

# Cross-Border Cooperation in U.S. Economic Sanctions Matters

Cross-border economic sanctions enforcement matters often involve cooperation between U.S. and non-U.S. agencies. Sanctions enforcement matters can implicate several different types of U.S. authorities, and there are multiple avenues for cross-border cooperation between U.S. and non-U.S. sanctions regulators, banking regulators and criminal prosecutors. Cross-border cooperation may occur at various stages of a sanctions enforcement matter, including during an investigation, at its conclusion, and in the context of post-settlement remediation obligations, such as compliance reviews by a monitor or independent consultant. Institutions outside the U.S. must consider at each stage how to navigate cooperation with U.S. authorities while complying with applicable local law requirements and coordinating as needed with local authorities.

While the U.S. Department of the Treasury's Office of Foreign Assets Control ("OFAC") is the primary sanctions regulator in the U.S., sanctions investigations often involve several U.S. federal and state authorities. Cross-border U.S. sanctions investigations may involve multiple jurisdictions, leading to a potential need for cooperation between U.S. and non-U.S. authorities, which can be accomplished through multiple avenues. Regulatory cooperation can take place at every stage of the investigation, from negotiating the scope of the investigation (which may cover historical transactions and conduct spanning a period of several years), throughout the investigation itself (which may last a number of years), and in the context of post-settlement obligations, which can be extensive in the context of criminal resolutions such as deferred prosecution agreements or guilty pleas. Navigating these complex investigations can be challenging for non-U.S. financial institutions seeking to cooperate with U.S. authorities while remaining in compliance with applicable local laws.

## OVERVIEW OF U.S. ECONOMIC SANCTIONS AUTHORITIES

OFAC is the primary U.S. sanctions regulator. The regulation and enforcement of economic sanctions laws is the exclusive domain of the Federal government in the U.S. pursuant to the Supremacy Clause of the U.S. Constitution. There are currently 25 U.S. sanctions programs, several of which are multilateral pursuant to the United Nations Participation Act. Other U.S. sanctions programs are unilateral. Mechanisms of international cooperation that are available for multilateral sanctions programs may not be available for unilateral sanctions programs. In addition to

OFAC, the U.S. Commerce Department can also be a party to sanctions investigations when matters involve export control (e.g., dual use items), and the U.S. State Department can be a party in matters involving defense items.

Other civil authorities, such as the Board of Governors of the Federal Reserve, the various Federal Reserve banks, and the Office of the Comptroller of the Currency, can be involved in enforcement matters against financial institutions. As a number of non-U.S. financial institutions operate branches in the U.S. that are also licensed at the state level, state financial services and products regulators, such as the New York Department of Financial Services ("DFS"), can also be involved in sanctions matters involving the institution that they regulate. Banking authorities do not enforce federal sanctions regulations, they are generally looking at safety and soundness matters, including whether their regulated institutions are operating in compliance with applicable laws and regulations.

In addition to civil authorities, sanctions matters can also involve criminal authorities, who will assess potential willful violations of criminal laws. At the federal level, the U.S. Department of Justice is active in sanctions investigations.<sup>1</sup> State and local prosecutors, such as the New York County District Attorney's Office (DANY) can also investigate and bring actions for violations of state laws such as books and records laws.

## REGULATORY COOPERATION IN SANCTIONS INVESTIGATIONS

In the U.S., multi-agency investigations are commonplace for sanctions matters. The more significant the issue is, the more likely it will attract attention from multiple agencies. U.S. agencies often work together and share information, often coordinating to jointly discuss with institutions and their counsel the scope and tenor of the investigation, interim reports, settlement terms, allocation of penalties and post-settlement commitments. While some commentators may view this joint action as "piling on," it is important to note that within the U.S. legal system, OFAC, the banking regulators and the prosecutors have different authorities and supervisory/regulatory objectives. OFAC implements and enforces sanctions laws, banking regulators ensure that supervised institutions operate in a safe and sound manner under



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1. Relevant divisions of the U.S. Department of Justice include the National Security Division and the Anti-Money Laundering Division based in Washington, D.C. as well as local U.S. Attorney's Offices across the U.S. The U.S. Attorney's Offices for the Southern District of New York and for the Eastern District of New York have been active in sanctions matters.


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their respective banking laws, and prosecutors focus on criminal violations of law. Institutions should therefore take into account these differing priorities in their investigative approach and communications with each agency.

Most cross-border sanctions investigations involve a detailed review of historical transactions and documentary evidence over a number of years. These investigations generally include employee interviews, reviews of client information related to historical transactions and relationships, and reviews of other historical documents and emails, all of which can implicate banking secrecy, data protection and other local laws. In some cases, U.S. authorities will rely on the assistance of local authorities to obtain documents and information through administrative channels based on cooperation agreements between relevant authorities, whether sanctions regulators, banking regulators or criminal prosecutors.

For example, U.S. prosecutors may seek to obtain evidence from local prosecutors pursuant to a Mutual Legal Assistance in Criminal Matters Treaty (“MLAT”). Each MLAT is specific and may include different requirements, such as the requirement that the requesting state has jurisdiction over the criminal offense at issue in the investigation, or that the conduct at issue constitute a violation of local law in the state of the authority providing the information. In such cases, MLAT requests may not be granted for matters involving U.S. unilateral sanctions programs.

Similarly, OFAC can ask for the assistance of local sanctions authorities via Memoranda of Understanding (“MOU”) between OFAC and Treasury Departments responsible for sanctions enforcement, and the U.S. banking regulators can seek to obtain information located abroad by relying on MOUs with local banking regulators. In some cases, home country banking regulators have been designated in U.S. settlement agreements to receive copies of required post-settlement submissions to U.S. authorities or to provide assistance to U.S. authorities for certain post-settlement obligations via existing MOUs.

When administrative cooperation channels are not available, U.S. authorities can request documents or information directly from an institution, in which case any local law requirements applicable to the cross-border transfer of information in the context of an investigation must be considered. OFAC, banking regulators and prosecutors all have subpoena powers and can compel the production of information and documents. U.S. banking regulators require cooperation from the non-U.S. head offices of institutions with banking activities in the U.S. In recent years, U.S. authorities have become increasingly sensitive to local law requirements and potential conflicts of law regarding production requests, but U.S. authorities may request explanations to understand the extent and basis of local law requirements. Institutions commonly work with local counsel in the relevant jurisdictions to consider options for complying with requests from U.S. authorities in accordance with local law if administrative assistance from local authorities is not available.

Financial institutions may also wish to proactively contact their local authorities and home country regulators at different stages of an investigation, for example

regarding the scope of the investigation, the timing of the settlement announcement, or any potential collateral consequences of the settlement with the U.S. authorities (e.g., loss of license). Keeping home countries regulators informed, even if the violations at issue do not derive from local legal requirements, can form an important part of an institution’s ongoing relationship with its home country regulators and open a channel to address any local supervisory concerns.

## REGULATORY COOPERATION POST-SETTLEMENT

Settlement agreements often are signed with multiple U.S. agencies and generally include ongoing commitments that can last several years. While each settlement is unique, sanctions settlements commonly require compliance program enhancements, an annual enterprise-wide risk assessment, periodic and ad hoc reporting to U.S. agencies, including reporting violations and circumvention attempts of U.S. sanctions laws. Settlements can also impose the review of an institution’s sanctions compliance program by a monitor or an independent consultant. Independent consultants, usually imposed pursuant to settlements with the Federal Reserve, or monitors, usually imposed pursuant to settlements with the DFS, will often review a risk-based sample of U.S. dollar payments (i.e., payments cleared through the U.S.), often focusing on businesses or locations that originated the payments at issue in the underlying investigation. Compliance program and payment sampling reviews by a monitor or independent consultant can trigger the same cross-border information transfer issues as those raised in the context of an investigation. However, settlement agreements with U.S. agencies usually require that post-settlement obligations be carried out in a manner compliant with local laws. Compliance with local laws can also be included as a contractual obligation in the engagement agreement with a monitor or independent consultant. Local regulators and local counsel can assist in explaining the extent of local requirements to U.S. authorities and monitors/independent consultants.

While U.S. sanctions settlements generally involve only U.S. agencies as signatories, local authorities may be cited as receiving information or providing assistance for certain post-settlement obligations. Home country regulators will sometimes use their authority to seek assistance from regulators in another country where the institution maintains a branch in order to facilitate a monitor or independent consultant review in that jurisdiction. Local regulators may also be parties to the monitor/independent consultant engagement letter or receive copies of reports submitted by a monitor/independent consultant to the Federal Reserve or DFS.

Whether at the outset of an investigation, during an investigation or in the post-settlement context, there are multiple avenues for financial institutions to cooperate with U.S. authorities while remaining compliant with local law requirements. ■