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# Lawfare and U.S. Supremacy: The Bank Secrecy Act, FCPA, USA PATRIOT Act, and OFAC Sanctions

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## INTRODUCTION

The United States economy is a critical component of the global financial system. As such, the U.S. dollar, the primary currency used for international transactions, is the global reserve currency.<sup>1</sup> Every oligarch and corporation in nearly every country on the planet who hold significant amount of U.S. dollars as a source of value and as a means of conducting international trade depends on the near-to-mid-term viability of the U.S. dollar, its real estate market, and its securities trading market, or, depend on foreign financial institutions that do, to preserve their wealth.<sup>2</sup>

The U.S. economy is deeply interconnected with the global financial system and its stability is critical to the financial well-being of many entities around the world. This serves as a greater explanation than geography, the national nuclear stockpile, or any of the other defensive characteristics often cited by Pax Americana for why the U.S. has not been invaded by any hostile power in the last eighty years.

To maintain America's leadership position in the global economy, a legal framework has evolved which aims to ensure the protection of American interests. The maintenance of American global hegemony, and the desire to prevent the enemies of America from benefiting from this largesse, has created a complex legal infrastructure for a globalized economy which reflects a web of interdependencies that exists between countries.<sup>3</sup>

Though the binding nature of international law is dubious at best,<sup>4</sup> the global nature of the American market means that the financial laws that govern lending, payment processing, beneficial ownership, and legal entity incorporation within the U.S. have global implications.<sup>5</sup>

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<sup>1</sup> Thomas Costigan, Drew Cottle & Angela Keys, *The US Dollar as the Global Reserve Currency*, 8 WORLD REVIEW OF POLITICAL ECONOMY 104, 106 (2017).

<sup>2</sup> RICHARD N. COOPER, THE FUTURE OF THE DOLLAR 4 (Peterson Institute for International Economics 2009).

<sup>3</sup> Zachary Selden, *America's Global Advantage: US Hegemony and International Cooperation*, 73 J. OF POLITICS 620, 620 (2011) (reviewing CARLA NORRLOF, AMERICA'S GLOBAL ADVANTAGE (2010)).

<sup>4</sup> See Thomas M. Franck, *Legitimacy in the International Systems*, 82 AM. J. INT'L L. 705, 707 (1988) ("Why should rules, unsupported by an effective structure of coercion comparable to a national police force, nevertheless elicit so much compliance, even against perceived self-interest, on the part of sovereign states?").

<sup>5</sup> STIJN CLAESSENS & M. AYHAN KOSE, FINANCIAL CRISES: EXPLANATIONS, TYPES, AND IMPLICATIONS 33 (Int'l Monetary Fund 2013); See Investment Company Institute General Membership Meeting, Mary Jo White, Chair, U.S. Securities and Exchange Commission, Regulation in a Global Financial System (May 3, 2013), <https://www.sec.gov/news/speech/2013-spch050313mjw>.

The threat of extradition to face the International Criminal Court (ICC) for human rights abuses resonates among the economic and military elite of countries that depend on International Monetary Fund (IMF) loans for economic solvency. By contrast, the threat of being cut off from American capital markets can be a powerful deterrent for illicit behavior, as it can lead to severe financial consequences. Thus, every single company and high net worth individual has a massive incentive to maintain their access to American capital markets.<sup>6</sup>

“Compliance” refers to efforts made by the financial services sector and the private sector as a whole to adhere to certain reporting requirements and constraints.<sup>7</sup> Maintaining compliance, personnel, and software has become an increasing cost for international financial institutions, especially since the increase in popularity of new asset classes like cryptocurrencies and the comprehensive sanctions put on Russia after the invasion of Eastern Ukraine.<sup>8</sup>

The economic “Coalition Forces” of the United States represent a powerful and coordinated network that works to ensure compliance with the complex legal framework governing international finance. This coalition includes a combination of U.S. regulators, cooperating Financial Intelligence Units (FIUs), international partners, and the compliance staff working within major financial institutions and multinational companies.

On the other side of the conflict are kleptocrats, Transnational Criminal Organizations (TCOs), terrorist groups, as well as government officials, military officers, oligarchs, and State-Owned Entities (SOEs) of hostile foreign states.<sup>9</sup> Alongside these actors are the Gate Keepers: lawyers, accountants, bankers, broker-dealers, company formation agents, realtors, proprietors of cash-intensive businesses such as casinos, and dealers of precious metals and fine art that make obscuring income and assets possible on a large scale.<sup>10</sup>

## ECONOMIC WARFARE

### Overview

Economic warfare, like conventional warfare, must be pursued judiciously. It is not a matter of dispute whether the U.S. has the greatest arsenal to conduct conventional or economic warfare. But an over-exuberant use of sanctions, regulations, and asset seizures would hurt the

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<sup>6</sup> U.S. SECURITIES AND EXCHANGE COMMISSION, STRATEGIC PLAN: FISCAL YEARS 2022-2026 6 (2022).

<sup>7</sup> BANK FOR INTERNATIONAL SETTLEMENTS, GUIDELINES: CORPORATE GOVERNANCE PRINCIPLES FOR BANKS 11 (Basel Committee on Banking Supervision 2015).

<sup>8</sup> Aidan Houlihan, *Ukraine War Highlights Importance of Banks Investing in the Future of Compliance*, Corporate Compliance Insights (July 6, 2022), <https://www.corporatecomplianceinsights.com/banks-proactive-invest-compliance/>.

<sup>9</sup> *Combating Transnational Criminal Threats in the Western Hemisphere: Hearing Before the Subcomm. on the W. Hemisphere of the H. Comm. on Foreign Affairs*, 115th Con. 115-152 (2018) (testimony of Jennifer Fowler, Deputy Assistant Secretary, Office of Terrorist Financing and Financial Crimes).

<sup>10</sup> FATE, GLOBAL MONEY LAUNDERING & TERRORIST FINANCING THREAT ASSESSMENT 44 (2010).

American economy, empower its foes, and put economic strain on allies, all of which would threaten American economic supremacy in the long term.<sup>11</sup>

Four main legal frameworks define U.S. economic warfare:

- The 1970 Bank Secrecy Act (BSA) defined reporting requirements for transactions and the process for filing Suspicious Activity Reports (SARs) and Currency Transaction Reports (CTRs) to the Financial Crime Enforcement Network (FinCEN), which was mostly targeted towards money laundering and tax evasion by criminal organizations.<sup>12</sup>
- The 1977 Foreign Corrupt Practices Act (FCPA), allowed the asset seizure of wealth derived from improper relationships with foreign governments.<sup>13</sup>
- The 2001 Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act), was a terrorism omnibus bill that restricted the anonymity of correspondent banking and the first legal framework for Countering the Finance of Terrorism (CFT).<sup>14</sup>
- The 1917 Trading With the Enemy Act (TWEA),<sup>15</sup> the 1945 United Nations Participation Act (UNPA),<sup>16</sup> the 1977 International Emergency Economic Powers Act (IEEPA),<sup>17</sup> the 1999 Federal Narcotics Kingpin Designation Act (Kingpin Act),<sup>18</sup> and other legislation and Executive Orders that define the sanctions authority of OFAC and recognition of certain international sanctions by the U.S.

## The Bank Secrecy Act

Each of these legislations has unique legal and geopolitical implications. As aforementioned, the Bank Secrecy Act of 1970 created reporting requirements for financial

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<sup>11</sup> Margaret Doxey, *International Sanctions: Trials of Strength or Tests of Weakness?* 12 MILLENNIUM J. OF INT'L STUDIES 79, 79 (1983).

<sup>12</sup> FEDERAL DEPOSIT INSURANCE CORPORATION, DSC RISK MANAGEMENT MANUAL OF EXAMINATION POLICIES 1 (n.d.).

<sup>13</sup> Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494, as amended by Title V of the Omnibus Trade & Competitiveness Act of 1988, Pub. L. No. 100-418, 5001-03, 102 Stat. 1415, 1415-25 (codified as amended at 15 U.S.C. 78m(b)(2), 78m(b)(3), 78dd-1, 78dd-2, 78ff (1994)); *See also Foreign Corrupt Practices Act*, U.S. DEPARTMENT OF JUSTICE (Feb. 3, 2017) (discussing the purpose of enacting the Foreign Corrupt Practices Act), <https://www.justice.gov/criminal-fraud/foreign-corrupt-practices-act> [hereinafter FCPA].

<sup>14</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272; *See also USA PATRIOT Act*, FINANCIAL CRIMES ENFORCEMENT NETWORK, <https://www.fincen.gov/resources/statutes-regulations/usa-patriot-act> (discussing the purposes of the USA PATRIOT Act) [hereinafter PATRIOT Act].

<sup>15</sup> Trading With the Enemy Act, 50 U.S.C. app. §§ 1-44 (1970) [hereinafter TWEA].

<sup>16</sup> Pub. L. No. 264, §§ 1-7, 59 Stat. 619, (1945) (codified at 22 U.S.C. §§ 287-287e (1988)) [hereinafter UNPA].

<sup>17</sup> International Emergency Economic Powers Act, Pub. L. No. 95-223 § 201, 91 Stat. 1625, 1626 (1977) [hereinafter IEEPA].

<sup>18</sup> Federal Narcotics Kingpin Designation Act, codified at 21 U.S.C. §§ 1901-1908 and 8 U.S.C. § 1182 [hereinafter Kingpin Act].

institutions. It was the foundational law for modern Anti-Money Laundering (AML) efforts.<sup>19</sup> Originally, the BSA was directed at organized crime, including both Transnational Criminal Organizations and criminal organizations, such as the Mafia, within the U.S.<sup>20</sup>

The BSA's application as a tool of economic warfare is likely not clearly understood to those outside of law enforcement and finance. One must consider the BSA in the context of the centrality of the U.S. banking system to global finance in order to comprehend why it serves as such a crucial fulcrum in denying financial services to enemies of the U.S. government.

The BSA-mandated reporting requirements were not merely for suspicious activity, but also for all activity past a certain threshold of monetary value.<sup>21</sup> In the former instance, suspicious activity must be documented by the financial institution and filed in a Suspicious Activity Report (SAR) that is sent to FinCEN.<sup>22</sup>

“Suspicious activity” is difficult to define, but is often grounded in a risk-based BSA compliance model of the institution where the activity is taking place.<sup>23</sup> A “risk-based” model refers to the tacit acknowledgement that, regressing towards the mean, if financial institutions and businesses had to verify every single transaction on their books, their compliance costs would be so high that almost no business could operate at a profit.<sup>24</sup>

A certain triage has to be done to identify transactions that reach the threshold of high risk, which require review and assessment. In the modern day, automated risk-ranking software often make this determination on the basis of jurisdiction, client type, transaction type, and other internally-determined risk factors.<sup>25</sup> In the case of these high-risk clients, the financial institution is obligated under the BSA to perform Enhanced Due Diligence (EDD) by which the client's legal identification, address, source of wealth, criminal history, and reputational history have to be vetted.<sup>26</sup> Additionally, their legal name and variations of it are checked against existing national and international lists of sanctioned persons and entities.<sup>27</sup>

What constitutes suspicious and high-risk behavior for one financial institution is not necessarily the same for another. A large investment bank with many international clients cannot reasonably be expected to file a SAR for every cross-border wire transfer, and thus may need to

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<sup>19</sup> *Bank Secrecy Act*, IRS (last updated Apr. 5, 2022), <https://www.irs.gov/businesses/small-businesses-self-employed/bank-secrecy-act> [hereinafter BSA].

<sup>20</sup> FEDERAL DEPOSIT INSURANCE CORPORATION, *supra* note 12.

<sup>21</sup> The Suspicious Activity Report, Federal Reserve Board Form 2230; FDIC Form 6710/06A; Office of the Comptroller of the Currency Form 8010-9, 8010-1.

<sup>22</sup> *Id.*

<sup>23</sup> FINANCIAL ACTION TASK FORCE, GUIDANCE FOR A RISK-BASED APPROACH 32 (2014).

<sup>24</sup> *Id.* at 19.

<sup>25</sup> Reciprocity, *What is a Compliance Risk Assessment*, RISKOPTICS (Aug. 15, 2022), <https://reciprocity.com/resources/what-is-a-compliance-risk-assessment/>.

<sup>26</sup> *Assessing Compliance with BSA Regulatory Requirements*, FFIEC BSA/AML Infobase (BSA/AML Manual), <https://bsaaml.ffiec.gov/manual/AssessingComplianceWithBSARegulatoryRequirements/02>.

<sup>27</sup> *Id.*

apply a more nuanced approach in determining suspicious behavior.<sup>28</sup> On the other hand, a local credit union that services mostly small businesses in a contained rural area with minimal international business activity likely would have such capacity.

As demonstrated above, risk factors do not merely refer to a specific type of transaction that is suspicious. They are relative to what would be considered “normal” behavior for a specific type of client. Herein a separate, but related, concept called Beneficial Ownership becomes crucial to BSA compliance.<sup>29</sup> Financial institutions have to know who they are doing business with, including when they do business with entities.

While many subtypes exist, fundamentally there are two kinds of entities that do business with a bank: operating entities and non-operating entities.

Operating entities are what is commonly known as a company: a legally incorporated entity that provides a good or service to customers or clients.<sup>30</sup> Companies range from sole proprietorships to multinational corporations and require banking services for access to credit, cash management, management of employee retirement plans, and other daily licit business needs.<sup>31</sup>

The level of scrutiny that operating entities face under the BSA depends on a variety of factors, but in the context of U.S. banking under the BSA, domestic operating entities are often subject to less scrutiny than foreign operating entities, but this is not always the case.<sup>32</sup> Similarly, publicly traded operating entities often require less scrutiny than private companies, as they are required to disclose certain financial information to the public, and are generally subject to regular public auditing.

The other type of entity is a non-operating entity. These are generally financial instruments used by Ultra High Net Worth (UHNW) individuals to hold assets. They include Personal Holding Companies used to hold securities and real estate offshore to reduce tax burdens and keep wealth safe from seizure.<sup>33</sup> They also include revocable and irrevocable trusts, used to hold assets for a trustee until they reach the age of majority, until the grantor dies, or until some

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<sup>28</sup> *Comment Letter: Review of the FATF Forty Recommendations Consultation Paper*, Investment Company Institute (Aug. 30, 2002) <https://www.ici.org/comment-letter/association-comments-risk-based-approach-anti-money-laundering-standards-september>.

<sup>29</sup> Financial Crimes Enforcement Network, *Beneficial Ownership Information Reporting Requirements* (Apr. 5, 2021) <https://www.regulations.gov/document/FINCEN-2021-0005-0001>.

<sup>30</sup> LGA, *Which Right Operating Entity is Right for your Business?* (Aug. 21, 2019) <https://www.lga.cpa/resources/operating-entity/>.

<sup>31</sup> *Id.*

<sup>32</sup> BSA/AML Manual: *Risks Associated with Money Laundering and Terrorist Financing*, FFIEC, <https://bsaaml.ffiec.gov/manual/RisksAssociatedWithMoneyLaunderingAndTerroristFinancing/28> (last visited Mar. 11, 2023).

<sup>33</sup> *Id.*

executable event occurs.<sup>34</sup> There are also operating entities owned by non-operating holding companies for various reasons.

In the case of both of these entity types and their various permutations, financial institutions have to verify beneficial ownership. For operating entities, this means either having legal identification and due diligence on file for all shareholders in excess of ten percent, or legal identification and due diligence on file for individuals assessed to have significant legal control of the entity (e.g., CEO or the Board of Directors of a publicly traded company).<sup>35</sup>

For non-operating entities, one hundred percent of beneficial ownership has to be verified and kept on file by the bank to remain compliant with the BSA.<sup>36</sup> For personal and corporate holding companies, this usually means signed and stamped share certificates for all shareholders, as well as legal identification and due diligence on file for all parties.<sup>37</sup>

Holding companies that can issue bearer shares, which confer ownership to their holder, are often subject to even higher scrutiny and require a signed letter from an attorney that contractually obligates the client to inform the bank if any of these shares are issued.<sup>38</sup> Due to their anonymity, which raises concerns for money laundering and tax evasion, bearer share entities are sometimes refused service regardless of these assurances and many tax haven jurisdictions have discontinued or outlawed this practice.<sup>39</sup>

For trusts, this usually means an executed trust document clearly identifying the Grantor (individual who funded the trust) and Trustee (ultimate beneficiary of the trust) as well as legal identification and due diligence on file for these parties.<sup>40</sup>

All of this is to say that when a SAR is filed, it is often on the basis of activity that is suspicious relative to the type of business these beneficial owners are known to be involved in, and the jurisdictions they are known to reside in.<sup>41</sup> By requiring financial institutions to identify the issue of beneficial ownership up front, the U.S. government is able to effectively force banks to pre-screen and refuse service to criminals and enemies of the state from accessing the

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<sup>34</sup> *What's Covered?: Revocable and Irrevocable Trust Accounts*, FED. DEPOSIT INSURANCE CORP. (March 8, 2022) <https://www.fdic.gov/resources/deposit-insurance/trust-accounts/>.

<sup>35</sup> *Officers, Directors and 10% Shareholders*, SEC (Apr. 8, 2022)

<https://www.sec.gov/education/smallbusiness/goingpublic/officersanddirectors>.

<sup>36</sup> BSA/AML Manual: *Assessing Compliance with BSA Regulatory Requirements*, FFIEC, <https://bsaaml.ffiec.gov/manual/AssessingComplianceWithBSARegulatoryRequirements/03> (last visited Mar. 30, 2023).

<sup>37</sup> Federal Register, Vol. 91, No 91 (Wednesday, May 11, 2016), Rules and Regulations (p. 29,398).

<sup>38</sup> *What are Bearer Shares? Benefits and Risks*, OFFSHORE PROTECTION (Oct. 8, 2022) <https://www.offshore-protection.com/bearer-shares#H2-12>.

<sup>39</sup> *Id.*

<sup>40</sup> Suzanne Sayward, *Trustee, Beneficiary, Grantor, and more – What do they all mean?* SAMUEL, SAYWARD, AND BALER (Jul. 19, 2022, 10:04 AM), <https://ssbllc.com/trustee-beneficiary-grantor-and-more-what-do-they-all-mean/>.

<sup>41</sup> Liliya Gelemerova, *On the frontline against money-laundering*, 52 CRIME LAW AND SOCIAL CHANGE, 35, 50 (2009).

financial system.<sup>42</sup> On the backend, the obligation to file SARs often assists U.S. law enforcement agencies with the information needed in indicting, apprehending, and ultimately convicting and seizing the assets of these individuals. The obligation to file SARs serves as an important tool for law enforcement in combating financial crimes.

Money launderers in other countries can often be operating for months and years with no knowledge that the United States federal government is monitoring all of their transactions subsequent to a SAR filing and gathering evidence for a federal case that can end in their extradition and seizure of their assets.<sup>43</sup> As a result, it is a federal crime to disclose the filing of a SAR to its subject.<sup>44</sup> This is because disclosure could potentially compromise the investigation or alert the subject that they are being investigated, providing the subject with the opportunity to take steps to evade law enforcement.

The other major reporting requirement imposed by the BSA is the obligation to file Currency Transaction Reports (CTRs) for all transactions in excess of \$10,000.<sup>45</sup> Many financial institutions set their threshold slightly below this number to avoid what is called structuring, making many small payments slightly below this threshold to purposefully avoid the filing of a CTR.<sup>46</sup> Structuring is itself a red flag and grounds for a SAR filing, as well as a federal crime.<sup>47</sup>

The filing of CTRs includes the legal name, legal address, Social Security Number, or foreign Tax Identification Number (TIN) of the sender, and legal identification of the person effectuating the payment. Large payments are not dispositive of any kind of criminal activity in and of themselves. That said, because FinCEN has access to these CTRs and banks have to keep them on file for five years subsequent to the transaction date, in an instance of a criminal investigation in which the suspect cannot give a legitimate reason for the payment or the source of the money used, CTRs can at minimum be used to indict them for tax evasion, if not other underlying criminal activity.<sup>48</sup>

The BSA has had critics since its implementation. Some legal scholars have argued that it constitutes a violation of the Fourth Amendment to collect and report vast amounts of personal and financial information without a warrant or any individualized suspicion.<sup>49</sup> Legal scholars also argue that the unwritten but legally precedential “Right to Privacy” is infringed upon by the

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<sup>42</sup> Federal Register, Vol. 87, No 198 (Friday, Sept. 30, 2022), Rules and Regulations (p. 59,498).

<sup>43</sup> Mariano-Florentino Cuellar, *The Tenuous Relationship between the Fight against Money Laundering and the Disruption of Criminal Finance*, 93 J. CRIM. L. & CRIMINOLOGY 311, 315 (2003).

<sup>44</sup> 31 U.S.C. § 5318(g)(2) (2022).

<sup>45</sup> FinCen, *Notice to Customers: A CTR Reference*, U.S. Dept. of the Treasury, <https://www.fincen.gov/sites/default/files/shared/CTRPamphlet.pdf> (last visited Mar. 11, 2022).

<sup>46</sup> Federal Financial Institutions Examination Council (FFIEC) *BSA/AML Examination Manual* (“FFIEC Bank Examination Manual”) at 3.

<sup>47</sup> FinCen, *supra* note 29.

<sup>48</sup> Adam Hayes, *Currency Transaction Report (CTR): Use in Banking and Triggers*, INVESTOPEDIA.COM (Jul. 29, 2021), <https://www.investopedia.com/terms/c/ctr.asp>.

<sup>49</sup> Emily Berman, *When Database Queries Are Fourth Amendment Searches*, 102 MINN. L. REV. 557, 579-80 (2017).



BSA's reporting requirements.<sup>50</sup> General advocates of financial deregulation have argued that it puts an unfair oversight burden on financial institutions that hinders economic growth in the aggregate.<sup>51</sup>

Ultimately, the BSA is the foundation, but not the core, of the regulatory tools at the disposal of the United States government to conduct economic warfare against its enemies.

### **Foreign Corrupt Practices Act of 1977**

*The Foreign Corrupt Practices Act of 1977 (FCPA)* is one of the greatest weapons of the U.S. government for preventing the usage of the U.S. banking system by foreign kleptocrats and one of the greatest revenue generating mechanisms of the U.S. federal government outside of taxation.

The FCPA prohibits American nationals and companies, as well as foreign nationals and subsidiaries of foreign companies within the U.S., from paying bribes to foreign officials.<sup>52</sup> What is meant by an "official" is a broad category that ties back to BSA compliance in the financial services industry.<sup>53</sup> Another risk category that exists outside of jurisdiction, business type, and the ability to issue bearer shares, is political exposure.

Politically Exposed Persons (PEPs) are people who, by virtue of holding public office or close familial relations with a PEP, represent a high risk of bribery and money laundering.<sup>54</sup> PEPs are not limited to heads of state or members of a national legislature. Government ministers, judges, military officers, members of a national royal family, as well as senior bureaucrats within government agencies and state-owned entities (SOEs) are often among the types of individuals classified as PEPs.<sup>55</sup>

The FCPA is essentially a law that prohibits payments to foreign PEPs in exchange for favorable business conditions in a foreign country. This can include anti-competitive granting of state contracts in exchange for kickbacks, as well as up-front bribes to ensure local regulatory agencies ignore a company's misdeeds, usually environmental crimes.

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<sup>50</sup> Nicholas Anthony, *Why Don't Americans Have Stronger Financial Privacy Rights?*, CATO INSTITUTE (Oct. 28, 2021), <https://www.cato.org/blog/why-dont-americans-have-stronger-financial-privacy-rights>.

<sup>51</sup> Norbert Michel and Jennifer J. Schulp, *Revising the Bank Secrecy Act to Protect Privacy and Deter Criminals*, CATO INSTITUTE (Jul. 26, 2022), <https://www.cato.org/policy-analysis/revising-bank-secrecy-act-protect-privacy-deter-criminals>.

<sup>52</sup> *Spotlight on Foreign Corrupt Practices Act*, U.S. SECURITIES AND EXCHANGE COMMISSION (Feb. 2, 2017), <https://www.sec.gov/securities-topic/foreign-corrupt-practices-act>.

<sup>53</sup> U.S. DEPARTMENT OF JUSTICE & U.S. SECURITIES AND EXCHANGE COMMISSION, A RESOURCE GUIDE TO THE U.S. FOREIGN CORRUPT PRACTICES ACT 19 (July, 2020).

<sup>54</sup> Alessa, *Potentially Exposed Persons and AML* (Oct. 8, 2020), <https://alessa.com/blog/politically-exposed-person-definition-by-country/>.

<sup>55</sup> BSA/AML Manual: *Politically Exposed Persons*, FFIEC, <https://www.ffiec.gov/press/PDF/Politically-Exposed-Persons.pdf> (last visited Mar. 12, 2023).

The tip of the spear of FCPA enforcement is the Money Laundering Asset Recovery Section (MLARS) of the U.S. Justice Department.<sup>56</sup> MLARS investigators track down the assets and work with foreign law enforcement agencies to seize the cash, real estate, and securities investments of violators of the FCPA.<sup>57</sup> This is a massive revenue generation tool for the U.S. government, which has increased enforcement of the FCPA in the last decade.<sup>58</sup>

While the FCPA can be, and is, used against individuals and firms in jurisdictions with favorable or neutral relations with the U.S., it is also a massive weapon against hostile actors. Take, for instance, the case of *United States v. Leonardo Santilli*.

Leonardo Santilli was a Venezuelan and Italian citizen.<sup>59</sup> He controlled two companies in Venezuela and two in the United States.<sup>60</sup> Santilli's companies had multiple corporate bank accounts located in Florida.<sup>61</sup> PDVSA was Venezuela's state-owned and controlled oil company and controls one of the largest reserves of oil.<sup>62</sup> PDVSA entered into joint ventures with foreign oil companies to leverage the foreign oil companies' expertise and maintained a majority stake in them.<sup>63</sup>

In 2017, an investigation was conducted into corruption of the PDVSA Subsidiaries and money laundering through the bank accounts and assets in Florida.<sup>64</sup> Law enforcement discovered nearly one billion dollars in payments from PDVSA to Venezuelan contractors in Florida.<sup>65</sup>

As a result, the Department of Justice filed a criminal complaint, arguing that there was probable cause that Santilli willfully and with the intent to further the conspiracy:

“(a) [knowingly] conduct[ed] a financial transaction... involv[ing] the proceeds of specified unlawful activity, knowing that the property involved in the financial transaction represented the proceeds of some form of unlawful activity... and (b) to knowingly transport, transmit, and transfer a monetary instrument and funds from a place in the United States to and through a place outside the United States, and to a place in the United States from and through a place outside the United States, with the intent to promote the carrying on of specified unlawful activity... It is further alleged that the specified unlawful activity is an offense against a foreign nation, specifically Venezuela,

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<sup>56</sup> *Money Laundering and Asset Recovery Section*, DEPT. OF JUSTICE, <https://www.justice.gov/criminal-mlars> (last visited Apr. 11, 2023).

<sup>57</sup> *Id.*

<sup>58</sup> Harold P. Reichwald, et al. *Investigations and White Collar Defense*, MANATT (Jul. 12, 2012), <https://www.manatt.com/insights/newsletters/investigations-white-collar-defense/corporate-investigations-07-12-12>.

<sup>59</sup> Complaint at 3, *United States of America v. Leonardo Santilli*, Civil Action 21-20614-Civ-Scola (S.D. Fla. Nov. 15, 2021).

<sup>60</sup> *Id.* at 4.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 5.

<sup>65</sup> *Id.*

involving bribery of a public official, and the misappropriation, theft, and embezzlement of public funds by and for the benefit of a public official...”<sup>66</sup>

Santilli died in Venezuela, so the court dismissed the case with prejudice in 2021.<sup>67</sup>

Oligarchs and political elites from countries with hostile relations with the U.S. still must rely on the U.S. banking system as the U.S. dollar is the international standard for cross-border invoices and petroleum trading.<sup>68</sup>

Beyond that, western countries remain the most stable place to invest in assets. In the case of countries like Venezuela and Russia that have experienced significant volatility in the value of their currency, purchasing high-end real estate properties through shell companies in cities like New York, Miami, Toronto, and London is an extremely common way for elites to preserve their wealth.<sup>69</sup>

The FCPA is the tool by which bad actors can be punished by the U.S. government and, beyond merely denying them access to the U.S. financial system, actually have their assets seized and used to pay down U.S. government debt in one of the more zero-sum examples of economic warfare.<sup>70</sup>

Like the BSA, the FCPA has its critics. It has been called imperialistic; a capricious means for the U.S. to extract value from poor countries while the U.S. itself is rife with corporate lobbying and other forms of political patronage often cited as de facto bribery and corruption.<sup>71</sup> In addition, it has been criticized for hampering U.S. corporate investment in foreign markets.<sup>72</sup>

To this latter charge, when viewing the long-term viability of the U.S. as the global economic leader, the critics of the FCPA may well have a point. Contrast the infrastructure of the FCPA, where private companies are held liable by the U.S. government for malfeasance in foreign countries, to the Chinese Belt and Road Initiative. The Chinese government has a strategic interest in paying bribes to secure infrastructure contracts in developing countries through initiatives like the “Belt and Roads” Initiative.<sup>73</sup>

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<sup>66</sup> *Id.* at 11-12.

<sup>67</sup> Foreign Corrupt Practices Act Clearinghouse, *Case Information United States of America v. Leonardo Santilli*, STANFORD LAW SCHOOL, <https://fcpa.stanford.edu/enforcement-action.html?id=792> (last visited Apr. 11, 2023).

<sup>68</sup> EMINE BOZ, ET. AL., PATTERNS IN INVOICING CURRENCY IN GLOBAL TRADE, International Monetary Fund 2 (2020).

<sup>69</sup> Linkurious, *Towers of cash: Investigating Money Laundering Through Real Estate* (Aug. 12, 2020), <https://linkurious.com/blog/real-estate-money-laundering/>.

<sup>70</sup> Sean Michael Welsh, *Financial Tracing in Asset Forfeiture Cases*, 67 DEPARTMENT OF JUSTICE J. OF FEDERAL L. AND PRACTICE, 65, 68 (2019).

<sup>71</sup> Mateo J. de la Torre, *The Foreign Corrupt Practices Act: Imposing an American Definition of Corruption on Global Markets*, 49 Cornell Int'l L.J. 469, 470 (2016); *New York v. Nat'l Servs. Indus.*, 352 F.3d at 694 (Leval, J., concurring).

<sup>72</sup> Mateo J. de la Torre, *supra* note 71 (discussing what may be a bribe or corporate lobbying in one country might be different in another).

<sup>73</sup> Sean J. Griffith & Thomas H. Lee, *Toward an Interest Group Theory of Foreign Anti-Corruption Laws*, 2019 U. ILL. L. REV. 1227, 1257 (2019).

This state-led Foreign Direct Investment initiative makes investments in countries in the Global South entirely agnostic to the rule of law and economic transparency of these jurisdictions. In the long term, it is obvious who the economic partner of choice would be for dictatorships and kleptocracies in Latin America, Africa, the Middle East, Southeast Asia, and Eastern Europe.

At the moment, the U.S. remains the most attractive development partner for nearly any country on the planet in terms of the goods and services U.S. firms can provide.<sup>74</sup> But if emerging market nations feel that their assets are not safe within the U.S. financial system, and if Chinese companies have a much greater latitude to enter these markets, including through the payment of bribes, it could imperil U.S. economic supremacy.

## 2001 USA PATRIOT ACT

While political momentum for the BSA and FCPA ultimately crystallized due to a heightened focus on financial crimes, the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001 was implemented in the immediate aftermath of the September 11th, 2001 attacks on the World Trade Center and Pentagon.

The media coverage and public perception of this law was mostly focused on the enhanced surveillance capabilities it gave to national security agencies.<sup>75</sup> Less discussed, and less well understood, were the financial provisions of the law that effectively created the field of Countering the Financing of Terrorism (CFT).<sup>76</sup>

The difference between AML and CFT, in brief, is that money laundering fundamentally consists of the proceeds from illegal activity that are placed, layered, and integrated into the licit financial system.<sup>77</sup> This allows the beneficiaries of the laundered assets to live lives of wealth and access while avoiding charges of tax evasion and not becoming a target for robbery by retaining their wealth in cash or precious metals.

Terror financing is the movement of assets from criminal *or* legitimate sources to be used to fund the activities of terrorist organizations.<sup>78</sup> While the distinction might seem inconsequential,

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<sup>74</sup> Jannick Damgaard & Carlos Sánchez-Muñoz, *United States is World's top Destination for Foreign Direct Investment*, IMF BLOG (Dec. 7, 2022) <https://www.imf.org/en/Blogs/Articles/2022/12/07/united-states-is-worlds-top-destination-for-foreign-direct-investment>.

<sup>75</sup> *Surveillance Under the USA/PATRIOT Act*, ACLU, <https://www.aclu.org/other/surveillance-under-usapatriot-act> (last visited Apr. 11, 2023); Safia Samee Ali & Halimah Abdullah, *Did the Patriot Act Change US Attitudes on Surveillance?* (Sept. 8, 2016 2:12 PM) <https://www.nbcnews.com/storyline/9-11-anniversary/did-patriot-act-change-us-attitudes-surveillance-n641586>; William Bendix & Paul J. Quirk, *Institutional Failure in Surveillance Policymaking: Deliberating the Patriot Act*, BROOKINGS INSTITUTE 1 (July, 2013).

<sup>76</sup> See NAT'L STRATEGY FOR COMBATING TERRORIST AND OTHER ILLICIT FINANCING, U.S. TREASURY DEP'T 39 (2020) (discussing how the PATRIOT Act broadened the BSA and expanded AML/CFT).

<sup>77</sup> *Anti-Money Laundering/Combating the Financing of Terrorism*, INTERNATIONAL MONETARY FUND, <https://www.imf.org/external/np/leg/amlcft/eng/aml1.htm> (last visited Mar. 31, 2023).

<sup>78</sup> *Id.*

it affects how U.S. regulatory agencies and financial institutions can identify, monitor, and prevent these respective illicit activities.

The writers of the PATRIOT Act identified correspondent banking as the key vector for CFT, and this law vastly impacted how U.S. and foreign financial institutions can conduct correspondent banking by mandating that banks identify and verify the identities of all customers, including beneficial owners, and conduct ongoing monitoring of the transactions that flow through correspondent banking relationships.<sup>79</sup>

Correspondent banking is a process through which financial institutions in different jurisdictions maintain a business relationship.<sup>80</sup> As these relationships become more complex, the risk of money laundering and terror financing becomes greater, as U.S. financial institutions know less and less about the origination of the payment.<sup>81</sup>

At the most basic level is foreign jurisdiction correspondent banking, where a foreign financial institution makes a wire transfer to a U.S. financial institution on behalf of a client.<sup>82</sup> The next level of complexity is third party transactions, where a foreign financial institution makes a wire transfer to a U.S. financial institution that makes a wire transfer to a U.S.-based company with which the U.S. financial institution has a relationship.<sup>83</sup>

The most opaque correspondent banking relationship is what are called nested relationships. This is a situation, common in international business, in which a foreign company makes a wire transfer to a regional foreign financial institution that then makes a wire transfer to a larger national foreign financial institution which has a relationship with a U.S. financial institution that ultimately makes a wire transfer to the U.S. company for whom the payment is intended.<sup>84</sup>

The risk in the case of nested relationships is that the degrees of separation in these transactions prevent the verification of the source of the money and the purpose of the transaction that would usually be required under the BSA.<sup>85</sup>

Several sections of the PATRIOT Act that changed the reporting requirements for correspondent banking. Sections 311 and 312 of the PATRIOT Act outlined Special Measures for Jurisdictions, Financial Institutions, or International Transactions of Primary Money Laundering Concerns.<sup>86</sup> These sections of the law increased the reporting requirements and EDD

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<sup>79</sup> Financial Crimes Enforcement Network, *Fact Sheet: Section 312 of the USA PATRIOT Act*, U.S. DEPARTMENT OF THE TREASURY (Dec. 2005), <https://www.fincen.gov/sites/default/files/shared/312factsheet.pdf>.

<sup>80</sup> *Understanding Risk in Correspondent Banking*, DOW JONES, <https://www.dowjones.com/professional/risk/glossary/correspondent-banking/understanding-risk/#:~:text=Risks%20associated%20with%20correspondent%20banking,to%20corruption%20and%20money%20laundering> (last visited Mar. 31, 2023).

<sup>81</sup> *Id.*

<sup>82</sup> BANK FOR INT'L SETTLEMENTS, REVISED ANNEX ON CORRESPONDENT BANKING 4 (2016).

<sup>83</sup> *Id.* at 3-4

<sup>84</sup> BSA/AML Manual, *supra* note 26.

<sup>85</sup> *Id.*

<sup>86</sup> Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, 311-12.

obligations for holders of correspondent accounts consistent with existing BSA requirements for domestic customers.<sup>87</sup>

Section 313 banned correspondent banking with foreign shell banks (i.e., banks that do not have a verified physical location in any jurisdiction).<sup>88</sup> While it seems nonsensical now, until the implementation of the PATRIOT Act there were few restrictions on U.S. financial institutions' ability to do business with unregulated foreign shell banks whose opaque nature made them perfect vehicles for money laundering and terror financing.<sup>89</sup>

Section 319(a) of the PATRIOT Act gave the U.S. Treasury and Justice Departments increased latitude to seize the assets of any interbank account suspected of terror finance.<sup>90</sup> In fact, the wording of this subsection does not reference terrorism at all and empowers the Attorney General and Secretary of the Treasury to seize assets in the case of any suspected foreign criminal activity.<sup>91</sup>

Section 319(b) of the PATRIOT Act increased the reporting and record keeping requirements for financial institutions engaged in correspondent banking.<sup>92</sup> This subsection mandated that upon any subpoena or request for information related to a correspondent banking relationship, the domestic or foreign financial institution must provide relevant documentation to U.S. banking authorities within five days.<sup>93</sup> Failure to comply with a written request for this information was immediate ground for the termination of the correspondent banking relationship.<sup>94</sup> Failure to terminate the relationship incurred a civil penalty of \$10,000 per day for the U.S. financial institution until the termination of the relationship.<sup>95</sup>

Far more than the BSA and FCPA, the PATRIOT Act has been a lightning rod for criticism, both in the legal community and in the general public. However, this criticism is mainly directed at the law's perceived adverse impact on civil liberties within the United States, not the financial provisions of the law, which are not well known or understood.<sup>96</sup>

When appraising the law's potential drawbacks for the long-term economic dominance of the U.S., there is both overlap with, and divergence from, the case of the FCPA. Like the FCPA, overzealous usage of asset forfeiture against foreign persons and entities can hurt the United States' viability as the number one destination for global investment and financial services. However, because the PATRIOT Act is broadly geared towards non-state terrorist groups, not nation states, the risks of this type of friction are generally lower.

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at § 313.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at § 319.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Surveillance Under the USA/Patriot Act, supra* note 75.

## Sanctions

Finally, the most powerful tool in the economic arsenal of the U.S., and the one most commonly associated with economic warfare is sanctions. Specific sanctions are often implemented by Executive Order, with exceptions such as the 2017 Countering America's Adversaries Through Sanctions Act (CAATSA).<sup>97</sup>

However, the authority for implementing these sanctions is codified in legislation, notably the Trading with the Enemy Act of 1917 (TWEA), the International Emergency Economic Powers Act (IEEPA) (granting the executive branch the authority to block transactions deemed to be a threat to U.S. national security or the American economy), the 1945 United Nations Participation Act (UNPA) (ratification of the UN charter that included recognition of UN-imposed sanctions), and the 1999 Kingpin Act (counter-narcotics sanctions targeting TCOs).<sup>98</sup>

Regulatory authority to enforce the other three AML/CFT enforcement mechanisms is divided between various divisions of the Department of Justice, the Securities and Exchange Commission, and FinCEN. Sanctions are generally the sole domain of the Department of Treasury Office of Foreign Assets Controls (OFAC).

OFAC's core responsibilities include the implementation and enforcement of sanctions, and the maintenance of the list of Specially Designated Nationals (SDNs); individuals and entities under economic blockade by the U.S.<sup>99</sup>

OFAC has enforcement authority in two places: economic activity with U.S. jurisdiction and the implementation of secondary sanctions. U.S. jurisdiction, as it relates to sanctions, includes: U.S. persons (e.g., United States citizens, residents of the U.S., and American companies); branches of U.S. corporations abroad; foreign subsidiaries of U.S. persons or companies; goods and services from the U.S. (e.g., export controls); and transactions in U.S. dollars.<sup>100</sup> Included under the umbrella of U.S. jurisdiction for sanctions enforcement is that U.S. persons may not facilitate sanctions violations for the benefit of others.<sup>101</sup>

Secondary sanctions are a tool developed by the State Department that is now used by OFAC.<sup>102</sup> They are sanctions that affect transactions with no U.S. jurisdiction. These sanctions are extremely controversial among U.S. allies, are used sparingly, and are only applied to

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<sup>97</sup> Countering America's Adversaries Through Sanctions Act, Pub L. No. 115-44, 131 Stat. 886 (2017) (codified at 22 U.S.C. § 9401).

<sup>98</sup> TWEA, *supra* note 15; IEEPA, *supra* note 17; UNPA, *supra* note 16; Kingpin Act, *supra* note 18.

<sup>99</sup> *Specially Designated Nationals and Blocked Persons List (SDN) Human Readable Lists*, OFAC (Mar. 31, 2023), <https://ofac.treasury.gov/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists>.

<sup>100</sup> ROBERTO GONZALEZ & JOSHUA THOMPSON, *SANCTIONS USA 2023* (2022).

<sup>101</sup> *U.S. Citizen who Conspired to Assist North Korea in Evading Sanctions Sentenced to over five Years and Fined \$100,000*, DEPARTMENT OF JUSTICE (Apr. 12, 2022), <https://www.justice.gov/opa/pr/us-citizen-who-conspired-assist-north-korea-evading-sanctions-sentenced-over-five-years-and>.

<sup>102</sup> Ole Moehr, *Secondary Sanctions*, ATLANTIC COUNCIL (Feb. 6, 2018), <https://www.atlanticcouncil.org/blogs/econographics/ole-moehr-3/>.

“knowing” and “significant” financial activity, which is defined ad hoc by the State Department and OFAC.<sup>103</sup>

There are four main categorizations of OFAC sanctions in terms of scope. First, there are comprehensive sanctions. These sanctions target entire countries or regions, such as the U.S. sanctions on Cuba, and almost entirely block the country from economic ties with the U.S. (with the exception of some humanitarian carve outs).<sup>104</sup>

Second, and less extreme, are regime-based sanctions. These sanctions, also referred to as list-based sanctions, include those against Iran that targeted Iran’s government, military, and associated SOEs.<sup>105</sup>

Third, are sectoral sanctions, such as those that were placed on Venezuela in 2019 targeting their oil and gas (O&G) sector.<sup>106</sup> From 2014 to 2022, U.S. sanctions on Russia could have been considered regime-based or sectoral, as they targeted specific oligarchs and companies complicit in the annexation of Crimea limited to certain sectors, like defense and O&G.<sup>107</sup>

However, the sanctions imposed on Russia in response to their February 2022 invasion of Ukraine were comprehensive. While they are not as stringent as the sanctions on countries like Cuba and North Korea, for an economy of Russia’s size and global presence, they are about as harsh as could feasibly be imagined. This is especially true considering that, unlike in the case of Cuba, the U.S. was joined in its efforts by the EU and the UK.<sup>108</sup>

Finally, the fourth type of sanctions are Global Magnitsky sanctions that target specific individuals, usually for human rights violations.<sup>109</sup>

Sanctioned persons and entities are maintained by OFAC on the SDN list. Any entity that has fifty percent or more aggregate beneficial ownership by individuals or entities on the SDN

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<sup>103</sup> John E. Smith, Saqib Alam, Felix Helmstädter & Jonathan M. Babcock, *OFAC Issues new FAQs Clarifying Iran Secondary Sanctions*, MORRISON FOERSTER (June 18, 2020), <https://www.mofo.com/resources/insights/200618-ofac-new-faqs-iran-sanctions>.

<sup>104</sup> Cuba Sanctions, DEPARTMENT OF STATE, <https://www.state.gov/cuba-sanctions/> (last visited Apr. 1, 2023).

<sup>105</sup> See Office of Foreign Assets Control, *Iran Sanctions*, U.S. Dept. of the Treasury, <https://ofac.treasury.gov/sanctions-programs-and-country-information/iran-sanctions> (last visited Apr. 1, 2023) (listing advisories to the public and guidance documents on issues related to sanctions in Iran).

<sup>106</sup> See Press Release, Michael R. Pompeo, Secretary of State, Sanctions Against PDVSA and Venezuela Oil Sector (Jan. 28, 2019), <https://2017-2021.state.gov/sanctions-against-pdvsa-and-venezuela-oil-sector/index.html#:~:text=The%20United%20States%20has%20determined,for%20operating%20within%20this%20sector>.

<sup>107</sup> See Ukraine-/Russia-related Sanctions, OFFICE OF FOREIGN ASSETS CONTROL <https://ofac.treasury.gov/sanctions-programs-and-country-information/ukraine-russia-related-sanctions> (last visited Apr. 12, 2023) (listing advisories to the public and guidance documents on issues related to sanctions in Russia).

<sup>108</sup> Brian J. Egan, et. al., *Disparate US, EU and UK Sanctions Rules Complicate Multinationals’ Exits from Russia*, SKADDEN (Dec. 13, 2022) <https://www.skadden.com/insights/publications/2022/12/2023-insights/new-regulatory-challenges/disparate-us-eu-and-uk-sanctions-rules>.

<sup>109</sup> Office of Foreign Assets Control, *FAQ: Global Magnitsky Sanctions*, U.S. Dept. of the Treasury, (Dec. 21, 2017) <https://home.treasury.gov/policy-issues/financial-sanctions/sanctions-programs-and-country-information/global-magnitsky-sanctions>.



list, will be treated as an SDN.<sup>110</sup> These entities are known as Shadow SDNs, as they are effectively sanctioned and subject to the same penalties and restrictions as those explicitly sanctioned, without appearing on the SDN list.<sup>111</sup> This allows the U.S. government to target not just individuals or entities, but their networks and businesses as well.

When an entity or individual is placed on the SDN list, or the financial institution becomes aware that a client of theirs is an SDN or Shadow SDN, financial institutions are required by U.S. federal law to immediately freeze the assets of the SDN and notify OFAC within ten days.<sup>112</sup>

OFAC has a number of tools to pressure financial institutions. They can request additional information from businesses that appear to run the risk of sanctions evasion. They can also send cautionary letters and Finding of Violations to notify financial institutions of high-risk relationships on their books.<sup>113</sup>

The less conciliatory measures include Civil Monetary Penalties. These penalties can be for millions of dollars in the most egregious cases. OFAC may also issue Criminal Referrals.<sup>114</sup> Recent sentences for high-profile sanctions evasion convictions have ranged between two and five years in federal prison.<sup>115</sup>

Sanctions are frequently singled out by critics of U.S. foreign policy as an ineffective tool used by the U.S. government to create the perception of action when conventional war is infeasible.<sup>116</sup> In the case of comprehensive sanctions like those placed on Cuba, their deleterious effects on the standard of living for the average Cuban are massive, while they have objectively not produced any changes in regime behavior in six decades since their implementation.<sup>117</sup>

Similar critiques have been leveled at the more targeted sanctions packages levied against countries like Iran and Venezuela. However, the downwardly mobile nature of the economic pain caused by these sanctions has more to do with the kleptocratic nature of these regimes, not the intent or implementation of the sanctions. Moreover, it makes sense at a moral and strategic

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<sup>110</sup> Margaret M. Gatti, *Revised OFAC Guidance on "Shadow" SDNS*, MORGAN LEWIS (Aug. 25, 2014) [https://www.morganlewis.com/pubs/2014/08/intltradel\\_f\\_revisedofacguidanceforshadowsdns\\_25aug14](https://www.morganlewis.com/pubs/2014/08/intltradel_f_revisedofacguidanceforshadowsdns_25aug14).

<sup>111</sup> *Id.*

<sup>112</sup> 31 CFR 501.603(a)(1); 31 CFR 501.603(b)(1)(i); 31 CFR 501.604(a)(1); 31 CFR 501.604(c).

<sup>113</sup> 31 CFR PART 501 APPENDIX A.

<sup>114</sup> Office of Foreign Assets Control, *2022 Enforcement Information*, U.S. Dept. of the Treasury, <https://ofac.treasury.gov/civil-penalties-and-enforcement-information/2022-enforcement-information> (last visited Apr. 1, 2023).

<sup>115</sup> What are the Penalties for Breaking OFAC Sanctions?, DOW JONES, <https://www.dowjones.com/professional/risk/glossary/sanctions/ofac-sanctions-penalties/> (last visited Apr. 1, 2023).

<sup>116</sup> Richard Hanania, *Ineffective, Immoral, Politically Convenient: America's Overreliance on Economic Sanctions and what to do About it*, CATO INSTITUTE, (Feb. 18, 2020) <https://www.cato.org/policy-analysis/ineffective-immoral-politically-convenient-americas-overreliance-economic-sanctions>.

<sup>117</sup> Isabella Oliver & Mariakarla Nodarse Venancio, *Understanding the Failure of the U.S. Embargo on Cuba*, WASHINGTON OFFICE ON LATIN AMERICA (Feb. 4, 2022), <https://www.wola.org/analysis/understanding-failure-of-us-cuba-embargo/>.

level why the U.S. would want to prevent narcotraffickers, terrorists, developers of nuclear weapons, and abusers of human rights from having access to the American financial system.

The over usage of sanctions represents a massive risk to the economic future of the United States. Fundamentally, what sanctions do is use American economic leverage to force the other countries of the world to choose whether they want to do business with the U.S. or with the sanctioned entity or country. In the case of, say South Sudan, this is an extremely obvious choice for most nations.

The U.S. would win this zero-sum economic struggle against almost any single adversary nation on the planet, but it remains to be seen whether the U.S. can win against the collective GDP of *all* of its adversaries. The sanctions imposed on Russia represented the crossing of the Rubicon for U.S. sanctions efforts. Up until February of 2022, most of the targets of U.S. sanctions were small, economically undeveloped nations.

Even in the case of relatively developed countries like Iran and Venezuela, they were regional economic powers, but they were not global economic powers. The placement of comprehensive sanctions on a trillion-dollar economy with significant global integration was a massive act of economic warfare, the shockwaves of which are still being felt.

The sanctions on Russia, one of the largest petroleum exporters on the planet, have caused significant increases in the price of fuel.<sup>118</sup> It has had this effect even in the United States, which is a net energy exporter, but the effects have been even worse in the EU, which joined the U.S. in sanctioning Russia in response to their invasion of Ukraine.<sup>119</sup>

European elites and public sentiment that were hewing to lofty ideals of the Rules-Based International Liberal World Order and Ukrainian sovereignty in the spring of 2022 are now faced with the prospect of a cold European winter without Russian gas.<sup>120</sup> In the distant future, if U.S. allies' conformity with the U.S. foreign policy agenda comes at the cost of their material well-being, they will cease to be U.S. allies. Which is to say nothing of the effects that the sanctions have had within Russia.

Russian banks were entirely kicked off of the SWIFT system, the global interbank messaging system that serves as the arteries of global finance.<sup>121</sup> For the first time in decades,

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<sup>118</sup> Scott Horsley, *U.S. gas Prices hit Record Highs Following Sanctions on Russia*, NPR (Mar. 12, 2022 5:46 PM) <https://www.npr.org/2022/03/12/1086309021/u-s-gas-prices-hit-record-highs-following-sanctions-on-russia>.

<sup>119</sup> *What's Next for oil and gas Prices as Sanctions on Russia Intensify*, J.P. MORGAN, (Mar. 10, 2022) <https://www.jpmorgan.com/insights/research/oil-gas-energy-prices>.

<sup>120</sup> Jorgelina Do Rosario, *Rising Energy Prices Could fuel Social Unrest Across Europe this Winter*, REUTERS, (Sept. 1, 2022 7:09 PM) <https://www.reuters.com/business/energy/rising-energy-prices-could-fuel-social-unrest-across-europe-this-winter-2022-09-01/>.

<sup>121</sup> Russell Hotton, *Ukraine Conflict: What is Swift and why is Banning Russia so Significant?*, BBC, (May 4, 2022) <https://www.bbc.com/news/business-60521822>.

Russian Foreign Exchange (FOREX) markets have recorded days in which more rubles have been exchanged for Chinese yuan than U.S. dollars.<sup>122</sup>

This is an unprecedented amount of de-dollarization for a major world economy. If the U.S. is not judicious in the way that it uses sanctions against its adversaries; if it tries, for instance, to impose a similar package of sanctions on China for any future actions it might take against Taiwan, the U.S. dollar could lose its global reserve currency status.

Global de-dollarization is not something that would occur overnight, but even if it occurred over the course of decades, the United States' multi-trillion-dollar national debt would start taking on an extremely different character. Punishing bad actors through financial means is an important tool to hinder enemies of the United States short of conventional warfare. But its efficacy as a tool is entirely contingent on the fact that the U.S. is the preeminent global economy.

## CONCLUSION

If, through an overzealous usage of sanctions, the BSA, FCPA, or the PATRIOT Act, the U.S. creates a parallel financial system of countries and entities blocked by the U.S., that system could one day come to rival the current U.S.-led financial system. The preeminent nation-states of that system will not care about things like human rights, environmentalism, or the rule of law. The reality is that this will make this system far more attractive to most developing countries.

The American government has an incredible set of legal tools to conduct economic warfare and protect its financial system from exploitation by individuals, groups, and governments responsible for the most grotesque acts of corruption and violations of human dignity. If it wants to preserve these tools now and into the future, it must use them with recognition of their long-term global ramifications.

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<sup>122</sup> Business Insider, *Moscow is now the Fourth Largest Offshore Trading hub for the Chinese Yuan*, MARKETS INSIDER (Nov. 29, 2022 12:44 AM) <https://markets.businessinsider.com/news/currencies/dollar-yuan-russia-moscow-4th-largest-offshore-cny-hub-2022-11>.