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Trade Compliance Flash: Canadian Bank Faces Penalties for OFAC Violations and Lack of OFAC Compliance Program

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On January 13, 2017, OFAC issued an enforcement action against Toronto-Dominion Bank (TD Bank), a Canadian company and its Luxembourg-based subsidiaries that involved apparent violations of the Cuban Assets Control Regulations (the CACR) and the Iranian Transactions and Sanctions Regulations (the ITSR).

The group of Apparent Violations all stem from the activity of TD Bank's Canadian operation. First, the Canadian bank failed to screen $1.165 million dollars of transactions for "any potential nexus to an OFAC-sanctioned country or entity prior to processing related transactions though the U.S. financial system." Second, TD Bank maintained accounts in Canada for a sales agent for an entity placed on the Specially Designated Nationals (SDN) list based on the Iran Sanctions Program. In maintaining this account, TD Bank processed 39 transactions totaling $515,071 to or through the U.S. financial system. Third, TD Bank maintained accounts on behalf of 62 Cuban nationals residing in Canada and processed 99 transactions totaling less than half a million dollars, again through the U.S. financial system. As a result of these activities, which are valued at approximately $2 million – and which TD Bank voluntarily disclosed – OFAC reached a settlement for remittance of $516,105.

In addition to this settlement, OFAC issued a Finding of Violation against TD Bank's Luxembourg-based online brokerage and banking subsidiary, Internaxx. OFAC found that Internaxx "provided U.S. securities-related products and services for customers resident in countries subject to comprehensive OFAC sanctions programs" – namely to persons residing or based in Cuba or Iran. Internaxx processed 3,491 securities-related transactions valued at approximately $92.869 million.

Key Mitigating Factors Considered by OFAC in Connection to the Apparent Violations:

- Voluntary disclosure.
- No actual knowledge by TD Bank managers and supervisors in the conduct that led to most of the violations.
- TD Bank also had a robust remedial response, which included change in policies and procedures.
- No prior history, substantial remediation, and providing detail in response to OFAC requests.

Key Aggravating Factors Considered by OFAC in Connection with the Apparent Violations:

- Several employees of TD Bank were aware that TD Bank processed USD transactions on behalf of Cuban entities.
- Several employees were aware of the gap in TD Bank procedures permitting such transactions to clear through the U.S. financial system.
- TD Bank had no compliance controls in place to detect and prevent violations of U.S. Sanctions.
- TD Bank is a large and sophisticated financial institution.

Key Mitigating Factors Considered by OFAC in Connection to the Finding of Violation:

- Internaxx took remedial action prompted by the parent and swiftly improved its OFAC compliance procedures.
- Internaxx is a small institution with little business outside of Luxembourg.
- No pattern of misconduct.
- The violation was detected through an annual anti-money laundering risk assessment by TD Bank's AML Compliance Team.

Key Aggravating Factors Considered by OFAC in Connection to the Finding of Violation:

- Internaxx did not have an OFAC compliance program in place to detect and prevent violations until October 2011.

Key Takeaways:

- Both the Apparent Violation and the Finding of Violation reflect the extensive extraterritorial reach of U.S. Sanctions programs. This reach is highlighted by the fact that these actions are targeted at a parent entity doing business in a jurisdiction with a strong blocking statute, which prohibits compliance with U.S. Sanctions by Canadian entities.
- Both of these actions also serve as a strong reminder of the need for companies and their subsidiaries to implement and enforce robust OFAC compliance programs, even in foreign countries.
- The published enforcement action and penalties occurred despite the remote U.S. nexus and the relatively small number and value of the transactions, signifying that foreign companies should not presume there is a materiality threshold for triggering OFAC enforcement actions.
- Companies must critically weigh the value of voluntary disclosures, cooperation, and timely and well-organized investigations in deciding how to address any issues that arise in the sanctions context.

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