FinReg

Davis Polk Insights on Financial Regulation

U.S. Prosecutors and Regulators Impose Second Largest Penalty Ever Levied Against a Financial Institution for Violations of U.S. Economic Sanctions

By John B. Reynolds, Jeanine P. McGuinness, Will Schisa, Britt Mosman & Ryan Johansen on November 21, 2018

POSTED IN ANTI-MONEY LAUNDERING, ECONOMIC SANCTIONS, OFAC

On November 19, 2018, a group of five U.S. federal and state prosecutors and regulators[1] announced that they had reached settlements with Société Générale ("**SocGen**") under which SocGen will pay penalties totaling $1.34 billion in relation to violations of U.S. economic sanctions concerning Iran, Cuba, Sudan and other sanctioned countries (collectively, the "**Settlements**"). As noted prominently in the DOJ's **press release**, the Settlements represent the second largest penalty ever imposed on a financial institution for violations of U.S. economic sanctions. Specifically, SocGen will forfeit to the United States $717,200,000 in a civil forfeiture action (of which one-half shall be transferred to the United States Victims of State Sponsored Terrorism Fund) and will pay an additional $325,000,000 to the DFS, $162,800,000 to DANY, $81,265,000 to the Federal Reserve and $53,900,000 to OFAC. In addition to agreeing to the monetary penalties, SocGen entered into a three-year Deferred Prosecution Agreement with the DOJ and DANY.

The OFAC portion of the Settlements, though comparatively small in relation to the overall penalties imposed, is notable in own its right, given that, as we observed **last month** in relation to a (considerably smaller) settlement with another financial institution, OFAC has this year announced very few public enforcement actions. We provide below a summary of the information released by the U.S. prosecutors and regulators regarding the Settlements, and identify some key takeaways from this case for financial institutions and others subject to U.S. laws and regulations related to U.S. economic sanctions.

Details of the Settlements

In General

According to the U.S. prosecutors and regulators, SocGen from 2003 to 2013[2] knowingly and willfully violated U.S. economic sanctions by illegally sending payments through the U.S. financial system in a manner that "caused both affiliated and unaffiliated U.S. financial institutions to process transactions that otherwise should have been rejected, blocked or stopped for investigation"[3] under OFAC regulations.

As noted in the Settlements, SocGen violated the Trading with the Enemy Act and the Cuban Assets Control Regulations promulgated thereunder ("**CACR**")[4] by operating 21 credit facilities that provided financing to various Cuban-related entities and business enterprises ("**Cuban Credit Facilities**") while making use of U.S.-cleared payments through New York-based financial institutions. In order to conceal that it was processing these and other transactions on behalf of sanctioned individuals or entities or involving sanctioned countries, SocGen omitted or stripped out information about the sanctions targets from the SWIFT payment messages it sent to the U.S. financial institutions (**"Concealment Activities**"). In total, SocGen processed 9,000 such outgoing non-transparent transactions with a total value of more than $13 billion, of which at least 887 transactions with a value of $292.3 million were both non-transparent and violated U.S. sanctions.[5]

Because additional conduct charged and the precise periods of time at issue vary from regulator to regulator, we briefly note below a few differences among the settlements.

DOJ and DANY

The DOJ and DANY settlements relate to SocGen's violations of U.S. economic sanctions from 2004 up through and including 2010 in connection with the Cuban Credit Facilities and the Concealment Activities described above. The DOJ and DANY's investigation into SocGen was triggered in March 2012 by the blocking by other U.S. financial institutions of two transactions processed by SocGen on behalf of a Sudanese sanctioned entity, as well as a subsequent 2013 voluntary disclosure by SocGen of additional transactions with that Sudanese entity and a small number of other transactions that violated U.S. economic sanctions. The DOJ and DANY

faulted SocGen for failing to timely disclose the Cuban Credit Facilities and the Concealment Activities at the time DOJ and DANY's investigation commenced. Instead, according to the prosecutors, SocGen did not disclose these activities until October 2014. This fact was specifically highlighted in the DOJ's press release and appears to have been viewed as a fairly significant aggravating factor.

OFAC

The OFAC **settlement** relates to SocGen's apparent violations of the CACR, the Sudanese Sanctions Regulations ("**SSR**")[6] and the Iranian Transactions Regulations, later renamed the Iranian Transactions and Sanctions Regulations ("**ITSR**"),[7] for at least the five years up to and including 2012. Specifically, OFAC stated that, as a result of the Concealment Activities, SocGen processed approximately $22.5 million in payments in violation of the SSR and $34.2 million in payments in violation of the ITSR. In addition, SocGen's Concealment Activities, in combination with its involvement in the Cuban Credit Facilities, resulted in over $5.5 billion in payments in violation of the CACR.

Though the OFAC settlement relates to the same underlying behavior, OFAC, in marked contrast to the DOJ and DANY, did not fault SocGen for failing to timely disclose the Concealment Activities and the Cuban Credit Facilities. To the contrary, in its **web notice** concerning the settlement, OFAC stated that SocGen voluntarily disclosed the apparent violations and cooperated fully with OFAC in its investigation.

In determining the appropriate settlement amount in this case, which was determined to be an "egregious" matter under OFAC's Economic Sanctions Enforcement Guidelines,[8] OFAC considered the following aggravating and mitigating factors:

Aggravating Factors

- OFAC stated that SocGen had indications that its conduct might constitute a violation of U.S. law, and that certain SocGen employees demonstrated awareness that SocGen's conduct constituted a violation of U.S. law before and at the time the apparent violations took place;
- OFAC noted that SocGen exercised a reckless disregard for U.S. sanctions requirements by engaging in the Concealment Activities and that numerous

SocGen employees, including members of management across multiple business lines and locations, had actual knowledge of the conduct that led to the apparent violations;

- OFAC faulted SocGen for ignoring, on numerous occasions, warning signs that its conduct could have constituted an apparent violation, noting in particular instances where SocGen employees read OFAC enforcement actions brought against other financial institutions and discussed the similarities between the conduct in those enforcement actions and SocGen's payment practices; and
- OFAC noted that SocGen's conduct conferred significant economic benefit to persons subject to U.S. sanctions and undermined the integrity and policy objectives of multiple U.S. sanctions programs, and that SocGen is a large and commercially sophisticated financial institution.

Mitigating Factors

- OFAC noted that SocGen had not received a penalty notice or finding of violation from OFAC in the five years preceding the date of the earliest transaction giving rise to the apparent violations;
- OFAC credited SocGen's cooperation with its investigation, including by conducting an internal investigation, responding to multiple requests for information in a timely manner, and executing a statute of limitations tolling agreement with multiple extensions; and
- OFAC stated that SocGen took several remedial actions in response to the apparent violations, including creating a centralized sanctions compliance function, increasing the number of personnel within compliance and the total budget for sanctions compliance, and implementing a more comprehensive training regime that includes in-person training for certain individuals.

DFS

The DFS **settlement** covers 2003 to 2013—the broadest period of time of any of the Settlements. The DFS found that SocGen both used the Concealment Activities to conceal non-transparent and impermissible transactions with Iran, Cuba and Sudan and used the Cuban Credit Facilities to engage in around $7.7 billion in transactions with Cuban-related entities in violation of U.S. economic sanctions. In addition, the

DFS also found that SocGen made smaller payments in violation of sanctions against Libya, Myanmar and North Korea.

Notably, the DFS settlement faulted SocGen's non-U.S. employees, including in major Asian financial hubs, for "misunderstand[ing] or ignor[ing] the scope and applicability of U.S. sanctions laws and regulations." Likewise, the DFS **press release** announcing the settlement criticized SocGen's non-U.S. employees for their "minimal understanding of U.S. sanctions laws and regulations."

Federal Reserve

The Federal Reserve **settlement**, the lightest on details of any of the Settlements, relates to conduct between 2007 and 2012 similar to that described above. In addition to assessing a civil monetary penalty, the Federal Reserve settlement requires SocGen to engage in remediation efforts to address SocGen's lack of adequate transparency, risk management, and legal and compliance review policies and procedures designed to ensure compliance with OFAC regulations. During the term of the Federal Reserve's order, SocGen must engage an independent third party to conduct, on an annual basis, (i) a review of SocGen's OFAC compliance policies and procedures and their implementation across SocGen's global business lines and (ii) an appropriate risk-focused sampling of U.S. dollar payments. In addition, SocGen is barred from directly or indirectly retaining any individual who participated in the misconduct, was subject to formal disciplinary action in connection with the misconduct and has separated from SocGen or has had his or her employment terminated by SocGen.

Additional DFS Settlement

On the same day that the U.S. prosecutors and regulators announced the Settlements, the DFS reached a **separate settlement** with SocGen intended to address "serious deficiencies" in SocGen's Bank Secrecy Act/Anti-Money Laundering ("**BSA/AML**") compliance program (the "**AML Settlement**"). The AML Settlement, which requires SocGen to pay an additional penalty of $95 million (bringing the total penalties against SocGen announced this week to over $1.4 billion), stems from a 2009 written agreement entered into between SocGen, the predecessor to the DFS and the Board of Governors of the Federal Reserve System.

Under the 2009 written agreement, SocGen was required to address compliance and risk management deficiencies related to its BSA/AML compliance programs. Though SocGen made substantial progress between 2009 and 2013 in addressing these deficiencies, the DFS found over the course of four consecutive examinations from 2014 to 2017 that SocGen's implementation of a fully effective BSA/AML compliance program was "fall[ing] well short of expectations." In particular, the DFS identified deficiencies with respect to transaction monitoring, customer due diligence, internal controls and internal audit. Under the terms of the AML Settlement, SocGen is required to, among other obligations, take certain steps within 90 days to remediate these deficiencies and must, 18 months from now, engage an independent consultant to conduct a thorough evaluation of its remediation efforts.

Key Takeaways

- OFAC and the DOJ reached notably different conclusions with respect to whether SocGen had voluntarily disclosed the Cuba-related conduct at issue in the Settlements, with OFAC extending voluntary disclosure credit to SocGen and the DOJ faulting the bank for "failure to disclose its wrongdoing in a timely manner." This differential treatment appears to account in substantial part for the significant difference in scale of the DOJ and OFAC penalty amounts, and represents the second major sanctions case under the Trump administration (the other being the **ZTE settlement** in March 2017) where OFAC appears to have taken a significantly more conservative approach to the case than its DOJ counterparts.
- SocGen's conduct, the investigation of which started in 2012 and lasted for six years, perhaps bears less resemblance to the conduct at issue in more recent U.S. economic sanctions enforcement actions against financial institutions (see examples **here**, **here** and **here**) and instead is more evocative of earlier settlements. In particular, SocGen's Concealment Activities and the non-transparent use of payment messages are reminiscent of the conduct at issue in the DOJ's 2014 **settlement** with a different non-U.S. financial institution, still by far the largest of its kind.
- As discussed in our memorandum in **May 2018**, the DOJ earlier this year revised the U.S. Attorneys' Manual to address the practice of "piling on" by multiple enforcement authorities in the context of corporate resolutions. Among other things, the revised manual directs DOJ attorneys to

consider "crediting and apportionment of financial penalties, fines, and forfeitures, and other means of avoiding disproportionate punishment" and, when possible, "to coordinate with other federal, state, local, and foreign enforcement authorities" in the assessment of penalties. It is notable, then, that each prosecutor and regulator involved in the Settlements will receive payment from SocGen, with no crediting of payments made to other agencies and no suggestion by DOJ or any other agency that the penalty it imposed had been reduced in light of the penalties assessed by other agencies.

---

[1] The prosecutors and regulators are the United States Department of Justice ("**DOJ**"), the New York County District Attorney's Office ("**DANY**"), the Treasury Department's Office of Foreign Assets Control ("**OFAC**"), the Board of Governors of the Federal Reserve System and the Federal Reserve Bank of New York (together, the "**Federal Reserve**") and the New York State Department of Financial Services ("**DFS**").

[2] As explained further below, only the DFS settlement encompasses this full period. The settlements reached with the other prosecutors and regulators focus on various periods within this ten-year window.

[3] DOJ/DANY Statement of Facts, available **here**.

[4] 31 C.F.R. Part 515.

[5] The remaining non-transparent transactions were "U-turn" transactions involving Iran that appear to have been permissible under a general license in effect until November 2008.

[6] 31 C.F.R. Part 538.

[7] 31 C.F.R. Part 560.

[8] 31 C.F.R. Part 501, Appendix A.