



THEIR BOTTOM LINE: PROVIDING A LEGAL BASIS FOR
REGULATING RATINGS AGENCIES TO COMBAT MONEY
LAUNDERING IN THE BANKING INDUSTRY

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The American banking industry has long complained about overregulation and its ineffectiveness. Although banks do need space to operate and to ensure a capitalistic society functions at premium levels, taking a step back from regulation, as this administration seems to be doing, results in an uptick in terrorist funding by banks. Nevertheless, there is still a need to put pressure on banks to ensure they are not complicit in terrorist acts, let alone ensuring they are not aiding in forwarding them. This is especially significant given that the prior regulations, which have been in place since 2001, and subsequent lawsuits, have proven ineffective.

However, there are alternatives to lawsuits and regulations to force banks into compliance. The most effective alternative ensures that ratings agencies will drop a bank's rating for financing terrorism. This is in contrast to pursuing lawsuits against such banks, or regulating them, which are the current modes of policing the offending institutions. This works because the ratings agencies hold significant influence over a bank's actions. Therefore, forcing them to consider a bank's violations when calculating their rating is the preferable

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option Americans should pursue if they wish to stop the financing of terror on their soil.

I. INTRODUCTION	174
II. BACKGROUND & ANALYSIS	176
A. <i>The Reach of the Anti-Terrorism Act & Its Failure</i>	176
B. <i>OFAC & Its Ineffectiveness</i>	185
III. ANALYSIS	198
IV. PROPOSAL	203
IV. CONCLUSION.....	208

I. INTRODUCTION

Since the onset of the financial crisis, a debate has persisted among policymakers about how best to regulate banking institutions. Largely, this debate has focused on how to stabilize the American financial industry and economy without sacrificing its dynamism.¹ A growing facet of this debate, however, has little to do with the domestic effects of banking regulation; rather, because “terrorist financing is hitting a new stage . . . [and because] we have major organizations around the world that want to access the [American] financial system, because they have significant amounts of capital to invest,” banking regulations have become a focal point in the fight against terrorism.² Still, with the current administration taking a

¹ Alan S. Blinder & Mark Zandi, *The Financial Crisis: Lessons for the Next One*, CTR. ON BUDGET & POL’Y PRIORITIES (Oct. 15, 2015), <https://www.cbpp.org/research/economy/the-financial-crisis-lessons-for-the-next-one>. This article was completed in February 2019, just when the new Democratic House majority took effect.

² Tracy Kitten, *Terrorist Financing a Growing Worry for US Banks*, BANK INFO SECURITY (Mar. 16, 2016), <http://www.bankinfosecurity.com/interviews/terrorist-financing-growing-worry-for-us-banks-i-3125>.

step back in banking regulation,³ effective regulation is an easily neglected aspect.

It remains important to put pressure on the banking industry to ensure they do not forward terrorist acts. This is especially significant given that the regulations, which have been in place since 2001, and litigation, which has been pending for decades, have both proven to be ineffective deterrents. Yet, there are alternatives to lawsuits and regulations that force banks into compliance.

This article seeks to establish a more effective alternative to increased banking regulation and civilian lawsuits to dissuade banking institutions from financing terror. Specifically, it proves that banks will be effectively deterred from financing terrorism if their ratings are dropped because of their terror-money laundering activities. To prove this, this article will first focus on the history of American banking regulation regarding terrorist financing and its current state of affairs. It will also examine how civilians have sued some offending banks, and how those same offending banks have settled countless violations with the U.S. Department of Treasury (Treasury). The ineffectiveness of the lawsuits in policing these offending banking institutions is best illustrated by emphasizing how long each suit took to progress, the inability to collect upon a guilty verdict, and the incessant appeals that resulted, which often overturned the guilty jury verdicts on obscure procedural grounds. This article will then discuss the operations, regulations, and settlements of the Office of Foreign Assets Control (OFAC). The failure of such settlements will then be reflected in showing the recidivism rate of the banking institutions that settled. Finally, this article will show the significant influence that ratings agencies have on banking institutions. Therefore, forcing ratings agencies to consider a bank's OFAC violations when calculating their rating is the

³ Sylvan Lane, *Fed Bank Regulator Walks Tightrope on Dodd-Frank*, THE HILL (Nov. 14, 2018), <https://thehill.com/policy/finance/416771-fed-banking-regulator-walks-tightrope-on-dodd-frank>. See also *Update from the Comptroller of the Currency: Hearing Before the S. Comm. on Banking, Housing, and Urb. Aff.*, 115th Cong. 19 (2018) (testimony of Joseph M. Otting, Comptroller of the Currency).

preferable option for stopping the financing of terror on American soil.

II. BACKGROUND & ANALYSIS

A. *The Reach of the Anti-Terrorism Act & Its Failure*

In response to the 1985 Palestinian hijacking of the *Achille Lauro* cruise ship, in which an American citizen was murdered, Congress enacted the Anti-Terrorism Act (ATA) in 1992 as a private civil remedy provision.⁴ The ATA allows individual victims of terror to seek damages for “violent acts or acts dangerous to human life.”⁵ The provision acts both as a terrorism deterrent and as a means of affording remedies to those victimized by terrorism by allowing victims of terror and their surviving family members to sue terrorists and their financiers in federal court.⁶ However, “[w]ith perpetrators typically difficult to find, some observers had written off the ATA as impractical and largely symbolic. After the attacks of Sept[ember] 11th though, that began to change.”⁷

In *Boim v. Quranic Literacy Inst.*, the United States Court of Appeals for the Seventh Circuit allowed parents of an American teenager, killed in Israel in 1996 by a member of Hamas, to sue multiple Islamic charities based in the United States for channeling money to Hamas.⁸ The Court held that the

⁴ Paul Barrett, *The Big Bet to Hold Banks Liable for Terrorism*, BLOOMBERG BUSINESSWEEK (Feb. 19, 2015), <https://www.bloomberg.com/news/articles/2015-02-19/are-credit-suisse-rbs-standard-chartered-hsbc-and-barclays-terrorist-banks->.

⁵ 18 USC. § 2333(a) (2018).

⁶ *Id.*

⁷ Barrett, *supra* note 4.

⁸ *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1001 (7th Cir. 2002). Although plaintiffs secured a \$156 million jury verdict against defendants initially, the judgment was subsequently modified, and the defendants then declared bankruptcy and never paid the damages; according to a 2017 decision by the Northern District of Illinois, although defendants recommenced their operations under different names, the Court declined to reimpose the \$156 million verdict on procedural grounds. *See Boim v. Quranic Literacy Inst.*, No. 00 C 2905, 2017 WL 2179457, at *4 (N.D. Ill. May 18, 2017). As of the completion of this article, plaintiffs have yet to appeal.

ATA “would have little effect if liability were limited to persons who pull the trigger or plant the bomb because such persons are unlikely to have assets, much less assets in the U.S., and would not be deterred by the statute.”⁹ In a subsequent decision for the same case in 2008, Judge Richard Posner also expressed an expansive interpretation of the ATA when he compared donations to Hamas with “giving a loaded gun to a child, (which also is not a violent act), [as both are] act[s] dangerous to human life.”¹⁰ Both decisions were considered expansive interpretations of the ATA; however, this interpretation ultimately was not applied in other circuits, leading to a split.¹¹ Although the jury awarded \$156 million to the plaintiffs, the families were never able to collect under the ATA, as the defendant foundations declared bankruptcy.¹²

The less expansive approach of the ATA was cemented in 2016 when Congress passed the Justice Against Sponsors of Terrorism Act (JASTA), by overriding President Obama’s veto. Although JASTA amended the federal judicial code to expand the jurisdiction of American courts over foreign states by narrowing their immunity, it only authorizes federal court jurisdiction over civil claims against foreign states for physical injury to a person or property or death that occurs *inside* the U.S. as a result of: (1) an act of international terrorism, and (2) a tort committed anywhere by an official, agent, or employee of a foreign state acting within the scope of employment.¹³ Further, the legislation clarified that “international terrorism” does not include an act of

⁹ *Boim*, 291 F.3d at 1021.

¹⁰ *Boim v. Holy Land Foundation (Boim III)*, 549 F.3d 685, 690 (7th Cir. 2008).

¹¹ *Compare Boim III*, 549 F.3d at 693 *with* *Weiss v. National Westminster Bank PLC*, 768 F.3d 202 (2^d Cir. 2014). For a more in depth discussion, *see generally* Olivia G. Chalos, *Bank Liability Under the Antiterrorism Act: The Mental State Requirement Under § 2333(a)*, 85 *FORDHAM L. REV.* 303 (2016); *Freeman v. HSBC Holdings PLC*, No. 14 CV 6601 (DLI) (CLP), 2018 WL 3616845 (E.D.N.Y. July 27, 2018).

¹² *See Boim*, 2017 WL 2179457, at *4 (“The plaintiffs have not provided support by way of case law or statutory authority for an *ex parte* order deeming, in advance, that the proposed service under the Illinois statute will be proper.”).

¹³ Justice Against Sponsors of Terrorism Act, Pub. L. 114-222, 130 Stat. 852 (2016).

war, and that a tort claim based on an omission or merely negligent act was not within federal court jurisdiction.¹⁴ Additionally, it also allowed an American national to file a civil action against a foreign state for physical injury, death, or damage because of an act of international terrorism committed by a designated terrorist organization.¹⁵

JASTA further amended the federal criminal code to impose civil liability on a person who conspires to commit or aids and abets, by knowingly providing substantial assistance, an act of international terrorism committed, planned, or authorized by a designated terrorist organization.¹⁶ However, JASTA did not define “aids and abets,” and “substantial assistance” is a vague term. Additionally, JASTA further permitted the Department of Justice (DOJ) and the State Department to intervene in JASTA actions and seek a stay if they could certify that the State Department was engaged in good-faith discussions with the foreign state to resolve the civil claims.¹⁷ However, it is notable that JASTA did not supersede the ATA, adding additional complications for those trying to properly interpret both.

Because of the vagaries inherent to the ATA and JASTA, various lawsuits commenced as to their ultimate reach.¹⁸ The first to limit their reach was *Jesner v. Arab Bank*.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Notably, there are currently numerous lawsuits attempting to use JASTA to sue Google and Twitter, and are currently pending on appeal. *See generally* Gonzalez v. Google, Inc., 335 F. Supp. 3d 1156 (N.D. Cal. 2018) (currently on appeal); Crosby v. Twitter, Inc., 303 F. Supp. 3d 564, 565 (E.D. Mich. 2018) (currently on appeal); Pennie v. Twitter, Inc., 281 F. Supp. 3d 874, 877 (N.D. Cal. 2017), *appeal dismissed*, Pennie v. Twitter, Inc., No. 17-17536, U.S. App. LEXIS 29753 (9th Cir. Oct. 19, 2018) (holding that there wasn't sufficient nexus between the injury and where the services were entitled to immunity under Communications Decency Act (CDA) from action).

i. *Jesner v. Arab Bank*

On April 24, 2018, in its decision in *Jesner v. Arab Bank*, the Supreme Court inherently limited the reach of the ATA, notably without mentioning JASTA.¹⁹ In its decision, the Court found that non-American citizens in American courts under the Alien Tort Statute (“ATS”) for extraterritorial acts where the law of nations did not impose such liability could not sue foreign corporations, including banks.²⁰ Enacted in 1789, the ATS originally gave American courts jurisdiction over claims against foreign defendants accused of misconduct outside of America’s borders, and allowed foreign individuals to seek remedies in American courts for human rights violations.²¹ In 2013, however, the Supreme Court first limited the reach of the ATS in its decision in *Kiobel v. Royal Dutch Petroleum*,²² noting that the ATS can be used by foreign entities against foreign entities in American courts *only if* violations “touch and concern the territory of the US.”²³ Although the Supreme Court has yet to decide the jurisdictional reach of the ATA, there are similarities between the ATS and the ATA, a point that has been used emphatically by defendants in the relevant ATA cases, namely *Freeman v. HSBC* and *Linde v. Arab Bank*.²⁴

ii. *Freeman v. HSBC*

In 2014, 130 families of Americans who were victims of Iranian-sponsored terrorism in Iraq between 2004 and 2011 filed suit against HSBC, Standard Chartered Bank, Barclays, Commerzbank, Credit Suisse, and Royal Bank of Scotland

¹⁹ *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1404-05 (2018).

²⁰ *Id.* at 1403. See also Alison Frankel, *Human Rights Lawyers Look for Silver Lining in Kiobel Black Cloud*, REUTERS (Apr. 17, 2013), <https://reut.rs/2KJhHnM>.

²¹ 28 U.S.C. § 1350 (2018).

²² *Kiobel v. Royal Dutch Petroleum*, 569 U.S. 108, 124-25 (2013).

²³ *Id.* Note, there is a Circuit split in the reach of the ATS. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 120 (2d Cir. 2010); *Flomo v. Firestone Nat. Rubber Co., LLC*, 643 F.3d 1013, 1021 (7th Cir. 2011); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 71 (D.C. Cir. 2011).

²⁴ *HSBC Case*, OSEN LAW LLC, <http://www.osenlaw.com/case/hsbc-case> (last visited Feb. 12, 2019).

(RBS).²⁵ The suit claimed that more than 1,000 American servicemembers were killed or injured by Iranian-designed and manufactured IEDs, and that Iran would not have been able to manufacture such explosives had the named banking institutions adhered to OFAC sanctions.²⁶ Additionally, the suit alleged a conspiracy²⁷ between the banks, Iran, and Iranian Banks, that transferred “billions of US dollars through the [US] in a manner designed to circumvent US regulators’ and law enforcement agencies’ ability to detect and monitor the transactions,” and that this money went directly to terrorist organizations that maimed and killed U.S. servicemembers during the war on terror.²⁸

This attempt to legally pin culpability for violent deaths on bankers relied upon

an intricate theory of causation: The European-based banks have handled hundreds of billions of dollars in international transfers for Iranian financial institutions. The Iranian financial institutions, in turn, have moved money for the Islamic Revolutionary Guard Corps (IRGC), an elite Iranian paramilitary organization, and for Hezbollah, the militant Shia movement based in Lebanon and backed by Iran. The Revolutionary Guard and Hezbollah have trained and armed Shia groups in Iraq that have kidnapped, shot, and blown up Americans.²⁹

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Freeman*, 2018 WL 3616845, at *22:

In terms of conspiracy liability, since the *Linde* court did not expressly describe the standards to follow in assessing a conspiracy claim, this Court concludes that the Second Circuit would assess conspiracy claims under the construct by *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983). Based on *Halberstam's* description of conspiracy liability, as bolstered by traditional conspiracy law, the plaintiffs must allege: (1) an agreement to join a conspiracy, which can be inferred from a tacit understanding; (2) the performance of unlawful acts as part of the conspiracy; (3) injury caused by one or more of the parties; and (4) that these overt acts were pursuant to the common scheme and objective of the conspiracy. The parties need not share the same goal in joining the conspiracy; nor must they be aware of a co-conspirator’s intentions or goals in carrying out its overt acts.

²⁸ *HSBC Case*, *supra* note 24.

²⁹ *Barrett*, *supra* note 4.

Although this case is still pending, there is a chance that the Supreme Court may not hold the decision in *Jesner* applicable to *Freeman*, given that it concerns American citizens, and that the defendant banks actually conducted this illegality on American soil, which may be found to “touch and concern” a U.S. territory.³⁰ It is of note that subsequent to the Supreme Court’s decision in *Jesner*, on July 27, 2018, the District Court for the Eastern District of New York did not dismiss *Freeman* upon the defendant’s motion to dismiss, and the case is currently proceeding before the Eastern District, according to the standards set forth in *Linde v. Arab Bank*.³¹

iii. *Linde v. Arab Bank*

In July 2004, American terror victims and their estates sued Arab Bank, PLC, also in the District Court for the Eastern District of New York.³² The suit was premised on the ATA, and was the first civil lawsuit of its kind.³³ The suit attempted to hold Arab Bank liable “for deaths and severe injuries resulting from acts of international terrorism that Palestinian terrorist groups perpetrated between 2000 and 2004.”³⁴

The action commenced after a Passover bombing at a hotel in Netanya, Israel killed 30 people, including Americans, and wounded another 140.³⁵ After the attack, “the Israeli military recovered a trove of documents in the West Bank that allegedly linked Arab Bank to Hamas payments to the families of suicide bombers.”³⁶ Israel made the documents publicly available, and the suit was brought upon the realization that Arab Bank

³⁰ *Freeman v. HSBC Holdings PLC*, 1:14-cv-06601, COURTLISTENER, <https://www.courtlistener.com/docket/4323872/freeman-v-hsbc-holdings-plc/> (last visited Feb. 12, 2019). It is also of note that a new case was transferred and consolidated with *Freeman*, namely, *Martinez v. Deutsche Bank AG*, No. 16-1207-DRH, 2017 U.S. Dist. LEXIS 56095 (S.D. Ill. Apr. 12, 2017).

³¹ *Freeman*, 2018 WL 3616845, at *22.

³² *Arab Bank Case*, OSEN LAW LLC, <http://www.osenlaw.com/case/arab-bank-case> (last visited Feb. 12, 2019).

³³ *Id.*

³⁴ *Id.*

³⁵ Barrett, *supra* note 4.

³⁶ *Id.*

provided the critical link between donors and the encouragement of suicide bombers.³⁷ The extent of the proof of the perpetration included that Arab Bank had

knowingly provided material support to Hamas by illegally maintaining accounts for Hamas [and its senior leader] . . . that accepted multiple checks explicitly made out to beneficiary "Hamas;" . . . Arab Bank [also] knowingly provided material support to terrorist groups such as Hamas and Hezbollah that facilitated millions of dollars in direct transfers to the families of suicide bombers and other terrorist operatives through the Saudi Committee for the Support of the Intifada al Quds and the Al-Shahid Foundation. Lastly, the Plaintiffs proved that Arab Bank knowingly provided material support to Hamas by maintaining accounts for eleven Hamas-controlled organizations in the Palestinian Territories.³⁸

After more than ten years of litigation, a jury found Arab Bank liable for "knowingly providing financial services for Hamas" that provided the terrorist organization with millions of dollars over a period of five years, an offense sufficient to criminally convict an entity under the ATA.³⁹ After the verdict, Arab Bank filed three motions, one of which petitioned the U.S. Court of Appeals for the Second Circuit for review.⁴⁰ The Court denied such review, noting that the Bank's liability was established "[by] volumes of damning circumstantial evidence that defendant knew its customers were terrorists."⁴¹ Following this denial, Arab Bank chose to settle all ATA claims, but only if it would be allowed to take a one-time appeal of the liability verdict, again to the Second Circuit, which would then determine the settlement's precise contours.⁴²

³⁷ *Id.*

³⁸ *Arab Bank Case*, *supra* note 32.

³⁹ *Linde v. Arab Bank, PLC (Linde I)*, 97 F. Supp. 3d 287, 299 (E.D.N.Y. 2015), *vacated on other grounds*, *Linde v. Arab Bank, PLC (Linde II)*, 882 F.3d 314 (2d Cir. 2018).

⁴⁰ *See generally Linde II*, 882 F.3d at 314.

⁴¹ *Linde I*, 97 F. Supp. 3d at 313.

⁴² *Arab Bank Case*, *supra* note 32.

On February 9, 2018, the Second Circuit reversed itself, deciding that “material support” may not satisfy the ATA requirement of supporting international terrorism as a matter of law, and found procedural error in a jury instruction.⁴³ It then articulated a new parameter to pursue any bank under the ATA, stating that plaintiffs seeking to pursue claims of primary liability must prove more than simply a violation of the material support provisions of the ATA; there must be proof of the other elements necessary to prove an “act of international terrorism” as defined by 18 U.S.C. § 2331.⁴⁴ In other words, to establish primary liability, there must be proof that the defendant’s acts “also involve violence or endanger human life,” and “appear to be intended . . . to intimidate or coerce a civilian population . . . [or] to influence [or to affect] . . . a government.”⁴⁵ The court concluded that

providing routine financial services to members and associates of terrorist organizations is not so akin to providing a loaded gun to a child as to excuse the charging error here and compel a finding that as a matter of law, the services were violent or life-endangering acts that appeared intended to intimidate or coerce civilians or to influence or affect governments. That conclusion is only reinforced by our holding, in the context of a challenge to proof of the causation element of an ATA claim, that the mere provision of “routine banking services to organizations and individuals said to be affiliated with” terrorists does not necessarily establish causation. To be sure, the ATA’s causation and terrorist act elements are distinct, and plaintiffs argue that Arab Bank’s financial services to Hamas should not be viewed as routine. But that raises questions of fact for a jury to decide. Because we cannot conclude that a jury properly instructed as to all definitional requirements of § 2331(1) would have to find Arab Bank’s financial services to constitute acts of international terrorism supporting ATA liability, we

⁴³ *Linde II*, 882 F.3d at 314, 332.

⁴⁴ See *Freeman*, 2018 WL 3616845, at *22.

⁴⁵ *Id.*

adhere to our conclusion that the identified charging error requires vacatur and remand.⁴⁶

Pursuant to the settlement, no new jury was impaneled, or trial was had. However, the Second Circuit's surprising and fickle change of course should be of concern to those worried about stopping banks from financing terrorism via the ATA, especially in a post-*Jesner* era.⁴⁷

Additionally, it is notable that after *Linde* was filed, but before the jury verdict, OFAC launched its own probe against Arab Bank.⁴⁸ In 2005, the bank "agreed to a settlement with [OFAC]'s Financial Crimes Enforcement Network, which had been looking into whether the bank had adequate protections against money laundering and terrorism finance. Without admitting wrongdoing, Arab Bank agreed to pay a \$24 million fine and limit activities of its New York branch. [But] the settlement focus[ed] on the bank's procedural shortcomings," and not the fact that the bank was helping funnel money to terrorists.⁴⁹

The State Department and the DOJ were also involved in pretrial work against Arab Bank:

Arab Bank objected [to discovery measures as they] would kill its chances at trial and "threaten the ruin the single most important financial institution in the Palestinian territories and Jordan if not the entire Middle East," [o]fficials at the US Department of State shared at least some of the bank's alarm, although the [DOJ] and Treasury departments argued that the Obama administration

⁴⁶ *Linde II*, 882 F.3d at 327.

⁴⁷ A summary of the new parameters can be found in the latest decision in *Freeman*, 2018 WL 3616845, at *22 ("Having set forth these elements, the Court must examine the pleadings to determine whether plaintiffs have met their burden at this stage of either alleging the definitional requirements of Section 2331(1) under a theory of primary liability under the ATA, or sufficiently pleading the elements of a conspiracy claim as set out in *Halberstam* necessary to survive defendants' motion to dismiss under Rule 12(b)(6).").

⁴⁸ Barrett, *supra* note 4.

⁴⁹ *Id.*

shouldn't take the side of the accused bank. In the end, the administration split the difference. [DOJ] filed a brief that May, warning that the [discovery] order "could undermine the United States' vital interest in maintaining close cooperative relationships with Jordan and other key regional partners in the fight against terrorism." But [DOJ] also urged the Supreme Court to reject Arab Bank's plea for pretrial intervention, advice the high court followed.⁵⁰

While there are major differences between the facts in *Linde*, *Freeman*, and *Kiobel*, namely, that HSBC violated OFAC regulations while on American soil,⁵¹ in contrast to *Jesner*, there is no telling how this limiting trend will now affect the enforcement of the ATA. While Congress passed the ATA "to impose liability 'at any point along the causal chain of terrorism,' including the flow of money,"⁵² the ATA, which in its decades-long history has never permitted a plaintiff to collect,⁵³ may be further defanged by the progeny of *Jesner* and the enactment of JASTA, and, in any event, reinforces the need to pursue a different path other than lawsuits to combat terrorist financing.

B. OFAC & Its Ineffectiveness

Historically, the American government has used "targeted economic sanctions as a tool against international terrorists and terrorist organizations."⁵⁴ However, after the 9/11 terrorist attacks,

⁵⁰ *Id.*

⁵¹ See *Freeman*, 2018 WL 3616845, at *22.

⁵² 18 U.S.C. § 2333(a).

⁵³ See Sean Savage, *Supreme Court Will Not Hear Case Regarding American Victims of Palestinian Terror*, JEWISH NEWS SYNDICATE (Apr. 2, 2018), <https://www.jns.org/us-supreme-court-will-not-hear-case-on-american-victims-of-palestinianterror/>. Although the case is not indicative of banking institutions, the Second Circuit decision holds "that the victims needed to show they were specifically targeted or that the attackers intended to harm US interests," to use the ATA. *Id.*

⁵⁴ OFF. FOREIGN ASSETS CONTROL, DEP'T OF TREASURY, TWENTY-FOURTH ANNUAL REPORT TO THE CONGRESS ON ASSETS IN THE UNITED STATES RELATING TO TERRORIST COUNTRIES AND INTERNATIONAL TERRORISM PROGRAM DESIGNEES 2 (2015).

President Bush issued Executive Order 13224 [also known as the “Patriot Act”], significantly expanding the scope of then-existing US sanctions against terrorists and terrorist organizations. The combination of programs targeting international terrorists and terrorist organizations with those targeting terrorism-supporting governments constitutes a wide-ranging assault on international terrorism and its supporters and financiers.⁵⁵

To “[s]top[] the ability of terrorists to finance their operations ... the [Bush] Administration ... implemented a three-tiered approach based on (1) intelligence and domestic legal and regulatory efforts; (2) technical assistance to provide capacity-building programs for US allies; and (3) global efforts to create international norms and guidelines.”⁵⁶ This article focuses primarily on the first tier: the intelligence and domestic legal and regulatory efforts.

To begin its regulatory efforts, the Bush Administration established OFAC within Treasury. It designated OFAC as the lead office responsible for implementing sanctions with respect to assets of international terrorist organizations and terrorism-supporting countries.⁵⁷ Still in operation, OFAC implements sanctions as part of its general mission to administer and enforce economic and trade sanctions based on American foreign policy and national security goals.⁵⁸ In administering and enforcing US economic sanctions programs, OFAC focuses on identifying persons for terrorist designation; assists parties, such as banks, in complying with the sanctions prohibitions through its compliance and licensing efforts; assesses civil monetary penalties against persons violating the prohibitions, either

⁵⁵ *Id.*

⁵⁶ MARTIN A. WEISS, CONG. RESEARCH SERV., RL33020, TERRORIST FINANCING: US AGENCY EFFORTS AND INTER-AGENCY COORDINATION (2005).

⁵⁷ *About OPAC*, DEP'T OF TREASURY, <https://www.treasury.gov/about/organizational-structure/offices/pages/office-of-foreign-assets-control.aspx> (last visited Feb. 12, 2019).

⁵⁸ *Office of Foreign Assets Control - Sanctions Programs and Information*, DEP'T OF TREASURY, <https://www.treasury.gov/resource-center/sanctions/pages/default.aspx> (last visited Feb. 12, 2019).

through commencing lawsuits or orchestrating settlements; works with other American government agencies, including law enforcement, on sanctions-related issues needing coordination; and coordinates with other nations to implement similar strategies.⁵⁹ Currently, OFAC administers sanctions programs targeting international terrorists and terrorist organizations, their supporters, and countries that have been designated as state sponsors of terrorism.⁶⁰ “Many of the sanctions are based on United Nations and other international mandates, are multilateral in scope, and involve close cooperation with allied governments.”⁶¹

When OFAC is alerted to potential violations of sanctions, it begins to probe into the bank’s alleged illicit activities. If it finds such activity, it contemplates prosecution or settlement. The banking institutions prefer settlement, as exemplified by the fact that OFAC has yet to commence a prosecution in the eighteen years since its enactment. Part of such OFAC settlements include DOJ deferred-prosecution agreements, “which have corporate defendants pay fines, don’t dispute they’ve done wrong, and promise to reform—all with the threat looming of a potential future criminal indictment should they not reform.”⁶² To date, although many financial institutions have not

⁵⁹ *Id.* One of the most recent developments in this area was the Hizballah International Financing Prevention Act Amendments Act (“HIFPAA”), which imposes secondary sanctions on the [Hezbollah Foreign Relations Department or] FRD. While the FRD is already sanctioned by the United States, secondary sanctions require the administration to sanction ‘any foreign person that the President determines knowingly provides significant financial, material, or technological support for or to’ the FRD, in addition to other Hezbollah actors engaged in fundraising and recruitment. See Matthew Zweig, *US Law Targets Hezbollah in Europe*, REAL CLEAR WORLD (Feb. 26, 2019), https://www.realclearworld.com/articles/2019/02/26/us_law_targets_hezbollah_in_europe_112972.html.

⁶⁰ *Id.*

⁶¹ *About OPAC*, *supra* note 57.

⁶² Barrett, *supra* note 4. “Credit Suisse resolved its sanctions violations with an agreement to pay \$536 million in fines in December 2009. Royal Bank of Scotland agreed to \$500 million in May 2010; Barclays, \$298 million in August 2010; Standard Chartered, \$667 million in December 2012; and HSBC, \$1.9 billion, also in December 2012. Stuart Gulliver, HSBC Group’s chief

reformed,⁶³ the DOJ has declined to commence any prosecution of the continuously offending institutions.

i. The Credit Suisse Settlement

In 2009, after funneling hundreds of millions of dollars to sanctioned entities,⁶⁴ Credit Suisse settled its OFAC violations for \$536 million.⁶⁵ This settlement was orchestrated because both OFAC and the DOJ had found that Credit Suisse had

deliberately removed material information, such as customer names, bank names and addresses, from payment messages so that the wire transfers would pass undetected through filters at U.S. financial institutions. Credit Suisse was also convicted of training its Iranian clients to falsify wire transfers so that such messages would also pass undetected through the U.S. financial system. This scheme allowed U.S. sanctioned countries and entities to move hundreds of millions of dollars through the U.S. financial system.

For its Iranian clients, Credit Suisse promised that no message would leave the bank without being hand-checked by a Credit Suisse employee to ensure that the message had been formatted to avoid U.S. filters. If an Iranian client provided payment messages that contained

executive officer, said of the settlement that the bank, Europe's largest, was "profoundly sorry" and accepted 'responsibility for our past mistakes.'" *Id.*

⁶³ See, e.g., News Release, Fin. Indus. Regulatory Auth., FINRA Fines Credit Suisse Securities (USA) LLC \$16.5 Million for Significant Deficiencies in its Anti-Money Laundering Program (Dec. 5, 2016) [hereinafter FINRA], available at <http://www.finra.org/newsroom/2016/finra-fines-credit-suisse-165-million-significant-deficiencies-its-aml-program>.

⁶⁴ Claudio Gatti & John Eligon, *Iranian Dealings Lead to a Fine for Credit Suisse*, N.Y. TIMES (Dec. 15, 2009), <https://www.nytimes.com/2009/12/16/business/16bank.html>.

⁶⁵ Press Release, Dep't of Treasury, OFAC, U.S. Treasury Department Announces Joint \$536 Million Settlement with Credit Suisse AG (Dec. 16, 2009), available at <https://www.treasury.gov/press-center/press-releases/Pages/tg452.aspx>; see also News Release, Dep't of Justice, Office of Public Affairs, Credit Suisse Agrees to Forfeit \$536 Million in Connection with Violations of International Emergency Economic Powers Act and New York State Law (Dec. 16, 2009), available at <https://www.justice.gov/opa/pr/credit-suisse-agrees-forfeit-536-million-connection-violations-international-emergency>.

identifying information, Credit Suisse employees would remove the detectable information so that the message could pass undetected through OFAC filters at U.S. financial institutions.⁶⁶

Simply, OFAC, through its then-Under Secretary for Terrorism and Financial Intelligence, Stuart Levey,⁶⁷ found that, for decades, “Credit Suisse’s international communications showed a continuous dialogue about the scheme, assessing how to better process Iranian transactions to ensure increased business from existing and future Iranian clients, going so far as providing its Iranian clients with a pamphlet entitled, ‘How to transfer USD payments,’ which provided detailed payment instructions on how to avoid triggering OFAC filters or sanctions.”⁶⁸ Assistant Attorney General Lanny A. Breuer articulated it bluntly: “Through its egregious conduct, Credit Suisse illegally moved hundreds of millions of dollars through the American financial system and actively assisted sanctioned countries in evading US laws. In essence, Credit Suisse said to sanctioned entities, ‘We’ve got a service, and that service is helping you evade US banking regulations.’”⁶⁹

Still, instead of pursuing legal action, OFAC chose to settle with Credit Suisse, stating that since “[t]hroughout the investigation, Credit Suisse ha[d] provided prompt and substantial cooperation, including working with regulators to find a method consistent with Swiss law to disclose a significant portion of the data, communications and documentation underlying the misconduct.”⁷⁰ Since “Credit Suisse has also committed substantial resources to conducting an extensive internal investigation of the misconduct and has agreed to

⁶⁶ *Id.*

⁶⁷ Although Levey was the first Under Secretary for Terrorism and Financial Intelligence in Treasury, serving from July 2004 to February 2011, shortly after the Credit Suisse settlement, Levey became the Chief Legal Officer at HSBC, commencing in January 2012. See *Leadership, Stuart Levey*, HSBC, <https://www.hsbc.com/who-we-are/leadership/stuart-levey> (last visited Feb. 12, 2019).

⁶⁸ Dep’t of Justice, *supra* note 65.

⁶⁹ *Id.*

⁷⁰ *Id.*

enhance its sanctions compliance programs to be fully transparent in its international payment operations,” and they could pin violations on no specific person, no such action needed to be commenced.⁷¹ Instead, this settlement was to be the end of any such prosecutions.

While \$530 million may seem like a hefty fine, it is of note that this offense was perpetrated over many years, of which the average profit for Credit Suisse was over \$30 billion per year.⁷² Moreover, while the financial crisis has something to do with Credit Suisse’s sharp downturn in gross profit in 2008, it is of note that in 2009, the year of the settlement, Credit Suisse had a \$22 billion increase in gross profit from 2008,⁷³ while many banks were still declining in profitability. This increase in gross profit despite the settlement underscores how a bank’s profitability is not being affected by the settlements.

It is unclear if anyone at OFAC, in the ten years since the offense, has monitored Credit Suisse to ensure that it is now in compliance with the regulations. However, it is notable that, just in December 2016, the Financial Industry Regulatory Authority (“FINRA”) found Credit Suisse to again be in violation of sanctions. FINRA then fined the bank \$16.5 million for failing to investigate high-risk activity, and for failing “to properly implement its automated surveillance system to monitor for potentially suspicious money movements” from 2011 until 2015,⁷⁴ something that had been a part of the initial settlement agreement in 2009.⁷⁵ This quick recidivism further underscores the clear profitability of banks orchestrating terrorist financing, and how the settlements do not deter banks from seeking these illicit profitable measures.

⁷¹ *Id.*

⁷² *Credit Suisse Group Gross Profit 2006-2018*, MACRO TRENDS, <https://www.macrotrends.net/stocks/charts/CS/credit-suisse-group/gross-profit> (last visited Feb. 12, 2019).

⁷³ *Id.*

⁷⁴ FINRA, *supra* note 63.

⁷⁵ Dep’t of Justice, *supra* note 65.

ii. Subsequent Regulatory Modifications Since the Credit Suisse Settlement

After the Credit Suisse Offense, Congress stepped in by choosing to increase fines to dissuade offenders,⁷⁶ instead of choosing to improve monitoring and regulation. Perhaps this was because the banking industry was already so heavily regulated;⁷⁷ perhaps this was because Congress thought higher fines would be an adequate dissuasion to stop banks from funneling money to terrorists. Either way, analysts found that, by 2014, “OFAC fines ha[d] skyrocketed ... [W]hen Congress effected an increase in the statutory maximum per violation, [they moved the] cap [from] \$11,000 to \$250,000 per violation or twice the value of the underlying transaction.”⁷⁸

However, Congress then clarified that “[w]hen assessing fines, OFAC [should] look[] to a myriad of factors, including the awareness of senior management, the size and sophistication of the entity, and reporting procedures. The more sophisticated the entity being investigated, and the higher the level of knowledge of the infractions within the entity, the heftier the fines. However, if an entity self-reports a violation, fines can be slashed in half.”⁷⁹

Even with this modification, however, Congress’s amendments have allowed OFAC to rake in an

[U]nprecedented amount of fines. In 2008, before enhanced penalties became effective, total penalties amassed were approximately \$3.5 million for 108 settled matters. Just one year later OFAC amassed an amount of

⁷⁶ Erica Sollie, *\$1.1 billion and counting – the new era of OFAC enforcement*, BAKER & HOSTETLER LLP (Mar. 4, 2014), <http://www.bakerlaw.com/alerts/11-billion-and-counting-the-new-era-of-ofac-enforcement>.

⁷⁷ S. Comm. on Banking, Housing, and Urban Affairs, *supra* note 3.

⁷⁸ Sollie, *supra* note 76.

⁷⁹ *Id.* This is further illustrated in the Royal Bank of Scotland (RBS) settlement, where the bank paid \$33 million to settle OFAC violations arising out of transactions made in Iran, Sudan, Myanmar, and Cuba, but because RBS self-reported these violations, it was able to avoid paying the statutory maximum of over \$132 million. *Id.*

over \$772 million for just 27 matters – increasing penalties per matter by nearly one-thousand-fold. Recent years have proven that this jump was no anomaly, but rather the beginning of a new era of heightened OFAC enforcement and penalty assessment. 2012 was the biggest year thus far, with OFAC windfalls of over \$1.1 billion for only 16 matters.⁸⁰

In 2014, such settlements were “indicative of a global movement toward international and national banking institutions uncovering and disclosing past OFAC regulatory violations to regulators,” which should assure banking compliance with OFAC regulations.⁸¹ This is simply not the case, however, as evidenced by the recidivism of Credit Suisse and countless others, including HSBC.⁸²

iii. The HSBC Settlement

Just over two years after the Credit Suisse Settlement, in 2012, a new offender was put on OFAC’s radar: HSBC Holdings PLC. The offenses seemed similar and as egregious as those of Credit Suisse, even though Congress had put the new measures in place to deter such violations.⁸³ The offenses seemed to stem from an internal email from a HSBC Europe relationship manager to members of the HSBC US Compliance Unit that stated:

⁸⁰ *Id.* Throughout those years settlements included: HSBC with a fine of \$1.9 billion; ING Bank with a fine of \$619 million; Standard Chartered Bank with a fine of \$132 million; Bank of Tokyo-Mitsubishi UFJ, Ltd, with a fine of \$8.5 million; JP Morgan Chase Bank with a fine of \$88 million; Lloyds TSB Bank with a fine of \$217 million; and Barclays Bank PLC with a fine of \$176 million. *Id.*

⁸¹ *Id.* However, since the start of the Trump administration, we’ve seen an unprecedented lessening in OFAC’s activities, with only two settlements thus far in 2019, and seven in 2018, compared with fifteen in 2015, and twenty-two in 2014. See DEP’T OF TREASURY, CIVIL PENALTIES AND ENFORCEMENT INFORMATION, <https://www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx> (last visited Feb. 12, 2019); see also Samuel Rubinfeld, *Societe Generale to Pay \$1.3 Billion to Resolve U.S. Sanctions, Money-Laundering Violations*, WALL ST. J. (Nov. 19, 2018), <https://www.wsj.com/articles/societe-generale-to-pay-1-3-billion-to-resolve-u-s-sanctions-money-laundering-violations-1542652611>.

⁸² FINRA, *supra* note 63.

⁸³ Sollie, *supra* note 76.

[W]e have instructed Bank Melli to alter the format of [its] payments to achieve straight through [processing] . . . we have further asked them to only put 'One of our clients' in field 52, thus removing the chance of them inputting an 'Iranian referenced' customer name, that causes fall out of the cover payment sent to HBUS and a breach of OFAC regulations . . . The key is . . . that the outgoing payment instruction from HSBC will not quote 'Bank Melli' as sender - just HSBC London . . . This then negates the need to quote 'DO NOT MENTION OUR NAME IN NEW YORK' in field 72."⁸⁴

This email explicitly endorsed the practice of officials evading OFAC filters, and allowed close to \$500 million to transfer to Iran and other OFAC sanctioned countries. It also was clear that officials throughout HSBC US, including compliance officials, their head, and business managers, "were aware that HS[BC Europe] was discussing with Bank Melli how to structure Iranian-related payments to be processed through [the US]" even though they were warned that "OFAC might view [the] formatting instructions to Bank Melli as a willful disregard or evasion of US sanctions, and that the non-transparent nature of the payment messages could make it impossible . . . to confirm that any payment would be permissible . . . pursuant to US sanctions regulations."⁸⁵ Further, although a few heads attempted to stop this illegal activity, and a proposal was agreed upon, it was never implemented, nor did anyone at HSBC appear to be in charge of implementing it.⁸⁶ Additionally, by June 2007, "as a result of a meeting between a senior . . . Treasury official and the HSBC Group Compliance head, the HBME Deputy Chairman and HSBC head of Group Compliance agreed that HSBC Group should immediately end its Iranian relationships."⁸⁷

⁸⁴ Settlement Agreement Between Off. Foreign Assets Control and HSBC Holdings, Dep't of Treasury (Dec. 10, 2012) [hereinafter Settlement Agreement], https://www.treasury.gov/resource-center/sanctions/CivPen/Documents/121211_HSBC_Settlement.pdf.

⁸⁵ *Id.* It is notable that close to the time of the OFAC settlement, Levey, the former Under Secretary for Terrorism and Financial Intelligence of the Treasury, became the Chief Legal Officer at HSBC. See HSBC, *supra* note 67.

⁸⁶ Settlement Agreement, *supra* note 84.

⁸⁷ *Id.*

However, it is unclear if that agreement was ever put into action, as HSBC continued to have an Iranian presence⁸⁸ at least until 2012, when the settlement agreement was imposed.

While OFAC was deciding what to do about HSBC's numerous violations, the US Senate published an investigatory report that was strongly critical of HSBC's policies promoting the evasion of OFAC filters.⁸⁹ The report alleged that

HSBC ... [1] had not treated its Mexican affiliate as high risk, despite the country's money laundering and drug trafficking ... [2] had transported \$7 billion in US bank notes to [sanctioned entities] ... [3] had circumvented US safeguards designed to block transactions involving terrorists, drug lords and rogue states, including allowing 25,000 transactions over seven years without disclosing their links; [4] providing US dollars and banking services to some banks in Saudi Arabia despite their links to terrorist financing; [and 5] in less than four years it had cleared \$290 m[illion] in "obviously suspicious" US travellers' checks.⁹⁰

Despite the Senate report and the ensuing negative publicity, OFAC decided to settle once again, forcing HSBC to pay \$1.9 billion in fines.⁹¹

"[A]s big as the \$1.9bn penalty looks, it could have been much worse,"⁹² BBC Business Editor Robert Peston commented.

⁸⁸ *All Things Considered* (NPR Broadcast Dec. 11, 2012), <https://www.npr.org/2012/12/11/167000599/hsbc-officials-knowingly-dealt-with-iranian-banks>.

⁸⁹ Robert Peston, *HSBC to Pay \$1.9bn in US Money Laundering Penalties*, BBC NEWS (Dec. 11, 2012), <http://www.bbc.com/news/business-20673466>.

⁹⁰ *HSBC Blasted for 'Stunning Failures Over Oversight'*, BBC NEWS (Dec. 11, 2012), <http://www.bbc.com/news/business-20683421>; see generally STAFF OF S. PERMANENT SUBCOMM. ON INVESTIGATIONS, 112TH CONG., U.S. VULNERABILITIES TO MONEY LAUNDERING, DRUGS, AND TERRORIST FINANCING: HSBC CASE HISTORY (Comm. Print 2012).

⁹¹ Settlement Agreement, *supra* note 84.

⁹² Peston, *supra* note 89. It is of note that HSBC profit in 2012 was still almost \$72 billion. See *HSBC Gross Profit*, MACRO TRENDS, <https://www.macrotrends.net/stocks/charts/HSBC/hsbc/gross-profit> (last visited Feb. 12, 2019).

He further explained that what OFAC had done was essentially put the bank on probation for funneling billions of dollars to terrorists globally.⁹³ This was clearly the preferable option for HSBC, because “if HSBC had been indicted for these offences, that would have meant that the US government and others could no longer have conducted business with it, which would have been humiliating and highly damaging.”⁹⁴ Further, its new Chief Legal Officer, Levey, knew all too well that this was the preferable option, having served as the Under Secretary for Terrorism and Financial Intelligence in Treasury from July 2004 to February 2011.⁹⁵

OFAC explained that this option was also preferable to the US government. As the bank “had taken on new senior management [including Levey] since the time the problems happened . . . [I]t ha[d] appointed a former US official to work as its head of financial crime compliance, which is a new position.” Further, as with Credit Suisse, OFAC explained that it did not commence a criminal prosecution because, “they never found one bank official or any collection of bank officials acting together that were doing this on purpose. They painted a picture of a disorganized bank not communicating with itself that was collecting all of these fees and either not knowing or not wanting to know where it was all coming from.”⁹⁶

However, in 2016, OFAC’s failure to commence a criminal prosecution against HSBC became known. According to a House Committee Report, OFAC chose not to prosecute HSBC *not* because they lacked “adequate evidence to prove HSBC’s criminal conduct[; rather] internal Treasury documents show that DOJ leadership declined to pursue” a prosecution recommendation by the agency’s Asset Forfeiture and Money Laundering Section staff “because senior DOJ leaders were concerned that prosecuting the bank ‘could result in a global

⁹³ *Id.* See also Settlement Agreement, *supra* note 84.

⁹⁴ Peston, *supra* note 89.

⁹⁵ See HSBC, *supra* note 67.

⁹⁶ CBS News, *Why No Prosecution for HSBC Money Laundering?*, YOUTUBE (Dec. 11, 2012), <https://www.youtube.com/watch?v=4C05S0pVKQE>.

financial disaster’—as [Britain’s Financial Services Authority] repeatedly warned.”⁹⁷

It is understood that the government ought to avoid causing a global financial disaster, but as a result, banking institutions simply have not been held accountable for financially aiding terrorists. This inexcusable lack of government prosecution culminated in the ATA finally being used in civilian suits⁹⁸ against the biggest offenders in the industry, including HSBC and Credit Suisse, as discussed *supra*. One of the plaintiffs’ lawyers for the *Linde* and *Freeman* cases, Gary Osen, has explained this need to use the ATA: “[t]he government settlements don’t connect the dots between the evidence of widespread concealment of the defendants’ dealings with [those terrorists] financed by those [] banks. [So our suits are] connecting the dots.”⁹⁹

iv. The Current State of OFAC

Since the election of the new administration, there has been a steady decline in OFAC activity.¹⁰⁰ This can be for a variety of reasons. On the positive end, many banking institutions now have robust compliance divisions of which some of their duties are dedicated to OFAC enforcement,¹⁰¹ and law firms have created divisions to counsel clients on how to

⁹⁷ REPUBLICAN STAFF OF H. COMM. ON FIN. SERVS., 114TH CONG., TOO BIG TO JAIL: INSIDE THE OBAMA JUSTICE DEPARTMENT’S DECISION NOT TO HOLD WALL STREET ACCOUNTABLE 27 (Comm. Print 2016) [hereinafter Comm. on Fin. Servs.].

⁹⁸ *HSBC Case*, *supra* note 24.

⁹⁹ Barrett, *supra* note 4.

¹⁰⁰ Dep’t of Treasury, *supra* note 81. A notable exception to this is OFAC’s November 2018 Societe Generale settlement, in which Societe Generale was fined \$1.34 billion for offenses similar to those committed by HSBC and Credit Suisse. Prosecutors alleged that the bank “avoided detection, in part, by making inaccurate or incomplete notations on payment messages that accompanied the transactions . . . [and] engaged in a deliberate practice of concealing.” However, it is arguable that this investigation and negotiations commenced prior to the current administration taking office. See Rubinfeld, *supra* note 81.

¹⁰¹ Anthony Effinger, *The Rise of the Compliance Guru – and Banker Ire*, BLOOMBERG (Jun. 25, 2015), <https://www.bloomberg.com/news/features/2015-06-25/compliance-is-now-calling-the-shots-and-bankers-are-bristling>.

mitigate risks *before* OFAC commences actions.¹⁰² However, one of the current administration's main platforms is banking regulation rollback,¹⁰³ and it has regularly followed through on this promise.¹⁰⁴ Further, Comptroller of the Currency Joseph Otting has made it clear that reform in this area is one of his top priorities, stating in testimony before the Senate Banking Committee that compliance with current anti-money laundering ("AML") requirements has become "inefficient and costly," requiring banking institutions to spend "billions each year,"¹⁰⁵ and confirming that there would be rollbacks on regulations as agencies attempt to further streamline them.

Still, the likelihood that *most* banking institutions are suddenly compliant with AML and sanctions regulations is unlikely, given the rate of recidivism¹⁰⁶ *before* the current administration was elected. Additionally, FINRA stated in its 2018 Report on Examination Findings that it "continues to find problems with the adequacy of some firms' overall AML programs; allocation of AML monitoring responsibilities, particularly responsibilities for trade monitoring; data integrity in AML automated surveillance systems, especially in suspense accounts for processing foreign currency money movements and conversions; firm resources for AML programs; and independent testing of AML monitoring programs."¹⁰⁷ Therefore, even if the current administration follows through on its planned rollbacks, in the AML and sanctions arena some sort of policing of banking

¹⁰² Matthew L. Biben, *Strengthening Your AML Compliance Program*, N.Y.L.J. (Mar. 27, 2018), <https://www.law.com/newyorklawjournal/2018/03/27/strengthening-your-aml-compliance-program/?slreturn=20190118154814>; see also Jeremy Paner, *Nearly 75 Percent of OFAC Penalties Have One Commonality*, HOLLAND & HART, TRADE SANCTIONS BLOG (Apr. 2, 2018), <http://www.tradesanctions.com/nearly-75-percent-ofac-penalties-one-commonality/#page=1>.

¹⁰³ See Lane, *supra* note 3.

¹⁰⁴ See Alicia Adamczyk, *What Trump's Banking Deregulations Mean for You*, LIFEHACKER: TWO CENTS (Jun. 1, 2018), <https://twocents.lifehacker.com/what-trumps-banking-deregulations-mean-for-you-1826484981>.

¹⁰⁵ S. Comm. on Banking, Housing, and Urban Affairs, *supra* note 3.

¹⁰⁶ FINRA, *supra* note 63.

¹⁰⁷ See Fin. Indus. Regulatory Auth., *Report on FINRA Examination Findings* (Dec. 2018), 10 available at http://www.finra.org/sites/default/files/2018_exam_findings.pdf.

institutions is still necessary to ensure the US financial industry is not used as a financial playground for terrorists.

III. ANALYSIS

After the Credit Suisse Offense, Congress chose to increase fines for offenders,¹⁰⁸ instead of improving monitoring and regulation of the banks. In addition, while OFAC has proudly proclaimed that it has raked in an “unprecedented amount of fines,”¹⁰⁹ this increase in fines and settlements simply proves that fines do not adequately deter banks¹¹⁰ from continuing their illegal activities, or, if they have yet to be caught, from stopping those activities altogether.¹¹¹

Furthermore, legal action is now pending against many of the settled banks that had promised reform.¹¹² Credit Suisse in particular had promised to have new measures in place to investigate its high-risk activity and ensure compliance with OFAC sanctions. However, in December 2016, FINRA found Credit Suisse to again be in violation of the US financial regulatory scheme, and again fined the bank \$16.5 million primarily for failing to investigate high-risk activity, and for failing “to properly implement its automated surveillance system to monitor for potentially suspicious money movements” from 2011 until 2015.¹¹³ This partial failure of implementation just

¹⁰⁸ Sollie, *supra* note 76.

¹⁰⁹ *Id.*

¹¹⁰ Because the aforementioned examples are so exemplary, this Section will focus on HSBC and Credit Suisse’s continued offenses since the settlements.

¹¹¹ For example, Societe Generale continued to commit its offenses even after HSBC and Credit Suisse settled with OFAC, undeterred by the immense fines both banks had paid; in addition, Credit Suisse reoffended after its settlement, undeterred by the fine it itself had paid. See Rubinfeld, *supra* note 79; FINRA, *supra* note 63.

¹¹² See Freeman, 2018 WL 3616845, at *1.

¹¹³ FINRA, *supra* note 63. Note that, FINRA’s 2019 Risk Monitoring and Examination Priorities Letter also notes that FINRA will continue to review for compliance with AML, which remains an ongoing area of focus for the agency. See Fin. Indus. Regulatory Auth., *2019 Risk Monitoring and Examination Priorities Letter* (Jan. 2019), available at http://www.finra.org/sites/default/files/2019_Risk_Monitoring_and_Examination_Priorities_Letter.pdf. However, FINRA is not OFAC, and just because FINRA

two years after the Credit Suisse settlement may be credited to the lack of OFAC oversight of Credit Suisse subsequent to the settlement; however, it may also be credited with the fact that fines are simply not an adequate deterrent to stop banks from continuing their illegal activities.

Another reason for this rate and tendency for recidivism is likely the substantial profit the banks make from the illegal activities, since it is far greater than the fines OFAC implements. To take the Credit Suisse example, Credit Suisse conducted thousands of illegal transactions spanning two decades, but only paid a \$536 million fine.¹¹⁴ To say that the fine was larger than the profit Credit Suisse made from such transactions would be ludicrous, as in 2009, the year of the settlement, Credit Suisse raked in over \$30 billion in gross profits, which was \$22 billion greater than its gross profits in 2008 as a result of the financial crisis.¹¹⁵ Over the many decades that banks have engaged in this kind of activity, given how much they stand to financially gain on each individual transfer, the insignificance of the even larger settlements, like Societe Generale's settlement of \$1.34 billion,¹¹⁶ and HSBC's settlement of \$1.9 billion,¹¹⁷ becomes obvious. Settlements simply do not force banks to rethink their illegal and immoral financial behavior.

This tendency for recidivism may also be because many banks, especially those based in Europe, do not care for American regulations and sanctions, especially after the Iran

is continuing to monitor offenses does not mean that OFAC is continuing to monitor or is doing so effectively.

¹¹⁴ Dep't of Treasury, *supra* note 65.

¹¹⁵ Macro Trends, *supra* note 72. See also Matt Egan, *American Bank Profits Are Higher Than Ever*, CNN BUS. (Mar. 3, 2017), <https://money.cnn.com/2017/03/03/investing/bank-profits-record-high-dodd-frank/index.html>.

¹¹⁶ Katanga Johnson et. al, *Societe Generale to Pay \$1.4 billion to Settle Cases in the U.S.*, REUTERS (Nov. 19, 2018), <https://www.reuters.com/article/us-usa-fed-socgen/societe-generale-to-pay-1-4-billion-to-settle-cases-in-the-u-s-idUSKCN1NO26B>.

¹¹⁷ Settlement Agreement, *supra* note 84.

Deal.¹¹⁸ Such tendencies are exemplified by the results of government investigations, which cite to

numerous examples of [these] ... European banks allegedly seeking to obscure dealings with the Iranian institutions. In one series of internal memos ... Barclays employees acknowledged using a method called “cover payments” to “circumvent US legislation” barring business with Iran, Cuba, and certain other countries. “Moral risk exists if we carry on using cover payments, but that is what the industry does,” a ... Barclays memo stated. “IMHO”—in my humble opinion—the memo continued, “we should carry on using cover payments and accept that there is a risk of these being used on occasion to hide true beneficiaries (who may or may not be sanctioned individuals or entities)” ... In an ... e-mail, the head of Standard Chartered Bank’s New York operation warned an executive at the home office in London that continuing to do business covertly with counterparties in Tehran potentially exposed “management in US and London (e.g. you and I) and elsewhere to personal reputational damages and/or serious criminal liability.” The Standard Chartered executive in London allegedly responded: “You [obscenity] Americans, who are you to tell us, the rest of the world, that we’re not going to deal with the Iranians?”¹¹⁹

Still, many banks claim the defense that their recidivism is not intentional,¹²⁰ and is the result of overregulation, as banks cannot keep up with every reform when there are so many.¹²¹ Prior to 9/11, the AML regulations were really driven toward preventing banks from processing transactions for drug

¹¹⁸ Barrett, *supra* note 4.

¹¹⁹ *Id.*

¹²⁰ *American Banks Think They are Over-regulated*, THE ECONOMIST (May 4, 2017), <https://www.economist.com/special-report/2017/05/04/american-banks-think-they-are-over-regulated>.

¹²¹ John Merline, *US Regulatory Costs are World's No. 10 Economy*, INVESTOR'S BUS. DAILY (Apr. 29, 2014), <https://www.investors.com/news/economy/regulatory-economy-booms-under-president-obama/>. Federal regulatory authorities issued 3,659 rules last year alone; that is one new rule every 2.5 hours. *Id.*

traffickers and organized crime.¹²² Nevertheless, when the 9/11 terrorists spent between \$400,000 and \$500,000 to plan and conduct their attack, and used the anonymity of the global financial system to move their money through ordinary transactions,¹²³ it was “realized that the financing of terrorism was something the government had to pay attention to.”¹²⁴ This was because it was not that the existing mechanisms had failed; rather, the existing mechanisms were “never designed to detect or disrupt transactions of the type that financed 9/11.”¹²⁵

Upon analysis, Congress decided that law enforcement agencies such as the FBI could not detect these transactions alone; it needed help from the banking institutions themselves.¹²⁶ But, these regulations have evolved significantly since 9/11, so now “check cashers, credit card companies, wire transfer companies, jewelers . . . [are subject to regulations] since everyone’s worried something will slip through the cracks. Nobody wants to be the examiner for the bank where the transactions that finance the next 9/11 goes through.”¹²⁷ As a result, regulators are requesting everything from the banks, to not let the institution get away with anything.¹²⁸ However, this reaches a point of “diminishing returns,”¹²⁹ as banks will “spend lots and lots of money to show progress that they’re dealing with these issues, but they’re not necessarily dealing with them smartly. So now their resources are completely misfocused on trying to put their fingers in the holes . . . and fix the little leaks, while something really bad is happening at the top, and no one’s really had the bandwidth to step back and look at the bigger picture.”¹³⁰ The bigger picture, according to KPMG Forensic Analyst Teresa Pesce, is asking whether a bank is really stopping

¹²² KPMG US, *Terrorist Financing and Anti-Money Laundering Regulation*, YOUTUBE (Jan. 27, 2016), <https://www.youtube.com/watch?v=7Ldx2EVYnJI>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* (citing THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES (2004)).

¹²⁶ *Id.*

¹²⁷ KPMG US, *supra* note 122.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

terrorist financing by looking at “all these student loan transactions, or credit card transactions, or auto finance transactions . . . [because] the answer is probably not.”¹³¹ Note, financial institutions such as banks have already spent billions on anti-money laundering compliance efforts, yet they still fall short of meeting regulators’ expectations.¹³² It is unclear if the billions figure also includes the settlements they have paid to OFAC.

Besides the lack of deterrence due to either the lack of pressure settlements put on bank reform, or the overregulation of the industry, there is another particularly fascinating aspect. In 2016, the House exposed that a prosecution was not commenced by OFAC not because the agency lacked “adequate evidence to prove HSBC’s criminal conduct[; rather] internal Treasury documents show that DOJ leadership declined to pursue” a prosecution recommendation “because senior DOJ leaders were concerned that prosecuting the bank ‘could result in a global financial disaster’—as [Britain’s Financial Services Authority] repeatedly warned.”¹³³ The spokesman for the DOJ says the decision not to prosecute HSBC was still made in good faith, as the agency is “committed to aggressively investigating allegations of wrongdoing at financial institutions, and . . . holding individuals and corporations responsible for their conduct.”¹³⁴ Furthermore, “DOJ’s decisions on potential corporate criminal cases must include consideration of 10 factors, including ‘whether the prosecution may have substantial adverse consequences for innocent third parties, such as employees, customers, investors, pension holders and the public.’”¹³⁵ Still, activity such as this promotes distrust in government for those who think it is more important to prosecute the evil and achieve justice over saving the economy.

¹³¹ *Id.*

¹³² *Id.*

¹³³ Comm. on Fin. Servs., *supra* note 97, at 27.

¹³⁴ Kevin McCoy, *Report: DOJ Overruled Recommendation to Prosecute HSBC*, USA TODAY (Jul. 11, 2016),

<https://www.usatoday.com/story/money/2016/07/11/report-doj-overruled-recommendation-prosecute-hsbc/86942600/>.

¹³⁵ *Id.*

When unelected officials, such as those leading OFAC and the DOJ, choose to save the economy over saving civilian and/or military lives, civilians begin to think Wall Street plays too big a part in politics, and turns to other measures to stop evil, such as through legal action, as exemplified by *Freeman v. HSBC*, and those who have joined the suit, and *Linde v. Arab Bank*.

IV. PROPOSAL

In the eighteen years since the establishment of OFAC, and in the fourteen years since the first ATA lawsuit was filed, there has not been a significant drop, if any at all, in terrorists using banks to help finance their activities.¹³⁶ However, there is an alternative way to pressure banks into adhering to sanctions, one of which lies in the greater domain of AML, and not just in the domain of counterterrorism financing: involving ratings agencies. The most effective measure has ratings agencies take into account OFAC violations and pending ATA lawsuits when calculating a bank's rating.

Ratings agencies "are some of the most powerful players in world finance. Specifically, they rate the 'creditworthiness' of companies and currencies. In the process, it is hoped that they give investors an idea [of] which investments are safest to make."¹³⁷ When a ratings agency highlights a serious situation, there is a "cooling effect their downgrades have on investment."¹³⁸ However, there has been significant pushback on ratings agencies' influence, with many stating that the agencies

¹³⁶ *Id.*; see also Barrett, *supra* note 4.

¹³⁷ Patrick Kingsley, *How Credit Ratings Agencies Rule the World*, THE GUARDIAN (Feb. 15, 2012), <https://www.theguardian.com/business/2012/feb/15/credit-ratings-agencies-moodys>. It is admitted that "[m]ore people would trust the agencies if they hadn't got so much so wrong so recently. In 2009 Moody's issued a report titled 'Investor fears over Greek government liquidity misplaced'; within six months, the country was seeking a bailout. Meanwhile, S&P's sovereign debt team miscalculated US debt by as much as \$2tn when it downgraded America's credit rating last August." *Id.*

¹³⁸ *Id.* "The rating agencies fuelled the crisis in 2008 . . . and we can question whether they are not doing the same thing in the current crisis." *Id.*

were “very lax” during the sub-prime mortgage crisis of 2008, and should have been harsher on banks,¹³⁹ leading to disaster:

In the run-up to 2008, a staggering proportion of mortgage-based debts were rated AAA, when . . . they were junk. The same goes for groups such as Enron, Lehman Brothers, and AIG. Days before they went bust, [the big three ratings agencies] all still rated these failing companies as safe.¹⁴⁰

The same could be said for ratings agencies’ treatment of banks currently violating OFAC sanctions, as the ratings agencies have been similarly unresponsive to the allegations of banks financially assisting terrorists. None of the banks that we have looked at thus far¹⁴¹ have been downgraded as a result of their OFAC offenses or on account of the ATA lawsuits pending against them.¹⁴² The ratings agencies’ failure to downgrade banks for their OFAC offenses or pending ATA lawsuits suggests the agencies do not think such violations and lawsuits affect a bank’s viability.¹⁴³ This consistently lax attitude toward violations inadvertently encourages banks to continue their activities that violate OFAC sanctions, since they know their ratings will not be affected by doing so.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ For simplicity’s sake, I will only be looking at S&P’s ratings of the banks mentioned in this Article. Those ratings include Credit Suisse: A, positive; HSBC: AA-, negative; Arab Bank: BB-, negative. S&P GLOBAL, https://www.standardandpoors.com/en_US/web/guest/home (last visited May 4, 2018).

¹⁴² *Ratings, Credit Suisse AG*, S&P GLOBAL, https://www.standardandpoors.com/en_US/web/guest/ratings/entity/-/org-details/sectorCode/FI/entityId/114352 (last visited May 4, 2018). *See also* S&P, *Credit Suisse AG ‘A/A-1’ Ratings Affirmed On Higher Loss Absorbing Capacity, Legal Entity Restructuring; Outlook Stable* (Nov. 16, 2016), https://www.standardandpoors.com/en_US/web/guest/article/-/view/type/HTML/id/1757074.

¹⁴³ *See* Reem Heikal, *What is a Corporate Credit Rating?*, INVESTOPEDIA, <http://www.investopedia.com/articles/03/102203.asp> (last visited May 4, 2018).

Further, failure to acknowledge banks' OFAC violations appears inconsistent with S&P's mission to honestly assess a bank's risk and give it a rating. When S&P rates a bank, it considers the following factors: a bank's institutional framework, the current state of the economy, its management, financial measures such as liquidity, budgetary performance, and budgetary flexibility, and debt and contingent liabilities.¹⁴⁴ Often, a rating also includes deciding a bank's CreditWatch score. S&P's CreditWatch rating

highlights [the analyst's] opinion regarding the potential direction of a short-term or long-term rating. It focuses on identifiable events and short-term trends that cause ratings to be placed under special surveillance by S&P Global Ratings' analytical staff. Ratings may be placed on CreditWatch under the following circumstances: When an event has occurred or ... a deviation from an expected trend has occurred or is expected and when additional information is necessary to evaluate the current rating. Events and short-term trends may include ... *regulatory actions*, performance deterioration of securitized assets, or anticipated operating developments.¹⁴⁵

Although S&P says it will consider a regulatory action when rating a bank, this has not been reflected by their ratings of the banks at issue in this article.¹⁴⁶

This should change, since the threat of a lower rating would be an effective deterrent as banking institutions care deeply about their ratings.¹⁴⁷ "There are more than 150 ratings agencies worldwide, but in order to have any credibility, companies really need at least one [rating agency] on their side, and preferably all three [major ratings agencies as] it's difficult, if

¹⁴⁴ Jane Hudson Ridley et al., *Rating's Agencies: How New Evaluation Could Impact Your Rating*, GOV'T FIN. OFFICER'S ASS'N, <http://www.gfoa.org/sites/default/files/Rating%20Agencies.pdf> (last visited Feb. 12, 2019).

¹⁴⁵ *Ratings Definitions*, S&P GLOBAL, https://www.standardandpoors.com/en_US/web/guest/article/-/view/sourceId/504352 (last visited Jul. 12, 2019) (emphases added).

¹⁴⁶ See Ratings, *supra* note 142.

¹⁴⁷ Kingsley, *supra* note 137.

not impossible, to do anything against [them].”¹⁴⁸ Most banks care so much about their rating that they pay up to \$2.5 million just to be rated in the first place.¹⁴⁹ And that’s part of the problem:

In theory, this [payment] creates a conflict of interest, because it gives the agency an incentive to give the companies the rating they want. It could explain why, for much of the past decade, agencies seemed happy not to question either the risks banks were taking, or the accuracy of their accounts. “We rely on audited statements,” one senior analyst [said]. “We are hamstrung by audited statements. If lying accountants sign off on a fiction . . .” The analyst . . . left the sentence unfinished, but her inference was clear: the agencies are only as effective as their clients are honest.¹⁵⁰

This “lack of objective information sources, as well as falling investment in research, is expected to ensure the agencies play a vital role in global financial markets” even though some bankers are “increasingly asking clients for the flexibility not to peg investments to credit ratings.”¹⁵¹ While this change of heart may come to fruition in a few years, for now, investors still do care about a bank’s rating, and, in turn, banks care about their rating. That is why ratings agencies could effectively pressure banks into changing their behavior, and, in turn, cut off terrorism’s cash flow.

One way to ensure ratings agencies take OFAC violations and pending ATA lawsuits into account when deciding a bank’s rating is by properly regulating ratings agencies’ methodologies. Congress took a step in this direction in 2006, when it passed the Credit Rating Agency Reform Act, which allowed the Securities

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* (“In theory, this [payment] creates a conflict of interest, because it gives the agency an incentive to give the companies the rating they want . . . [but also] the agencies are only as effective as their clients are honest.”).

¹⁵⁰ Kingsley, *supra* note 137.

¹⁵¹ Shankar Ramakrishnan, *Influence of Ratings Agencies Hard to Dismiss*, REUTERS (Jul. 2, 2012), <http://www.reuters.com/article/markets-credit-idUSL2E8I2BZ020120702>.

and Exchange Commission (“SEC”) to regulate certain practices of ratings agencies.¹⁵² Then, in 2010, Congress passed the Dodd-Frank Act, creating the Office of Credit Ratings (“OCR”) within the SEC to “enhance the regulation, accountability, and transparency of ratings agencies.”¹⁵³ The Act required OCR to monitor ratings agencies to (1) ensure the protection of users of credit ratings; (2) promote accuracy in credit ratings; (3) ensure that credit ratings were not unduly influenced by conflicts of interest; and (4) that there was greater transparency and disclosure to investors.¹⁵⁴ Although the SEC has gutted these statutes through the regulatory process,¹⁵⁵ these acts are of significance because they delineate a legal framework for regulating ratings agencies methodologies. At the same time, neither statute nor regulation has targeted the ratings agencies’ methodologies specifically.¹⁵⁶ Subsequent regulations should encapsulate such guidance.

Within this new regulatory regime would be a mandate forcing ratings agencies to factor OFAC violations and ATA lawsuits into their ratings of banking institutions. When Treasury commences an investigation into a bank for terrorism financing, or when they settle, a ratings agency would be required by law to factor this new information into their rating of the banking institution, likely downgrading it. While proposing specific legislation is beyond the scope of this article, the main point is that government offices that already regulate ratings agencies should compel ratings agencies to define the effect of financing terror on a bank’s viability. If ratings agencies are compelled to consider these illegal activities, it will provide a

¹⁵² Denise Finney, *A Brief History of Credit Rating Agencies*, INVESTOPEDIA (June 4, 2018), <http://www.investopedia.com/ask/answers/102814/who-regulates-credit-rating-agency.asp>.

¹⁵³ *About the Office of Credit Ratings*, SEC, <https://www.sec.gov/ocr/Article/ocr-about.html> (last visited Apr. 26, 2018).

¹⁵⁴ *Id.*

¹⁵⁵ Frank Partnoy, *What’s (Still) Wrong with Credit Ratings*, 92 WASH. L. REV. 1407 (2017);

¹⁵⁶ Ramakrishnan, *supra* note 151. It should be noted that ratings agencies consider their ratings to be free speech, and, therefore, the factors they take into account should not be regulated. However, this has not hindered any congressional regulation of ratings agencies. See Partnoy, *supra* note 155.

strong incentive for banking institutions to stop funneling money to terrorists; if they launder money for terrorists, their bottom line will drop along with their rating.

This shifted focus on money laundering to be used in ratings methodology would be consistent with each ratings agency's pledge to rate the quality, or "creditworthiness," of investments.¹⁵⁷ A single OFAC violation can significantly affect a bank's viability, and a bank's rating ought to reflect that. Furthermore, although OFAC has yet to prosecute a banking institution, Congress could still increase the fines for those who violate OFAC sanctions at will, as it has done previously,¹⁵⁸ or compel OFAC to prosecute rather than settle with offending banking institutions. Both of these possibilities significantly threaten the viability of banks, and, aside from the moral obligation to obstruct terrorism, ratings agencies have a professional obligation to rate these financial institutions fairly.

Additionally, it is unclear how the Supreme Court will come out in deciding the applicability of *Jesner* regarding suits against banks for helping to finance terrorism on American soil. If the Court accepts an expansive interpretation of the ATA, it will most certainly affect a bank's viability, as banks will then be subject to countless other suits. Further, banks will have to pay out treble damages under the ATA,¹⁵⁹ forcing a banking institution to likely settle many claims. Potential liability like these certainly affect a banking institution's "creditworthiness," and as a result, they should be reflected in its rating.

IV. CONCLUSION

In the 16 years since 9/11, the threat of terrorism has not dropped; it has risen.¹⁶⁰ Moreover, although the War on Terror

¹⁵⁷ Kingsley, *supra* note 137.

¹⁵⁸ Sollie, *supra* note 76.

¹⁵⁹ 18 U.S.C. § 2333(a) (2018).

¹⁶⁰ Pamela Engel, *The Terrorist Threat is Worse Now than it was Before 9/11*, BUS. INSIDER (Sep. 11, 2016), <http://www.businessinsider.com/are-we-safer-now-than-on-911-2016-9>.



has yet to produce significant results,¹⁶¹ there are battles to be won on other fronts. Properly regulating ratings agencies so that they consider a banking institution's participation in terrorist acts is one such battle. If ratings agencies drop a banking institution's rating for financing terrorism, this will effectively dissuade banking institutions from violating OFAC sanctions and AML regulations altogether, since banks care a great deal about their ratings. This is the preferable alternative because in the close to two decades since the establishment of OFAC and the filing of civilian lawsuits under the ATA and JASTA, banking institutions seem to be less hindered by such lawsuits and increased fines to OFAC. While sanctions, AML and financial counterterrorism are not synonymous, we can fight counterterrorism battles using the weapons of sanctions and AML. These are fronts in which we can win.



¹⁶¹ *Id.*