelics performed denied party screenings, but the third-party screening software used did not produce any warnings or alerts for the purchaser.[190] This was due to a failure of the software to identify matches to the SDN List containing additional words in the inputted language.[191] As this case demonstrates, parties can be the subject of OFAC enforcement actions even where they have taken steps to screen their transaction parties and attempted to comply with OFAC regulations, and compliance can be complicated by the existence of OFAC's 50% Rule.

iv. Notice and Effect on Compliance Efforts

Non-U.S. individuals and entities do not face a clearly-defined set of rules when trying to determine what activities they may perform with U.S. dollars; even though an effective prohibition against the use of U.S. dollars in transactions with sanctioned entities may be in place, that prohibition is not readily apparent from a textual reading of the U.S. sanctions regulations. The use of the causation provisions as a basis for liability further muddies these expectations, as the causation provisions appear in two different forms across sanctions programs. These requirements around the use of U.S. dollars are not well-publicized by OFAC, and the vague language of "causing a violation" can easily fail to convey the basic directive that U.S. dollars cannot be used in transactions with sanctioned entities and may also obscure the fact that there could be an alternative basis for liability based on the export of financial services from the United States. This vagueness is especially worrisome where violation of these laws may involve criminal as well as civil penalties, as previously discussed.

Compliance is especially difficult where any transaction, no matter how small, may trigger a sanctions violation, since OFAC does not have a

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[187] *Enforcement Information for November 27, 2018*, U.S. DEP'T OF THE TREASURY (Nov. 27, 2018), https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/20181127_metelics.pdf.
[188] *Id.*
[189] *Id.*
[190] *Id.*
[191] *Id.*

minimum value threshold on transactions that constitute a sanctions violation.[192] Companies may lack visibility as to which companies are considered sanctioned entities in light of OFAC's 50% Rule and in the absence of public ownership information. The broad causation principles and the *TransTel* enforcement stance create the requirement that non-U.S. parties screen all parties to a transaction involving U.S. dollars.

OFAC has provided some guidance on its enforcement stance with respect to violations arising as a result of utilizing the U.S. financial system. While the information provides some reassurance that OFAC mainly focuses its compliance efforts on willful, reckless, or fraudulent behavior in connection with the use of the U.S. financial system, that information does not insulate non-U.S. business entities from potential enforcement actions should they cause violations of the sanctions programs without the presence of such actions. Namely, OFAC stated the following within its listing of Root Causes of compliance program deficiencies and breakdowns:

> OFAC has generally focused its enforcement investigations on persons who have engaged in willful or reckless conduct, attempted to conceal their activity (e.g., by stripping or manipulating payment messages, or making false representations to their non-U.S. or U.S. financial institution), engaged in a pattern or practice of conduct for several months or years, ignored or failed to consider numerous warning signs that the conduct was prohibited, involved actual knowledge or involvement by the organization's management, caused significant harm to U.S. sanctions program objectives, and were large or sophisticated organizations. [193]

These enforcement factors, however, offer little in the way of bright-line rules to help entities understand the prohibitions in place against the use of U.S. dollars with respect to the U.S. sanctions regulations and thereby implement an effective sanctions compliance program. These factors largely presuppose knowledge of the prohibitions involving U.S. dollars in their contemplation of parties who act willfully or recklessly and do not address the issue of entities who might not fully understand the scope of their compliance obligations with respect to U.S. dollars.

A lack of clear and public information around how U.S. sanctions regulations apply to U.S. dollar-denominated transactions might also cause a chilling effect on transactions that are legal but involve the use of U.S. dollars in areas where a relatively larger number of sanctioned parties reside. For

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[192] *OFAC FAQs: Sanctions Compliance*, *supra* note 181 (#44: "There is no minimum or maximum amount subject to the regulations").

[193] *Framework for OFAC Compliance Commitments*, *supra* note 163.

example, U.S. and European banks have scaled back relationships with banks in the Persian Gulf region due to sanctions concerns.[194] This trend would likely be exacerbated if OFAC brings other enforcement actions in the same vein as *TransTel*, namely, against non-U.S. entities who are not financial institutions, where the only nexus is the use of U.S. dollars, and where those enforcement actions are based on an expansive causation provision. If OFAC does not widely disseminate further information about the nature of U.S. sanctions as applied to U.S. dollar-denominated transactions, this confusion will likely persist.

v. Criminal Charges Based on Causation and Export of Financial Services

Defining what types of conduct might be prohibited by the causation provisions (along with the export of services to sanctioned parties) and considering the sufficiency of OFAC's notice regarding the prohibition of such conduct are particularly important in light of the fact that criminal penalties are available for certain violations of the OFAC regulations. Paragraph (c) of 50 U.S.C. § 1705 allows for a fine or imprisonment for any person who willfully commits, attempts to commit, conspires to commit, or aids and abets in the commission of, an unlawful act described in subsection (a) of the Penalties section.[195] Paragraph (a) includes, among other unlawful acts, the causation of a violation of any license, order, regulation, or prohibition issued under IEEPA.[196] Criminal penalties are possible for those who willfully commit acts that cause a sanctions violation.[197] Such a possibility is problematic where the issue of what may cause a violation is expansively defined and the type of conduct prohibited is often unclear from the text of the regulatory language. Courts have found that various IEEPA prohibitions are not, in fact, unconstitutionally vague.[198] While a challenge to the causation provisions on vagueness grounds might be unsuccessful given such precedent, an argument nonetheless persists that OFAC should make as clear as possible any prohibitions in place that could involve criminal charges if violated.

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[194] Tom Arnold & Stanley Carvalho, *Gulf Banks Could Lose Access to Dollar Clearing, UAE Central Banker Warns*, REUTERS (Nov. 14, 2016), https://uk.reuters.com/article/us-emirates-banks-usa/gulf-banks-could-lose-access-to-dollar-clearing-uae-central-banker-wanker-warns-idUKKBN1391AF.

[195] 50 U.S.C. § 1705 (2012).

[196] *Id.*

[197] *Id.*

[198] *See, e.g.*, United States v. Akova, 1:12-cr-00220-ELR-JKL-2, 2016 U.S. Dist. LEXIS 169136, (N.D. Ga. Oct. 28, 2016); *see also* United States v. Saboonchi, 48 F. Supp. 3d 815 (D. Md. May 7, 2014).

While OFAC has recently done more to clarify the obligations of parties in connection with their use of the U.S. dollar, the reach and expansiveness of the causation provisions in contexts outside of the United States are far from clear.

B. Considerations of Extraterritorial Application

Beyond the issue of whether the express language of the causation regulations permits the application of sanctions regulations to conduct outside the United States or by non-U.S. persons is the question of whether the regulations and the IEEPA statute in general can be applied extraterritorially to reach such conduct. While this Article focuses primarily on the differences in the regulatory language itself, rather than on the greater issue of extraterritorial application, this question is relevant because it raises the issue of whether the expansive regulatory language would have been understood to reach only conduct by U.S. persons or within the United States due to a generally accepted principle that the statute not be extended extraterritorially.

The case of *U.S. v. Hoskins* does not seem to limit the application of these causing provisions and IEEPA where the only U.S. nexus is the use of U.S. dollars, even though that case limited extraterritorial conduct prohibited by the Foreign Corrupt Practices Act (FCPA).[199] In *Hoskins*, the Second Circuit considered the extraterritorial application of the FCPA to the conduct of a foreign national who "never set foot in the United States or worked for an American company during the alleged scheme," on the theory that he was an accomplice or co-conspirator for an FCPA, for a crime that he was "incapable of committing as a principal."[200] With respect to the FCPA, the Second Circuit noted that "Congress had demonstrated an affirmative legislative policy in the FCPA to limit criminal liability to the enumerated categories of defendants."[201] The court described the two-step framework for analyzing extraterritoriality issues set forth by the Supreme Court in *RJR Nabisco*: first, whether the presumption against extraterritoriality has been rebutted, and if not, whether the case involves a domestic application of the statute, by examining the statute's "focus."[202]

Despite the Second Circuit's determination that Congress had expressly intended the FCPA to be applied only within the United States, no such express intent by Congress was demonstrated with respect to IEEPA, and the IEEPA statute is likely to be allowed to be applied extraterritorially. As discussed above, the court in *Zarrab* did not decide the defendant's motion to dismiss the indictment on the grounds of extraterritorial application, since it

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[199] United States v. Hoskins, 902 F.3d 69, 92-93 (2d Cir. 2018).
[200] *Id.* at 76.
[201] *Id.* at 95.
[202] *Id.*

found that the indictment had alleged a U.S. nexus.[203] However, the court noted that "[a]ssuming, *arguendo*, that the issue of extraterritoriality were to be reached," such arguments against the extraterritorial application of IEEPA and the ITSR "would likely prove to be unpersuasive."[204] Indeed, the court found that "[s]everal provisions of the IEEPA and the ITSR would (expressly) support the Court's jurisdiction and any presumption against extraterritoriality would be overcome by the United States' interest in defending itself."[205]

Moreover, the issue of whether the IEEPA statute can be applied extraterritorially is unlikely to become an issue in the dollar-clearing context, because "[t]he presumption against extraterritoriality does not apply where the failure to extend the scope of the statute to a foreign setting will result in adverse effects within the United States or where the conduct regulated by the government occurs within the United States."[206] Consistent with OFAC's position in the *TransTel* settlement, dollar clearing will be assumed to involve actions and parties within the U.S. As discussed above, even offshore dollar clearing systems appear to trigger at least some tangential connection to actions taken by U.S. entities or within the United States.

C. Potential Effects on the Use of the U.S. Dollar

OFAC's use of the broad causation provisions as an enforcement tool, along with the theory of export of financial services, means that sanctions policy will effectively follow the U.S. dollar outside of U.S. borders. Thus, U.S. sanctions policy can have a broad reach and affect a huge volume of international transactions. "The strength of American sanctions, after all, comes from the centrality of the United States financial system in the global economy, and the dollar's status as the world's dominant reserve currency."[207]

U.S. dollars are widely held abroad; U.S. dollar liabilities of non-U.S. banks totaled $12.8 trillion at the end of June 2018.[208] As of the first quarter of 2019, the dollar constituted almost 62% of all known central bank foreign exchange reserves.[209] Nations using the U.S. dollar as their official currency

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[203] Zarrab, 2016 U.S. Dist. LEXIS 153533, at *27.
[204] *Id.* at *28.
[205] *Id.*
[206] *Id.* at *8.
[207] Kathy Gilsinan, *A Boom Time for U.S. Sanctions*, ATLANTIC (May 3, 2019), https://www.theatlantic.com/politics/archive/2019/05/why-united-states-uses-sanctions-so-much/588625/.
[208] Iñaki Aldasoro & Torsten Ehlers, *The Geography of Funding of Non-US Banks*, BIS Q. REV. (Dec. 16, 2018), https://www.bis.org/publ/qtrpdf/r_qt1812b.htm.
[209] Kimberly Amadeo, *Why the U.S. Dollar is the Global Currency*, BALANCE (Apr. 18, 2019), https://www.thebalance.com/world-currency-3305931.

include Panama, Ecuador, El Salvador, East Timor, and Zimbabwe.[210] The U.S. dollar is the most dominant vehicle currency[211], as it was on one side of 88% of all trades in April 2016.[212]

OFAC's far-reaching enforcement stance with respect to U.S. dollar-denominated transactions, however, might possibly discourage foreign parties from using the U.S. dollar to avoid the application of U.S. sanctions. Indeed, it has been suggested that "[e]xceedingly punitive penalties may foster the development of payment systems that avoid the US dollar or the United States."[213] Moreover, foreign banks may become more reluctant to become involved in transactions touching the U.S. dollar due to the sanctions implications of such activity. For example, the European Union has created the INSTEX payment system for use in trade with Iran, avoiding cash payments by banks by way of a virtual ledger, in order to avoid the application of U.S. sanctions with respect to Iran.[214] The extended reach of U.S. sanctions could be a factor in making the U.S. dollar less attractive as a currency in which to complete international business transactions.

The application of U.S. sanctions might be one factor, but not a determinative factor, in causing non-U.S. entities to choose to make their global business transactions in a currency other than the U.S dollar. Indeed, "[b]ecause of increasingly tightening regulatory requirements (AML [anti-money laundering] and CTF [combatting terrorism financing] as well as regulatory sanctions requirements . . .) by key jurisdictions, such as the US and Europe, seventy-five per cent of global bank providers in this space have reduced their correspondent banking relationships . . . or withdrawn from this business altogether."[215] The issue of regulatory burden as a whole, rather than the particular application of U.S. sanctions, might diminish the use of U.S. dollars globally. The breadth and depth of the U.S. sanctions regulations, however, does certainly pose a unique burden to compliance at the present time. "The use of

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210 Troy Adkins, *Countries That Use the U.S. Dollar*, INVESTOPEDIA (Apr. 9, 2015), https://www.investopedia.com/articles/forex/040915/countries-use-us-dollar.asp.

211 "[I].e., medium of exchange between currencies." Amadeo, *supra* note 209 ("The dollar acts as a 'vehicle currency' in the sense that agents in non-dollar economies will generally engage in currency trade indirectly using the US dollar rather than using direct bilateral trade among their own currencies.")

212 BANK FOR INT'L SETTLEMENTS, TRIENNIAL CENTRAL BANK SURVEY (2016), https://www.bis.org/publ/rpfx16fx.pdf.

213 Ernest T. Patrikis, *Will Enforcement of US Sanctions Reshape How US-Dollar Transactions Are Cleared?*, FINANCIER WORLDWIDE (Sept. 2014), https://www.financierworldwide.com/will-enforcement-of-us-sanctions-reshapehow-us-dollar-transactions-are-cleared#.VBp7EJR_tic.

214 *EU Mechanism for Trade with Iran 'Now Operational*', DW.COM (June 28, 2019), https://www.dw.com/en/eu-mechanism-for-trade-with-iran-now-operational/a-49407662.

215 Ruth Wandhöfer & Barbara Casu, *The Future of Correspondent Banking Cross Border Payments*, SWIFT INST. (Oct. 10, 2018), https://swiftinstitute.org/research/the-future-of-correspondent-banking/.

sanctions has exploded in the 21st century"; as of May 2019, the United States had "7,967 sanctions in place."[216] OFAC's application of U.S. sanctions regulations to certain transactions made outside of the United States and by non-U.S. parties through the broad causation provisions and the export of financial services prohibitions therefore necessarily entails the application of a large number of regulatory rules and prohibitions.

Despite the potential regulatory burden posed by requiring foreign parties to comply with U.S. sanctions regulations in connection with all transactions involving U.S. dollars, it does not currently appear likely that another currency will soon become the global reserve currency. "[W]hile the euro accounted for the second-largest share of global central bank reserves by mid-2018, its share was only around one-third that of the dollar," and likewise, "[t]he renminbi accounted for . . . 1.84 per cent of global central bank reserves in mid-2018."[217] Indeed, as the enforcement actions described above demonstrate, OFAC's reach to transactions and parties largely outside of the United States but involving the U.S. dollar is not new, and yet the U.S. dollar continues to be widely used abroad. Given the present advantages and universality of the U.S. dollar, OFAC can most likely effectively attach its sanctions policy to the U.S. dollar without risking the wholesale abandonment of the U.S. dollar by foreign entities in order to avoid U.S. sanctions.

D. Cash

A related issue is whether it would be possible for the broad causation provisions (or alternatively, the prohibition against the export of financial services to sanctioned entities) to be interpreted to prohibit the use of U.S. dollars in the form of cash in transactions with sanctioned entities. If the sanctions obligations associated with U.S. dollars also applied to the use of the U.S. dollar in cash, such an enforcement policy would further extend the reach of U.S. sanctions to a large amount of funds. Namely, it was estimated as of year-end 2010 that the value of U.S. notes and coins in circulation was $983 billion ($942 billion in notes), of which as much as two-third was estimated to be held abroad.[218] Around 2007, it was estimated that close to $500 billion, or nearly 60% of all U.S. banknotes in circulation, were held outside of the

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[216] Gilsinan, *supra* note 207.

[217] Megan Greene, *The Dollar Can Defend Its Global Reserve Role Against EU and China*, FIN. TIMES (Nov. 7, 2018), https://www.ft.com/content/5054627c-e1b5-11e8-a8a0-99b2e340ffeb.

[218] Coppola, *supra* note 117.

United States.[219] Currently, around $580 billion in U.S. currency is estimated to be used outside of the United States.[220]

The OFAC prohibitions at issue are the same whether applied to cash or other types of transactions, but without dollar clearing, the direct causation issues involved in non-cash transactions would presumably disappear, as a U.S. financial institution need not be directly involved in the dollar clearing and settlement process. In the context of cash transactions, the export of financial services to sanctioned parties or countries would become even more attenuated. Bringing an enforcement action against cash transactions would also be more difficult than against non-cash transactions due to the detection and traceability issues inherent in the use of cash.

VI. RECOMMENDATIONS AND POTENTIAL ALTERNATIVES

A. Policy Goals Related to Restricting the Use of U.S. Dollars in Transactions with Sanctioned Parties

Making the causation provisions consistent would be a useful way to make the causation provisions clearer and more coherent and to bring the text of the Syrian and Zimbabwean sanctions provisions in line with the other causation provisions. In deciding *how* the causation provisions should be made consistent, however, the question arises: What are the policy goals of broad causation provisions and the *TransTel* settlement stance? Is it to spread U.S. sanctions policy worldwide, to curtail the use of U.S. dollars in questionable international transactions, or both? The expansive causation language, and OFAC's reliance on it and the theory of export of financial services to bring enforcement actions, serves to do both. As discussed in the *Zarrab* case, OFAC has the goal of "precluding transfers designed to dollarize transaction through the U.S. financial system for the direct or indirect benefit of Iranian banks or other persons in Iran or the Government of Iran."[221] With respect to Iran, it has been argued that threats with respect to the Iranian financial system include, for example, "proliferation financing, nuclear financing, missile financing," and also "terror financing, money laundering, and sanctions evasion."[222]

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[219] Richard G. Anderson & Marcela M. Williams, *How U.S. Currency Stacks Up – At Home and Abroad*, FED. RES. BANK OF ST. LOUIS (Apr. 1, 2007), https://www.stlouisfed.org/publications/central-banker/spring-2007/how-us-currency-stacks-upat-home-and-abroad.

[220] Amadeo, *supra* note 209.

[221] *See* Zarrab, 2016 U.S. Dist. LEXIS 153533, at *28 (citing Iranian Transactions Regulations, 73 Fed. Reg. 66,541 (Nov. 10, 2008)).

[222] *Sanctions Experts: Granting Iran Access to Dollars Endangers Global Banking System*, TOWER (Apr. 12, 2016), http://www.thetower.org/3221-sanctions-experts-granting-iran-access-to-dollars-endangers-global-banking-system/.

There are some limited circumstances in which OFAC allows U.S. financial institutions to be involved in the dollar clearing and settlement process that would otherwise be prohibited. For instance, in some instances U.S. financial institutions may process transactions (called "U-turn" transactions) involving U.S. dollars that both originated and terminated outside of the U.S.[223] Such exceptions, however, are few. The general rule applies that U.S. financial institutions may not be involved, however indirectly, in transactions with parties subject to U.S. sanctions.

This Article explores, in the following sections, both the options of entirely expansive and entirely limited causation provisions. It recognizes, however, that OFAC is far more likely to universally adopt the expansive language were the office to amend the causation provisions, given OFAC's goals, priorities, and use of the expansive causation provision in prior enforcement actions. Moreover, amending the limited causation provisions rather than the more expansive ones would entail far fewer changes to the actual text of the sanctions regulations themselves. Therefore, this Article recommends that the instances of limited causation language within the OFAC sanctions programs relating to Syria and Zimbabwe be amended to the broader form of the causation provision.

B. Making All "Causing a Violation" Provisions Expansive

The course of action recommended by this Article is to strike the language limiting prohibited transactions to those by U.S. persons or within the United States, thereby making the causation provisions found in the Syrian and Zimbabwean OFAC sanctions programs expansive ones. This approach has the advantage of simplicity and would allow non-U.S. actors to have a consistent set of expectations as to the permitted uses of U.S. dollars. This would also have the advantage of making all instances of the causation provisions align with how expansively OFAC has used the prohibition against the exportation of services to sanctioned areas or persons. Where the exportation of services from the United States or by U.S. parties is construed broadly and may also include the use of offshore payment systems, it may be confusing that the causation provisions themselves appear to be limited. Therefore, while the causation provisions by themselves might not necessarily fully indicate the scope of restrictions on and applicability of U.S. sanctions to U.S. dollar-denominated transactions that are not made within the United States or by U.S. persons, there will at least not be causation language found in the Syrian or Zimbabwean sanctions programs that indicates that causation violations are

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[223] *Frequently Asked Questions Related to Cuba*, U.S. DEP'T OF THE TREASURY (June 4, 2019), https://www.treasury.gov/resource-center/sanctions/programs/documents/cuba_faqs_new.pdf (citing 31 C.F.R. § 515.584(d) (2015)).

limited to actions taken within the United States or by U.S. persons. Such limited causation language might have the effect of creating a mistaken impression that the sanctions regulations do not necessarily attach to U.S. dollar-denominated transactions when such transactions do not meet the criteria of the limited causation provision.

As described above, U.S. dollar transactions do in fact appear to involve a U.S. party, however tangentially or in a minimal role, at some point in the dollar clearing and settlement process. The adoption of broad causation language across all U.S. sanctions programs would therefore have the advantage of clarity for foreign entities. Under this approach, quite simply, transactions involving U.S. dollars should not be entered into with parties sanctioned by OFAC, in order to avoid causing a U.S. financial institution to violate the sanctions regulations and thereby triggering a sanctions violation by the foreign entity itself. This also would make the causation provisions consistent with an expansive interpretation of the export of financial services, as OFAC has used in past enforcement actions.

As mentioned above, the broad causation language that appears within the text of the sanctions regulations does not by itself necessarily indicate the full applicability of U.S. sanctions, especially where parties outside of the United States might not expect U.S. sanctions regulations to apply. If broad causation language were universally adopted across sanctions programs, OFAC would do well to publicize this development widely, along with its already-existing prohibition on the export of financial services, and clearly and publicly state that these terms effectively mean a blanket prohibition against the use of U.S. dollars with sanctioned entities and individuals, whether or not such transactions are made by the United States or non-U.S. parties. OFAC has recently made a positive step in its Compliance Framework making clearer its restrictions against the use of U.S. dollars in sanctioned transactions;[224] OFAC should continue this trend with future publications and announcements. Moreover, this Article recommends that when the broad causation provisions are used as the basis for enforcement actions, OFAC should specifically identify the nature of the sanctions violation caused–for example, the involvement of U.S. financial institutions in the dollar clearing and settlement process.

C. Making All "Causing a Violation" Provisions Limited

The "causing a violation" provisions could also all be amended to the limited form of the causation language, to reach only parties within the United States or actions taken within the United States. This change would limit OFAC's reach to those dollar transactions with a clear U.S. nexus, instead of relying on the sometimes-unclear involvement of U.S. financial institutions in the dollar clearing and settlement process as the basis for OFAC jurisdiction.

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[224] *See Framework for OFAC Compliance Commitments*, *supra* note 163.

This change might also be in line with the original intent of the drafters of the causation provisions, as discussed in Part I of this Article. This change, however, might not have great practical effect; OFAC could charge the same type of conduct based on a theory of exportation of financial services, much as it has in the other enforcement actions besides *TransTel* described in Part II of this Article. Such an amendment of the causation provisions to appear more limited might cause foreign entities to mistakenly conclude that the U.S. sanctions laws and regulations do not apply to their U.S. dollar transactions with sanctioned entities, instead of recognizing that such transactions could be penalized through a theory of export of financial services from the United States. Adopting entirely limited causation provisions would also suffer from the difficulty of defining the nature of boundaries of the "transaction" that must occur within the United States or be taken by a U.S. person to be penalized for triggering a sanctions violation.

This Article therefore recommends that the causation provisions be amended so that they are all expansive in nature, rather than being all limited. This approach would make the causation regulations with the fewest changes to the text of the regulatory language. This approach would also best reflect that OFAC currently has the ability to reach U.S. dollar-denominated transactions made outside of the United States without direct involvement of U.S. persons, and would therefore not contribute to any mistaken impression that the sanctions regulations did not apply to such transactions.

VII. CONCLUSION

OFAC's use of the broad causation provisions, and alternatively the prohibitions against the export of services to sanctioned parties or countries, effectively attaches the U.S. sanctions regulations to all U.S. dollar-denominated transactions effected through dollar clearing and settlement systems, whether those transactions were entered into by U.S. parties or within the United States. The provisions prohibit the use of U.S. dollars with any sanctioned party where the U.S. dollar is used. The use of the broad causation provision by OFAC in *TransTel* to reach a U.S. dollar-denominated transaction entered into outside of the U.S. by non-U.S. parties was novel in that a broad causation provision was used to reach such conduct, but not in the sense that OFAC was penalizing types of transactions that had not previously been subject to OFAC enforcement actions.

As this Article discusses, the *TransTel* settlement involved the novel use of the broad causation provision because those broad causation provisions did not appear to have been developed with the expectation that they would apply to non-U.S. parties or to transactions outside the United States. Indeed, based on the language in the Federal Register discussing the North Korean sanctions, the broad causation language perhaps was intended to have the same

jurisdictional reach as the limited causation language specifically referencing actions taken by U.S. persons or within the United States. However, the facially expansive text of the broad causation provisions, and the broad general intended scope of the IEEPA statute to protect the interests of the United States, mean that the extraterritorial reach of the broad causation provisions is likely to survive any challenge based on legislative history. An argument that OFAC does not have the authority to enforce the broad causation principles extraterritorially in their current form is likely to fail. Although a difference in the causation principles across OFAC programs may not have been intended, one has arisen. Therefore, the more relevant issue is whether and how these provisions should be amended across sanctions programs in the future.

This Article concludes that the prohibitions against "causing a violation" should be made consistent across OFAC sanctions programs in order to allow actors to develop a clear set of expectations around the use of U.S. dollars by transactions with U.S.-sanctioned parties entered into either by U.S. or non-U.S. entities. Given OFAC's history in bringing enforcement actions based on the export of financial services, this Article recommends that all of the causation provisions be amended to be consistent with the broad version of that language, in order to avoid the impression that only transactions within the United States or by U.S. persons are subject to OFAC enforcement when they could also be pursued instead based on the alternative theory of export of financial services.

If OFAC intends in the future to take a position consistent with the *TransTel* settlement that all transactions with U.S.-sanctioned parties using U.S. dollars violate the sanctions provisions, whether entered into by U.S. or non-U.S. parties, then that stance should be widely publicized in a clear and consistent manner. Clarity and ease in developing effective compliance measures, as well as the advancement of the goals of U.S. sanctions programs, are the primary goals of adopting broad causation provisions across all U.S. sanctions programs. OFAC can further promote those goals by widely disseminating information about the effect of such causation provisions, and the prohibitions on the export of financial services, on the application of U.S. sanctions to transactions involving U.S. dollars.