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French Bank Settles Charges of Violating U.S. Sanctions

Crédit Agricole Corporate and Investment Bank (CACIB), a Paris-based subsidiary of Crédit Agricole S.A., agreed Oct. 20 to pay \$787.3 million in criminal and civil penalties for violating U.S. sanctions against Sudan, Iran, Burma and Cuba. The global settlement with D.C. U.S. Attorney, the Office of Foreign Assets Control (OFAC), the Federal Reserve Board, the New York County District Attorney and the New York State Department of Financial Services (DFS) involved \$32 billion in payments between 2003 and 2008 through its New York branch on behalf of entities in those countries.

CACIB personnel and managers were aware of the sanctions and knew they were required to block or reject those transactions. Despite this knowledge, they “used cover payments and/or implemented special payment practices in a manner that omitted references to U.S.-sanctioned parties in U.S. Dollar (USD) Society for Worldwide Interbank Financial Telecommunication (SWIFT) payment messages sent to the United States, thereby preventing U.S. financial institutions from appropriately reviewing and analyzing the transactions for compliance with OFAC regulations,” OFAC said.

Of the total penalty, \$312 million is due under a deferred prosecution agreement (DPA), including \$156 million to the U.S. Attorney and \$156 million to the New York District Attorney. The Fed issued a cease-and desist-order and imposed a civil penalty of \$90.3 million. With DFS, CACIB agreed to employ a compliance consultant for one year and pay a monetary penalty of \$385 million. OFAC levied a fine of approximately \$329.5 million, which it said will be satisfied by the payments to the other agencies.

“Crédit Agricole is committed to continue to strengthen its internal procedures and compliance programs regarding sanctions laws and will continue to cooperate fully with the U.S. and New York authorities regarding this matter, with its home regulators, the European Central Bank and the Autorité de Contrôle Prudentiel et de Résolution, and with the other regulators across its worldwide network,” the bank said in a statement.

U.S. Firms Will Be in Limbo for Months on Safe Harbor Rules

European Union (EU) officials concede that U.S. firms that have relied on Safe Harbor rules for the transfer of data from Europe to the U.S. will be in limbo for several months

without the protection they had under those rules and at risk of violating EU privacy laws. Although the EU's Article 29 Working Party, which comprises representatives of EU member state data protection authorities (DPA), suggested that there might be a grace period until the end of January 2016, that suggestion has no legal standing and each state DPA has the power to act on its own (see **WTTL**, Oct. 19, page 1).

U.S. and EU officials have already begun to speed up work on revising the 15-year-old Safe Harbor accord, but the EU commission will need to consult with the European Parliament and member states before concluding a deal. Then the agreement will have to be translated into the many official EU languages. Such a process will go well beyond January, sources suggest.

As the EU considers the impact of a EU Court of Justice (CJEU) ruling that declared the Safe Harbor pact invalid, the Working Party in its Oct. 16 statement said DPAs can continue to consider "standard contractual clauses" and "binding corporate rules" in evaluating whether individual companies are protecting EU data. "In any case, this will not prevent data protection authorities to investigate particular cases, for instance on the basis of complaints, and to exercise their powers in order to protect individuals," it said.

Such clauses and rules may still not be enough to allow companies to transfer data from the EU, according to Giovanni Buttarelli, the European Data Protection Supervisor, whose office oversees implementation of the EU Data Protection Regulation. "We cannot consider them entirely solid," he said on a conference call sponsored by the law firm of Sidley & Austin Oct. 20.

The CJEU decision, which focused on U.S. surveillance programs, makes it clear that "potential adjustments, derogations, additions for national security and prevention of crime purposes is to be defined narrowly and, therefore, now DPAs are in the position to be accountable for that exercise in a more accountable way," he said. "We cannot expect drastic solutions on these instruments in the short-term, and even the reform is not affecting directly decisions validating contractual clauses or legal instruments they have reviewed," Buttarelli stated.

When asked what advice he would give companies, Buttarelli said, "To be candid, I wouldn't be in their shoes, because I understand how they are now stressed. We too have stress as regulators." In regards to transferring data under rules that no longer exist, companies should "identify exceptional interim solutions by focusing for the time being on other requirements, although this may cost a little bit," he advised.

"The second suggestion is to work together and less unilaterally and follow the trend; think twice before spending money on solutions that are perhaps creative and wait for guidance by regulators," he said. "I'm sure in a few weeks the scenario will be much more clear," he added.

Iran Deal "Adoption Day" Sets Goals for Lifting Sanctions

The Obama administration completed the next requirement of the Iran nuclear agreement on "Adoption Day" Oct. 18, identifying trade sanctions that will be lifted once the International Atomic Energy Agency (IAEA) verifies that Iran has taken its required steps to curb its nuclear program. The previewed changes and waivers primarily will apply to

non-U.S. companies, with some export control relief for U.S. aircraft and aircraft parts (see **WTTL**, Sept. 21, page 4). “What we’re going to be doing tomorrow is a couple of steps that will demonstrate our commitment and our preparation to take sanctions-lifting steps moving forward,” a senior administration official, speaking on background, told a press call Oct. 17. “Here in the U.S. we’ll be issuing some waivers that will be contingent on reaching implementation day, when Iran completes all of its steps and is verified by the IAEA,” he said. Implementation day may be months away, he indicated.

“Implementation day is when these waivers will essentially take effect and the – at least from the U.S. perspective, the sanctions that we have that restrict or in some cases sanction non-U.S. companies for engaging in various economic activities, those will be waived and those companies will be able to engage in those activities without fear of being sanctioned in the United States,” the official explained.

“For U.S. companies there’s only some fairly narrow categories where the sanctions on those companies change. That includes with respect to the export of commercial passenger – or civilian passenger aircraft, with respect to the import of certain [products] and handicrafts from Iran, and with respect to some of the activities that subsidiaries of U.S. companies can take – or can conduct overseas,” he said.

As part of the Adoption Day measures, President Obama issued a memorandum to the secretaries of State, Treasury, Commerce and Energy directing them “to take all appropriate additional measures to ensure the prompt and effective implementation of the U.S. commitments” in the Joint Comprehensive Plan of Action (JCPOA). In particular, they were ordered to fulfill “U.S. commitments with respect to sanctions described in section 17 of Annex V of the JCPOA, including preparation for the termination of Executive Orders as specified in section 17.4 and the licensing of activities as set forth in section 17.5, to take effect upon confirmation by the Secretary of State that Iran has implemented the nuclear-related measures specified in sections 15.1-15.11 of Annex V of the JCPOA, as verified by the IAEA.”

“Even after Implementation Day, U.S. persons will continue to be broadly prohibited from engaging in transactions or dealings involving Iran, including the Government of Iran, with the exception of a few specific categories of transactions that OFAC will license pursuant to the JCPOA,” a Treasury statement declared. The department also issued new Frequently Asked Questions (FAQs) stressing that changes announced on Adoption Day won’t take effect until Implementation Day.

“Entering into contracts involving Iran or its government before Implementation Day may be sanctionable. In certain circumstances, this could include contracts that are contingent on the implementation of sanctions relief under the JCPOA, such as contracts involving individuals or entities on the SDN [Specially Designate Nationals] List. Until Implementation Day, we will continue to vigorously enforce the sanctions that remain in effect,” one FAQ stated.

As part of the package of Adoption Day measures, Secretary of State John Kerry invoked the waiver provisions of the Iran Freedom and Counter-Proliferation Act of 2012 (IFCA), including sections 1244(i), 1245(g), 1246(e) and 1247(f), effective as of Implementation Day. “I determine that it is vital to the national security of the United States to waive the imposition of sanctions” to comply with the JCPOA, he said in his order. He also

cited waivers under the 2012 National Defense Authorization Act and the Iran Threat Reduction and Syria Human Rights Act of 2012. The waivers will apply to transactions by U.S. persons for the sale of commercial passenger aircraft and spare parts and components. They also apply to non-U.S. persons for transactions not involving parties on the SDN list, covering foreign financial institutions; the sale, supply or transfer directly or indirectly to or from Iran of materials described in IFCA Section 1245(d); energy, shipping or shipbuilding; the nuclear program of Iran; procurement approved by the United Nations; certain permitted underwriting services, insurance or reinsurance by non-U.S. persons; and by foreign financial institutions with the Central Bank of Iran.

OFAC Issues Guidance on “False Hit Lists”

Companies trying to deal with “false hit lists” when screening foreign parties in trade transactions could find help in guidance OFAC issued Oct. 21 on the need to keep those lists up to date. The agency decided to provide the advice as a result of its issuance of a Finding of Violation to BMO Harris Bank NA for Iran sanctions violations. The guidance addresses cases where companies or individuals trigger a screening match, but after thorough review, are determined not to be blocked entities.

“In the case of software screening tools, once an individual or entity is added to the false hit list, the screening software typically will suppress an alert (or will otherwise bypass an alert) associated with the individual or entity, thereby eliminating any transaction hold on, or prompting further manual review of, such parties in the absence of other alerts,” OFAC noted.

“While false hit lists represent a common and legitimate practice, and are generally designed to reduce the volume of OFAC-related matches that a U.S. person has determined are false, it is important that each U.S. person implement policies and procedures designed to review, evaluate, and reassess the parties that are included on such lists,” OFAC noted.

The separate Finding of Violation notice to BMO Harris related to actions in February and March 2011 by M&I Bank, which BMO Harris acquired in July 2011. M&I originated six funds transfers totaling \$67,357 “on behalf of its customer, a company specializing in carpets that included the word ‘Persian’ in its name, for the purpose of paying an outstanding balance owed to an Iranian entity located in Iran for the purchase of Iranian-origin carpets,” OFAC noted.

“M&I Bank stated that it added the Company to the bank’s ‘False Hit List’ on May 29, 2009, after its OFAC interdiction software generated multiple alerts due to the word ‘Persian’ in the Company’s name,” the Oct. 21 notice said. Although OFAC revoked the general license for the importation of Iranian-origin carpets in September 2010, “M&I Bank did not remove the Company from the False Hit List or implement any additional measures to prevent or identify possible violations involving the Company,” it said.

OFAC said a Finding of Violation was appropriate because, in addition to other factors, “M&I Bank may have been unaware of the risks associated with a false hit list that was not reviewed and updated regularly,” it said. “This matter relates to transactions undertaken by M&I Bank in 2011, prior to its acquisition by BMO Harris Bank. We are

committed to meeting the highest standards of regulatory compliance in each of the jurisdictions in which we operate," wrote a BMO spokesperson in an email to WTTL.

Treasury Finds No Currency Manipulation, Again

In its semi-annual report to Congress on international economic and exchange rate policies Oct. 19, Treasury found no major trading partner manipulating its currency. It said China's currency, the renminbi (RMB), remains below its appropriate medium-term valuation but had appreciated before the recent shift in rate-setting policies.

Critics of the currency provisions in the Trans-Pacific Partnership (TPP), which have not yet been disclosed, aren't likely to find much ammunition in the cautiously worded report. In addition to China, exchange rates in other Asian countries have declined and there has been intervention, but none of those practices raised to the level of manipulation, according to Treasury.

In August, China changed how it sets the daily reference rate of its currency, Treasury acknowledged (see **WTTL**, Sept. 28, page 4). "Before the recent shift in exchange rate policy, the RMB had remained largely unchanged relative to the dollar, and thus had appreciated in real effective terms, along with the dollar, over the course of 2015. All told, the RMB has appreciated nearly 30 percent in real effective terms since June 2010," it noted. "The core factors that have driven RMB appreciation remain in place: strong external balances which include a sizeable and growing current account surplus, sharply improved terms of trade, and ongoing net inflows of foreign direct investment," it said.

Japan's "strict adherence to deficit-reduction targets could result in prematurely aggressive fiscal consolidation and threaten Japan's economic recovery and escape from deflation. Recalibrating fiscal policy to support economic growth and minimize fiscal drag would help avoid overburdening monetary policy and reliance on yen depreciation to support externally-driven growth," the report advised. Structural reforms facilitated by TPP, including in the agricultural and services sectors, "are needed to raise productivity and boost potential growth," it added.

In Korea, Treasury found an undervalued won. "Treasury estimates of foreign exchange intervention using valuation-adjusted reserves indicate that Korea continued to intervene to resist pressure for the won to appreciate against the dollar in the first half of 2015 but then sold foreign exchange in July and August to limit won depreciation, so that intervention over the calendar year to date appears roughly balanced," it said.

In general, "no major trading partner of the United States met the standard of manipulating the rate of exchange between its currency and the United States dollar for purposes of preventing effective balance of payments adjustments or gaining unfair competitive advantage in international trade," the department concluded.

Court Leans Toward Remand of FOIA Case on Export Data

Questions and comments from three Ninth Circuit appellate judges Oct. 21 suggest that they are likely to vacate and remand a district court ruling that data in export licensing

applications filed with the Bureau of Industry and Security (BIS) are not protected from disclosure under the Freedom of Information Act (FOIA). Most of the oral arguments in the case filed by the Electronic Freedom Foundation (EFF) focused on the “inarticulate” way Congress wrote legislation in 2014 confirming its intent that export licensing data was protected by Section 12(c) of the Export Administration Act (EAA) dating back to 2001 even though the statute expired 15 years ago (see **WTTL**, Feb. 9, page 7).

EFF counsel Mark Rumold argued the legislation enacted in December 2014 to restore 12(c) protection was not a properly written statute that correctly extends the protection of FOIA Exemption 3 to licensing data. Enactment of the stop-gap law “does not change this case in any material way,” he told the three-judge panel. “They have amended a lapsed law,” he said.

Justice attorney John Koppel said the legislative history of the new law, although skimpy, makes it clear “Congress wants to maintain the confidentiality” of license information. While the government asked the court to vacate the decision of District Judge Thelton Henderson, Koppel said it would not be adverse to having the decision vacated and remanded to Henderson to reconsider his ruling in light of the new statute.

Remanding the case to the district court “make sense to me,” said Appellate Judge Andrew Hurwitz. He said the new law was “a very strange statute,” but “it’s clear Congress wants the law to apply.” Appellate Judge Rosemary Marquez agreed and said it would be “beneficial to have Judge Henderson look at it.”

The judges questioned the strange way the legislation (S. 1683) was written because it did not clearly state that 12(c) was being applied retroactively nor did it just reenact the EAA. “It could have been done in a more adroit manner,” Koppel conceded. When asked why Congress did not renew the whole EAA, Rumold said “EAA is politically difficult.” Some lawmakers just wanted to maintain protection of licensing data, while others wanted to rewrite the entire law, he explained.

TTIP Negotiators Still Seek to Finish Talks in 2016

Faced with doubts about the fate of the TPP deal in Congress next year, the U.S. and EU still aim to complete the Transatlantic Trade and Investment Partnership (TTIP) before President Obama leaves office, TTIP negotiators contend. “We believe it is important to finish these negotiation’s during President Obama’s presidency,” said Chief U.S. Negotiator Dan Mullaney on a press call Oct. 23 at the end of a week of TTIP talks in Miami.

To accelerate talks, there will be more inter-sessional meetings of negotiators between formal rounds, with the next round expected early next year, he said. Mullaney and Chief EU Negotiator Ignacio Garcia-Bercero conceded the toughest issues in the negotiations are being put off until the end.

At the 11th round in Miami, both sides reviewed new tariff-cutting offers aimed at eliminating 97% of the tariffs in the two markets immediately upon implementation of any agreement. Negotiators won’t address the last 3% until “the end game,” Garcia-Bercero told reporters. Most of the week’s talks continued to focus on the same issues that have been on the agenda of earlier rounds, including meetings among regulators in nine sectors, services, market access, customs procedures, rules of origin and public

procurement. Negotiators have not yet addressed investor-state dispute settlement (ISDS) provisions. “We have no proposal yet from the commission,” Mullaney said. “We look forward to receiving a proposal,” he added. The two negotiators also conceded that differences remain over how to deal with financial services, energy, natural resources and geographic indications.

TPP Could Lose GOP Support in Congress, Sources Warn

While USTR Michael Froman claims the U.S. won't be able to renegotiate provisions of the just-concluded TPP, some Republican lawmakers are privately angry that too much was given away in the talks at the last minute. Especially troubling to some GOPers are market access agreements for dairy and rice, the carve-out of tobacco products from investor-state dispute settlement, treatment of intellectual property especially biologics and the wording and enforcement of labor provisions (see **WTTL**, Oct. 19, page 6).

Some lawmakers reportedly are upset about important developments that happened in Atlanta, particularly on some controversial issues, at the end. Although Congress was consulted during the negotiating, a lot of the outcome happened in rooms in the middle of the night, one source said.

On labor, there's a concern that labor enforcement provisions go beyond the fine balance that the trade promotion authority (TPA) bill created between labor and trade, sources say. On the tobacco carve-out, members are alarmed it sets a precedent that would take away any opportunity to use dispute settlement for a specific product or sector.

While Republicans, especially in the House Ways and Means and Senate Finance committees, are publicly saying they are reserving judgment until they see the final text, sources say the White House may lose votes on TPP, even from those who backed TPA. That is something the administration should have considered, one source said. While USTR is rushing to finish the legal scrub of the final text, some lawmakers complain it is not moving fast enough.

Democrats also are impatient to see the text. “You have yet to provide or indicate any specific date by which you will provide the current TPP consolidated texts including consistency plans, annexes, all side agreements and other documents concerning its implementation or enforcement, for review by Members of Congress in response to my multiple, previous requests. If the deal is so good, why is it still so secret?” Rep. Lloyd Doggett (D-Texas) wrote in a letter to Froman Oct. 22.

On a conference call sponsored by the Council on Foreign Relations Oct. 15, USTR Michael Froman quashed calls to renegotiate any TPP provisions. “This isn't one of those agreements where you can reopen an issue or renegotiate a provision. This is one where every issue is tied to every other issue and every country's outcome is balanced against every other country's outcome. And so that's the agreement that we'll be putting forward under TPA for a vote by Congress,” Froman said.

*** * * Briefs * * ***

EXPORT ENFORCEMENT: Mozaffar Khazaei was sentenced Oct. 23 in New Haven, Conn., U.S. District Court to 97 months in prison and ordered to pay \$50,000 fine for exporting

controlled material related to jet engines for F-35 Joint Strike Fighter and F-22 Raptor to Iran without licenses. He pleaded guilty in February 2015 to violating Arms Export Control Act (see **WTTL**, March 2, page 4). Government claimed he had stolen some 50,000 documents related to those programs from unnamed companies where he had worked. Khazaei has been in custody since his arrest in January 2014.

ANTIBOYCOTT: Composite Technologies Corporation, dba Thermomass, in Boone, Iowa, received warning letter from BIS Sept. 30 for furnishing information about business relationships with boycotted country on two occasions in June 2015. Two invoices regarding sales to Qatar included language: "Goods are of United States origin and not manufactured in Israel."

SUGAR: In 6-0 final vote Oct. 20, ITC found U.S. industry is materially injured by imports of dumped and subsidized sugar from Mexico. Sweetener Users Association (SUA) immediately denounced vote in statement. "The idea that domestic producers were suffering at a time when they made record profits is confounding," it said. "While today's decision is unfortunate, SUA and sugar-using industry representatives will redouble our efforts to work with Congress to enact meaningful sugar program reform," SUA added (see **WTTL**, Sept. 21, page 7).

STEEL GRATING: In 6-0 "sunset" vote Oct. 20, ITC said revoking antidumping and countervailing duty orders on certain steel grating from China would renew injury to U.S. industry.

TRADE PEOPLE: Peter Allgeier will retire as president of Coalition of Services Industries (CSI) at end of 2015, depending on replacement search, which has already begun, he told **WTTL** at Global Services Summit Oct. 21. Allgeier, who had long, distinguished career at USTR's office, including as deputy USTR, became CSI president in September 2012.

INDIA: ITC found "significant changes or new policies" in India in four areas: foreign direct investment; tariffs and customs procedures; local-content requirements, particularly concerning information and communications technology goods; and standards and technical regulations," it said in report released Oct. 22 (Pub. No. 4566). "The Modi government faced legislative challenges in passing other key policy reforms —notably changes in India's land acquisition laws, taxation policies, and other measures affecting the overall business climate," report said. Report drew reaction from Congress. "While there have been some positive developments since the Modi Administration began, significant concerns remain, and it is not yet clear whether policies that negatively affect foreign trade and investment are in fact headed towards much-needed reform," said joint statement from Senate Finance Committee Chairman Orrin Hatch (R-Utah), Ranking Member Ron Wyden (D-Ore.), House Ways and Means Committee Chairman Paul Ryan (R-Wis.) and Ranking Member Sander Levin (D-Mich.).

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